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REVIEW

"MY GOD!" IS THIS HOW A FEMINIST ANALYZES EXCITED UTTERANCES?

RANDOLPH N. JONAKAIT

I. INTRODUCTION

In *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, Professor Aviva Orenstein contends that "evidence law must be modified to address the disparity between RTS [rape trauma syndrome] and the current structure of the excited utterance [hearsay] exception."¹ She would expand the exception to include a "[s]exual violence survivor's statement," by which she means, "[a] statement concerning a sexual assault, made by the survivor concerning the event or its effect on the survivor."²

While it may be that more hearsay from rape claimants should be admitted into trials, Orenstein's proposal is based upon misconceptions of evidence law and upon incomplete and misleading empirical data. Her proposal would do little to correct the problems she identifies and, at the same time, it could lead to profound changes in evidence doctrine, which she does not recognize. While her analysis is supposedly driven by feminist principles and methods, she uses them haphazardly. The unintended consequences, if these principles were taken seriously, could be particularly dangerous for feminism.

II. HEARSAY, ADMISSIBILITY, AND CREDIBILITY

Orenstein states that those who are raped often delay in reporting the violence. Because of that delay, such statements are not admissible as excited utterances, a hearsay exception which permits otherwise inadmissible hearsay to be admitted if it was made under the stress of a startling event.³ The justification for

1. Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 211 (1996). Even in advance of its publication, this article received praise. See Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 393 n.23 (1996) (Orenstein's article is "a superb first effort at crafting a feminist approach to evidence issues . . .").

2. Orenstein, *supra* note 1, at 213.

3. See FED. R. EVID. 803(2) (permitting the admission of hearsay "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

this exception, Orenstein notes, is that statements precipitated by external startling events are made without reflection. Since reflective capacity is necessary for fabrication, excited utterances do not suffer from the danger of insincerity.⁴ All of that is accepted doctrine, but then Orenstein concludes that because excited utterances are thought to be sincere and because the rape victim's delayed report does not qualify for the exception, a rape victim's credibility is thereby denigrated.

In requiring an excited and near-immediate response from the victim, evidence law implicitly dismisses those who do not fit the fixed pattern of credibility. The structure of the rules insinuates that a reaction to a traumatic event that deviates from this prototype marks the declarant as unnatural, sneaky, vindictive, or otherwise unreliable.⁵

Orenstein comes to this conclusion, which leads to her proposal to admit rape claimants' hearsay, because she has mistaken conceptions regarding the hearsay framework and does not understand how credibility is determined in trials.

Professor Orenstein states that "the primary argument against hearsay evidence rests upon the assumption that it is dangerously unreliable."⁶ Hearsay may suffer from sincerity, narration, perception, or memory problems, but, she says, "[a]lthough these 'hearsay dangers' are also present in live testimony, they are diminished by the availability of cross-examination."⁷ Since hearsay, however, is presented without contemporaneous cross-examination, the hearsay dangers are not diminished, and hearsay is unreliable.

Orenstein's analysis is wrong. Hearsay is not inadmissible because it is unreliable, and cross-examination does not make testimony trustworthy. What I say to the store clerk, colleagues, friends, my spouse, my daughter, my minister, or the registrar is not all dangerously unreliable nor is what I am told by others. Such statements could be hearsay if offered in court, but they are not alarmingly untrustworthy. If that were true, society, commerce, religious and social organizations, and families could never function. On the other hand, not everything said in regular intercourse is correct either. Some of what is said outside the courtroom is true, and some is not. When a statement's trustwor-

4. Orenstein, *supra* note 1, at 173.

5. *Id.* at 203.

6. *Id.* at 192-93.

7. *Id.* at 167.

thiness is important to us, we have to judge its validity; we have to make judgments, consciously or not, about sincerity and memory and so forth. We develop methods for this in our everyday lives.

These customary credibility determinants, however, may not be available in the artificial, formal courtroom world. Instead, in court, we rely on cross-examination to provide information so that the statements' accuracy can be judged. When assertions are made in court, we believe, or hope, that because of cross-examination, the jury can judge the worth of what it hears. We expect an adversary to bring out information that would indicate why a statement should not be taken at face value. In contrast, when assertions are made out of court, not subject to contemporaneous cross-examination, we do not have confidence that the jury will receive the information to assess the statement.⁸

Neither cross-examination nor an oath makes trial testimony trustworthy. Everything said at a trial, even though subject to cross-examination, could not be reliable or there would be no factual dispute to resolve. We expect witnesses to differ at trial, but we hope that the trial presents information with which to analyze contradictions, inconsistencies, and deficiencies. "Cross-examination's central role is not to make evidence reliable. Instead, the adversary is given the opportunity to test and challenge the evidence in front of the jury so that jury will have all the information necessary to best assess what weight the evidence should be given."⁹ The concern regarding hearsay is not that it is unreliable, but that it cannot be properly evaluated.

8. See Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 434 (1986).

When the assertion is made in court, the trier makes these assessments with information in addition to the words of the declarant. An oath is given to the witness, and the trier of fact observes his demeanor. Cross-examination, however, is the most potent source of information about the assertion's worth. The declarant's adversary has a motive to explore ambiguities in the statement, to expose insincerity, reveal a flawed memory, or uncover a faulty perception.

The rule against hearsay is inextricably linked with the belief that cross-examination can demonstrate the debilities of an assertion. When an assertion is hearsay, it is not subject to contemporaneous cross-examination in front of the trier of fact. Hearsay is barred because the trier is unable to properly evaluate the hearsay assertions.

See also FED. R. EVID. art. VIII advisory committee's introductory note ("The belief, or perhaps hope, that cross-examination, is effective in exposing imperfections of perception, memory, and narration is fundamental.") (citing Edmund M. Morgan, *Foreward to AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE* 37 (1942)).

9. Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 587-88 (1988).

Although we have a rule declaring hearsay inadmissible,¹⁰ not all hearsay, of course, is inadmissible. Hearsay exceptions abound. Sometimes the conditions under which an assertion is uttered eliminate or lessen the possibilities of the hearsay dangers. When the hearsay concerns are reduced, the chances that a particular assertion is reliable are greater than for hearsay generally. Accepting such statements on their face is less likely to lead to a misvaluation than for hearsay generally. Cross-examination concerning such statements is less likely to reveal information to the jury useful for judging validity than it is for hearsay generally because something, supposedly, is already known about one or more of the hearsay dangers. Consequently, good reasons exist to admit that hearsay even though hearsay generally is not admitted.¹¹

Statements qualifying as excited utterances are at least theoretically thought to be more reliable than hearsay generally. The same, of course, is true for other admissible hearsay, but what is thought reliable is the assertion, not the declarant. We do not exclude hearsay falling within an exception because the declarant is untrustworthy nor do we admit inadmissible hearsay because its declarant is reliable. If the exception's rationale is correct, the excited utterance from the known liar is still unlikely to be a lie because the speaker spoke while his reflection was stilled, and therefore he was unlikely to be lying. Although an exception may deem a class of statements more reliable than hearsay generally and create an exception for that class, the exception says nothing about the declarant's general credibility.

An exception does not indicate that statements outside its boundaries or their makers are untrustworthy. If either the hearsay rule, or its exceptions, labeled inadmissible hearsay producers unreliable, the rules would be labeling everyone unreliable. Witnesses routinely make out-of-court statements about their testimony's subject matter that do not qualify as excited utterances because they are not made under the stress of a startling event. Such assertions have probably been made to spouses, friends, roommates, children, parents, and lawyers. If somehow evidence law brands these declarants untrustworthy, then everyone is unreliable.

It is only because Orenstein misunderstands these basic hearsay dynamics that she concludes that evidence law brands

10. See FED. R. EVID. 802.

11. No one rationale can explain all the hearsay exceptions. See Jonakait, *supra* note 8, at 470 (discussing rationale for hearsay exceptions).

those who utter hearsay that is not within the excited utterance exception untrustworthy or liars. "The excited utterance exception . . . implicitly deems such statements and, arguably, those who uttered them, more reliable. As a logical matter, the exception also denigrates statements outside its purview, deeming such statements, and the speakers who made them, insufficiently trustworthy."¹² Orenstein's analysis also rests on mistaken assumptions when she suggests that the excited utterance exception assumes that those who do not react to stress in a prescribed fashion are liars. Thus, she asks about the excited utterance exception: "Why does the law assume that everyone manifests stress in the same way? Who is likely to report immediately? Why do some people delay? Why is such delay assumed to be evidence of lying?"¹³

The rationale for the excited utterance exception is not a description or prescription for how trustworthy people do or ought to react to stress. While the rationale is that unreflecting assertions made in response to startling events are likely to be sincere, that rationale makes no assumptions about how people generally react to such events or even how often people react to a startling event by blurting out a statement. The rationale is only that if people do so react, the resulting utterance is likely to have a lessened sincerity danger and, therefore, can be admitted. The legitimate question for the exception is not how often people respond to stress by making unreflecting assertions, but when they do, is it trustworthy?¹⁴ If such declarations are trustworthy, it is of no consequence that only one in a thousand times does stress produce such a reaction.

This is no different, for example, from business records.¹⁵ That exception makes no assumption about how records are made and kept. If, however, they are made and kept in a certain way, they fall within the hearsay exception. That only a fraction of all records qualify as business records hardly means that the business record exception is wrong or that it needs expansion. Furthermore, the business records doctrine neither implies nor states that records not

12. Orenstein, *supra* note 1, at 198.

13. *Id.*

14. *Cf. id.* at 203.

[W]e must question why a reaction to stress that is at odds with women's documented experience is nevertheless venerated by evidence law. Part of the answer lies in the fact that although the excited utterance does not describe the experience of women who have suffered rape or other sexual violence, it does comport with society's *expectations* of survivors of sexual violence.

Id. (emphasis in original).

15. FED. R. EVID. 803(6).

falling with the exception are lies. Similarly, the doctrine neither implies nor states that the makers of non-qualifying records are untrustworthy. For example, evidence law does not say that because my notation that a retailer delivered me a damaged television is inadmissible that I should not be believed when I assert it.

It may be, as Orenstein maintains, that raped women who are calm after the attack are disbelieved.¹⁶ Evidence law, however, does not cause this disbelief.¹⁷ Evidence law admits or excludes evidence; it does not believe or disbelieve witnesses. Jurors gauge credibility.¹⁸ Of course, there is a connection between a juror's belief and what the evidence admits. What a juror does not hear, she cannot believe.¹⁹ If a victim could not testify about the rape because she delayed in reporting, evidence law would, in effect, be labeling her not credible. That, however, does not happen. The victim can testify about the rape, just as I can testify about the damaged television I received, even if my notation about it is inadmissible.

Even so, Orenstein claims that victims are denigrated because delayed reports of rapes are not admissible as excited utterances. If so, victims should seem more credible when jurors learn about delayed reports. Orenstein, however, contends that both judges and juries are less likely to believe the victim when they learn that she delayed in reporting the rape. Orenstein asks, "Why is such delay assumed to be evidence of lying?"²⁰

16. See Orenstein, *supra* note 1, at 203-04 (stating that rape victims who are calm after the assault are "disbelieved because they do not fit the expectation that a sincere woman genuinely wronged would cry out immediately").

17. Cf. Katherine A. Baker, *Once a Rapist: Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 565 (1997).

[E]mpirical analysis of the social norms surrounding rape suggests that rules of evidence may be ill-equipped to overcome a normative system that resists punishing rape. Contrary to popular belief, much of the difficulty with securing rape convictions stems not from an evidentiary problem of credibility, but from a normative problem of desert.

Id.

18. Cf. Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L. J. 127, 127 (1996) ("Cutting across the specific treatments of women's problematic encounters with the judicial system are two main themes: admissibility and credibility.").

19. Cf. Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 61 (1995) (contending that if cultural information can affect notions of blameworthiness, then access to cultural information and fundamental issues of blameworthiness "are clearly connected, because finders of fact and sentencers must have the information in order to adjudicate blameworthiness fairly in plea negotiations and at trials").

20. Orenstein, *supra* note 1, at 198.

If jurors find victims less credible when reports are delayed, the jurors must be learning about the reports, and they do. The defense introduces such evidence with hopes that the delayed reports will damage the credibility of the alleged rape victim.²¹ Orenstein argues that the excited utterance exception should be expanded to admit delayed reports so that a victim's credibility would not be unfairly denigrated, but under present law, the jurors already learn about these reports.²² Her proposal would accomplish almost nothing. Changing a hearsay exception may determine whether jurors hear about a delay during direct examination or cross examination. There is no reason to think that how or when the jurors learn this information will change their attitudes about the inferences to be drawn from the delay itself. This is the crucial issue never recognized by Orenstein. It is not evidence law preventing jurors from hearing about delayed reports that causes victims to be regarded skeptically. They are regarded skeptically because of societal attitudes as reflected in jury deliberations.²³

One of Orenstein's own examples illustrates this point. She refers to "the Anita Hill-Clarence Thomas hearings to demonstrate how delay in reporting hurts women's credibility. The senators, and even Thomas himself, relied on Hill's delay to question her memory, perception, and motives."²⁴ If Hill's credibility was questioned, it was not because she was prevented from stating when or why she complained. As an evidentiary matter, her hearsay was admitted, as Orenstein believes such hearsay should be. Even so, some people, because that complaint was delayed, drew negative inferences. Such conclusions came not from an evidence

21. See Taslitz, *supra* note 1, at 447 (noting that a common defense strategy in rape cases is to establish the crime was not promptly reported).

22. Cf. Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 435 ("[J]udges seldom find witnesses incompetent to testify; any gender bias in perceptions of credibility is therefore likely to have its greatest impact when the jury is deliberating, and not when the judge is determining competency.") (citing FED. R. EVID. 601 advisory committee's notes).

23. Cf. Baker, *supra* note 17, at 587. Baker reviews studies showing that sixty-six percent of one sample group believed that women's behavior or appearance provokes rape. Thirty-four percent believe that "women should be held responsible for preventing their own rape." Another study found that "most respondents, including victims, saw women's behavior and/or appearance as the second most frequent cause of rape." A more recent survey of 500 adult Americans found that thirty-eight percent of men and thirty-seven percent of women believe that a woman is partly to blame for her own rape if she dresses seductively. Given these perceptions, a victim's credibility may well be irrelevant — many jurors are going to blame her anyway.

24. Orenstein, *supra* note 1, at 206 (citing Kim Lane Schepple, *Just the Facts Ma'am: Sexualized Violence*, 37 N.Y.L. SCH. L. REV. 123, 149 (1992)).

doctrine, but from the common belief that a delayed report should be viewed skeptically.

If Orenstein really wants important change, it is not evidence law that she should confront, but societal attitudes. Apparently, even some people generally considered to be feminists draw negative inferences from a delayed report. A recent letter to the New York Times by Mary Jean Tully, a former president of the NOW Legal Defense and Education Fund, states:

I feel certain that Paula Corbin Jones would indeed have found . . . that feminism is sisterhood if she had brought charges against Gov. Bill Clinton at the time of the alleged incident. By waiting until he became President, she inevitably came across as someone who seeks not justice and reparation but notoriety and perhaps some political gain as well. Feminists could hardly be expected to support a cause like this.²⁵

In confronting societal attitudes, it is important to also recognize that skepticism about delayed reporting is not confined to statements made by alleged rape victims. For example, if a person at trial said that the defendant pulled a gun and then snatched a gold chain from the witness's neck, the witness's statement reporting that incident six months after its occurrence would not be admitted under the excited utterance exception. We might expect a defense attorney to elicit the fact that the delayed report was the first report to suggest to the jury that the witness was not credible.²⁶

Similar logic applies to defendants. The issue before the Supreme Court in *Jenkins v. Anderson* was whether pre-arrest silence could be used to impeach a criminal defendant consistently

25. Mary Jean Tully, *Not Justice: Notoriety*, N. Y. TIMES, Jan. 22, 1997 at A20.

26. In a murder case, two witnesses were seen standing over the body as it lay on a street in Brooklyn. Five days later, they said they had seen the defendant commit the murder. This statement, of course, was not admissible as an excited utterance, but I addressed it on cross examination. I argued to the jury that if the witnesses had seen the defendant commit the murder, they would have told the police immediately. Instead, I contended, the witnesses realized that they were probably seen over the body and might be implicated in the crime. The best way for them to avoid this was to implicate someone else, and they named the defendant, even though the conditions they described would not have allowed for any definite identification. The essence of the argument urged the jurors to be dubious because of the delayed report. If the jury agreed, they were not doing something wrong. Most assuredly, they were not somehow discriminating against women in accepting it. See *People v. Rivers*, 85 A.D.2d 674, 445 N.Y.S.2d 196 (App. Div. 1981), *rev'd*, 109 A.D.2d 758, 486 N.Y.S.2d 73 (App. Div. 1985), *remanded and acquitted*, No. 3168-1978 (N.Y. King's County July 17, 1986).

with the Fifth Amendment.²⁷ The Court held that it could, but the relevance of the defendant's silence should be noted. At trial, defendant claimed self-defense. He was cross-examined about the fact that he did not immediately report that claim, but waited almost two weeks before asserting it. Because of the delayed report, the prosecutor wanted the jury to be skeptical of the defendant's claims, not an unnatural inference given the facts.²⁸

Orenstein seeks to imply that the doctrine of excited utterances discriminates against rape victims by excluding delayed reports and that skepticism about delayed reports is a male notion about women reinforced in hearsay doctrine. In reality, evidence law treats rape victims and their hearsay as it treats others.²⁹ Further

27. 447 U.S. 231 (1980).

28. See *Davis v. State*, 344 Md. 331, 686 A.2d 1083 (1996). The court held that a defendant's alibi witness may be impeached with his failure to disclose the exculpatory information prior to trial when there exists "a relationship between the witness and the defendant, or circumstances, such that it would be the natural response of the witness to act to exonerate the defendant . . ." *Id.* at 345, 686 A.2d at 1089.

29. Orenstein suggests that one reason excited utterances should be expanded is because this exception discriminates against women generally. She states that powerful people may speak out quickly against affronts, but they have not "notice[d] that their experiences are not universal. But it is these very assumptions of normalcy, objectivity, and universality that feminism challenges." Orenstein, *supra* note 1, at 210. Because the dominant group will speak out quickly and have its hearsay admitted as excited utterances, those who do not have power and respond to affronts differently should also have their hearsay admitted.

Of course, if correcting gender discrimination is the principle espoused here, and if it turns out that the exception "excludes" typical male responses while including female-style statements, then we ought to correct that imbalance by finding a way to admit more male-styled assertions. Orenstein, however, suggests that excited utterances uniformly discriminate against women.

[O]ne could postulate that the critique could apply to all utterances made by women concerning startling events. If the willingness to make a quick, excited declaration reflects a typically male conversational style, the excited utterance rule would fail to describe the experiences of female witnesses in all types of exciting events.

Id. at 211.

Orenstein concludes that men are more likely than women to respond reflexively to affronts, but even if she were right about this, a proposition beyond proof, affronts are only a small part of the universe of startling events that could trigger an excited utterance. Her statement about the general effect of the exception goes counter to the male stereotype, or the dominant view, which holds that women lose control more often than men, blurt out more things than men, and therefore make more statements that would be classified as excited utterances than men. A male view is that men are more likely to be stoics and women hysterics. If you think of someone with a stiff upper lip, do you think of a man or a woman? Who is supposed to bite a bullet and get on with it? Cf. Denise Reaume, *What's Distinctive About Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from the Law*, 2 LEGAL THEORY 265, 286 (1996) ("When Lord Denning describes a female plaintiff, worried about cricket balls from a neighboring cricket pitch ending up in her back garden, as 'a very sensitive lady who worked herself up into . . . a state,' he is very clearly trading on traditional female stereotypes of hysteria and irrationality.") (quoting *Miller v. Jackson*, 3 All E.R. 338, 345 (C.A. 1977)). If these stereotypes were correct, then the excited

more, jury incredulity is not discrimination against rape victims; it is only part of a general skepticism about delayed reports.

Orenstein's proposal is based upon misconceptions. She misconceives the connection between credibility and hearsay. She misconceives why delayed reporting by a rape victim is disbelieved. She seeks to end a discrimination that does not exist.

If her proposal has merit, it is not for the reasons Orenstein offers. Instead of ending a discrimination, we should be concerned with finding a justification for a discrimination. We need grounds for treating the alleged rape victim's hearsay differently from the way we treat other similar hearsay. We need reasons to privilege the rape claimant's hearsay.³⁰ At times in her article, Orenstein seems to indicate that this privilege is in order. Her basis for doing so apparently comes from the rape trauma syndrome.

III. RAPE TRAUMA SYNDROME AND EXCITED UTTERANCES

Orenstein contends that evidence law should reflect the information learned from rape trauma syndrome research.³¹ Her claim is that evidence law should be changed because rape trauma syndrome establishes the reliability of the rape victim's delayed

utterance exception would apparently discriminate against men. Perhaps, then, the exception should be changed to remedy this discrimination.

We, of course, do not know if this is the effect of the exception, but what would it mean for this style of feminist theorizing if we concluded that the dominant group set up a hearsay exception that disfavors its style of discourse in favor of a perceived female style?

30. If she is not seeking to discriminate in favor of the rape victim, then she should be advocating the admissibility of all delayed reports, which she does not do. Cf. Dale A. Nance, *Foreword: Do We Really Want To Know the Defendant?*, 70 CHI.-KENT L. REV. 3, 13-14 (1994). Nance, discussing the proposal to permit other misconduct evidence in sexual offense cases notes:

If the law is to have integrity, the proposal to exempt other misconduct evidence in sexual offense cases must assume that the rationales of the *general* exclusion are correct, at least in the sense of justifying on balance the prohibition of other misconduct evidence when used to set up a propensity inference; otherwise, the proper response is to repeal the prohibition entirely.

Id.

31. Orenstein notes that courts have admitted RTS evidence to dispel misconceptions about how rape victims act, but have been reluctant to admit such evidence to prove that the woman did not consent. Orenstein, *supra* note 1, at 202. Orenstein continues,

This debate on the scope of RTS expert testimony underscores the importance of using the knowledge gained from RTS in more fundamental ways. One essential benefit of RTS research for evidence law stems from the information rule drafters can learn and apply in devising evidence rules that reflect the experience of survivors of rape and other sexual violence, and allow their voices to be heard in the courtroom.

Id.

assertions about the violence. As Orenstein presents it, this claim is anything but self-evident:

Ironically, these unexcited, reflective statements — described by RTS — that survivors make weeks or months after the trauma are not admissible under the current evidentiary scheme, even though their typicality makes them seem particularly trustworthy. The excited utterance exception, however, does not include these clinically observed, delayed, calm statements because of the time lag, as well as the declarant's lack of visible excitement. The rule has the psychology backwards. The rationale of the excited utterance exception rests on the theory that sincerity is guaranteed, because the declarant did not delay, or because any brief delay was mitigated by the stress that precluded fabrication by the declarant. But in fact, a rape survivor is more likely to be calm shortly after the incident and is more likely to delay reporting the crime.³²

Orenstein explains that the exception is based on a theory that the danger of lessened sincerity increases with lengthened reflection, but she then follows with the non sequitur: "But in fact, a rape survivor is more likely to be calm shortly after the incident and is more likely to delay reporting the crime."³³

Even if it were true that rape victims are more likely to be calm in the aftermath of a sexual attack, that hardly makes the exception's psychology backwards. The excited utterance doctrine is not predicated on the most frequent way people respond to any particular stress, but on the notion that a particular response to stress, the excited utterance, has a lessened sincerity danger. Furthermore, even if delayed rape reports are trustworthy, the psychology is still not backward. The backwardness claim implies that delayed reports are reliable, but the non-reflective ones are not. If this is indeed what Orenstein means by backwards, she should make that clear, for it is a proposition that has tremendous consequences for rape victims. Such an interpretation might lead to a hearsay exception for the delayed rape report, but it also should lead to more skepticism, and perhaps exclusion, of the immediate report because of its unreliability.

Perhaps Orenstein does not really mean that the psychology is backward, but instead intends to assert that while prompt reports are trustworthy, delayed reports are even more so. She does state,

32. *Id.* at 200-01.

33. *Id.*

"Ironically, these unexcited, reflective statements — described by RTS — that survivors make weeks or months after the trauma are not admissible under the current evidentiary scheme, even though their typicality makes them seem particularly trustworthy."³⁴

Upon closer examination, Orenstein's sentence makes no claim about the reliability of the delayed report, only that the reflective statements "seem particularly trustworthy." Of course, because they "seem" reliable does not make them so. Her indefinite assertion is hardly a basis for admitting a class of hearsay unless we are willing to admit anything that "seem[s] particularly trustworthy."³⁵ She does not explore the ramifications of that position, but surely it would change our notions of admissible hearsay.

Perhaps Orenstein intended a more definite claim, but she never actually asserts that the delayed reports *are* the most trustworthy ones, or *are*, at least, reliable. If actual, and not just seeming, trustworthiness is the claim, the only possible grounds offered by her for the reliability of delayed reports is their "typicality." She never explores the ramifications of that justification for a hearsay exception.

The typicality of a report, which is not the rationale for any other exception, would breach the hearsay dike with a flood. For those of us whose life is generally a routine, anything we say can be regarded as typical. A typical response to the contention that a contract was broken would be a claim that it was fulfilled. A typical response to the accusation of a rape would be a denial. It could be argued that the Post-its stuck to a computer monitor should be admitted under a business records exception because they could be as reliable as traditional business records. When pressed to show that these records are truly trustworthy, the reply would be that members of this office typically stick them there. If "typicality" is to be equated with trustworthiness, it would make more sense just to abandon the hearsay rule.

The paragraph suggests, without actually stating, that rape trauma syndrome establishes the trustworthiness of the delayed reports. If that is the claim, the documentation for it is lacking. First, such substantiation would require a clear statement of what constitutes rape trauma syndrome (RTS). Orenstein sees RTS, as others do, as a subset of the more general post-traumatic stress disorder (PTSD).³⁶ PTSD has spawned recent research. "Perhaps

34. Orenstein, *supra* note 1, at 200.

35. *Id.*

36. See *infra* note 89 and accompanying text.

the most startling and challenging finding is that PTSD occurs in only a minority of individuals exposed to trauma. The finding that PTSD, especially chronic PTSD, is not a common response to trauma was contrary to the implicit assumption" of the psychiatric community.³⁷ Orenstein, however, says that "RTS documents typical behavioral manifestations of survivors of rape"³⁸ The conflict between the assertion that RTS lessens "typical" responses and PTSD research which shows that PTSD is not a common response to trauma is not even noted, much less discussed. Furthermore, Orenstein never defines the typical behavioral manifestations that RTS documents. There are disagreements as to what behavior constitutes RTS. For example, Orenstein describes the syndrome as having, in effect, an acute reorganization phase.³⁹ This is a descriptive approach deriving from the original article on RTS by Burgess and Holmstrom.⁴⁰ A recent review article about RTS concludes, however, that although the Burgess and Holmstrom "study was very important in heightening awareness about the traumatic effects of rape, it was quite limited methodologically, and many of its results have not been replicated. Subsequent research, which is much more rigorous, conceptualizes rape trauma in terms of specific symptoms rather than more general stages of recovery."⁴¹ Consensus on those symptoms, however, has not been reached. The result is that the term RTS may not have much of a fixed meaning.⁴² Because RTS has multiple meanings, if one is to rely on RTS, then one must specify which RTS is being used.⁴³

37. Richard L. Newman & Rachel Yehuda, *PTSD in Civil Litigation: Recent Scientific and Legal Developments*, 37 JURIMETRICS 257, 263 (1997).

38. Orenstein, *supra* note 1, at 200. See also Hunter, *supra* note 18, at 147 ("Rape trauma syndrome (RTS) describes typical reactions to the experience of forced sexual assault.").

39. See Orenstein, *supra* note 1, at 200.

40. Ann Wolbert Burgess & Lynda Lyttle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

41. Patricia A. Frazier & Eugene Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 LAW & HUM. BEHAV. 293, 299 (1992).

42. See *id.* at 304-05.

[E]xperts in recent cases have described a broad range of symptoms and behaviors as consistent with RTS, some of which do not appear to be based on research. Testimony that is not research based often seems to be prompted by a defendant's claims that a complainant's behavior was inconsistent with having been raped. If virtually any victim behavior is described as consistent with RTS, the term soon will have little meaning.

See also *id.* at 299 ("RTS has several meanings in the literature.").

43. Cf. Newman & Yehuda, *supra* note 37, at 259 (quoting E.B. Blanchard et al., *Effects of Varying Scoring Rules of the Clinician-Administered PTSD Scale (CAPS) for the Diagnosis of Post-Traumatic Stress Disorder in Motor Vehicle Accident Victims*, 33 BEHAV. RES. & THEORY 471, 471 (1995)).

At a minimum, Orenstein needs to say if delayed reporting is an essential part of RTS. Indeed, she never states that delayed reports are more frequent than immediate ones. She only claims that a significant, but unspecified, percentage of rape reports are delayed.⁴⁴ It is one thing to say that research has shown that women often delay reporting a rape (although good research would quantify "often"); it is another to say that delayed reporting is part of rape trauma syndrome. If it is a component, then those who report rape immediately cannot have RTS, a position with enormous implications for rape cases.⁴⁵ If delayed reporting is not part of RTS, then it is hard to see how RTS can tell us that delayed reports are the most trustworthy.

If Orenstein's proposal hinges on empirical evidence about how rape victims act, then she should make that clear and fairly present the relevant information. If the empirical basis is incomplete or does not support the arguments, then that should be revealed with reasons as to why those deficiencies do not matter. Orenstein has not done that; selecting a quote or two about rape victims from the literature does not suffice.

[The psychiatric definition of PTSD] offered no guidelines on how to use or apply the diagnosis, creating the potential for over- or under-diagnosing based upon the decision as to whether a particular symptom is present to a sufficient degree or not The subjectivity inherent in the diagnosis has led to criticism that the diagnosis of PTSD is subject to bias, distortion, and misinterpretation and could reflect a patient's malingering.

Id.

44. Orenstein states that "a rape survivor is more likely to be calm shortly after the incident and is more likely to delay reporting the crime." Orenstein, *supra* note 1, at 201. What is being compared is not clear. She could mean that the person who is raped is more likely to be calm and delay reporting than a person who has a consensual sexual encounter and falsely claims rape. If that is her point, then Orenstein presumably should support informing the jury that a woman who is immediately upset and announces rape is less likely to have been raped than a woman who was calm and delayed.

Perhaps, however, her claim is that a rape victim is more likely to be calm than upset after the attack and more likely to delay reporting it than immediately recounting it. This claim of course says nothing about the reliability of rape reports, whether delayed or not. Even so, Orenstein's documentation here is off the mark. She cites authorities at this point for the propositions that rape victims "often" delay reporting and that a "substantial number" of rape victims delay reporting. No figures are given to support the contention that it is "more likely," no matter what the intended comparison group, that the report is delayed. She goes on to cite statistics that in one group who delayed reporting, 73% knew their assailant while only 50% who knew their assailant reported it promptly. These numbers, of course, tell us nothing about what percentage delayed reporting. Furthermore, no citation is given at all for the claim that it is "more likely" that a woman is calm after being raped. See Orenstein, *supra* note 1, at 201 n.158.

45. Frazier and Borgida report that while there is delayed reporting, which is more frequent when the victim knows her attacker, but "whether this behavior is part of RTS is questionable" Frazier & Borgida, *supra* note 40, at 304.

Such selective use of social science literature in legal analysis might be termed "social science lite" or "legal social science."⁴⁶ The hallmark of this practice is to develop a legal position first, and then search for some empirical support for that position. When such findings are located, the researcher stops searching, and the results are presented as if the position were derived from that data. A misleading presentation of empirical information can result in a widespread problem. Just as it is too common for legal scholars to search some historical record for a quote that supports their position without understanding or presenting the full context of the historical record,⁴⁷ evidence scholars may too frequently use social science in a selective and misleading manner. Perhaps because we are not trained in searching social science reports or for other reasons, we can too easily stop when a desirable reference is found without any attempt to survey the rest of the relevant literature.

Presumably as evidence scholars, however, we take the process of determining facts seriously, and "social science lite" ought to give us concern. In litigation, if attorneys urge the court to change the law, they have duties to search for and present both the favorable and unfavorable authorities. It is doubtful that attorneys feel that same sense of duty when advocating through academic writing. In court, the dangers of distortion by a selective presentation of information are reduced by the adversary system; opposing counsel is expected to search for and present the unfavorable authority. As

46. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995) (stating that many who use history in constitutional theory have "habits of poorly supported generalization — which at times fall below even the standards of undergraduate history writing"). See also Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (describing "law office history").

47. See Kelly, *supra* note 45, at 122 n.13 (Law office history is characterized by "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered."). See also Flaherty, *supra* note 45, at 553-54. Flaherty states that good legal history requires a thorough reading, or at least citation, of both primary and secondary source material generally recognized by historians as central to a given question Another procedural corollary requires viewing, or at least attempting to view, events, ideas, and controversies in a larger context. Here legal scholars, in what in its worst form is dubbed "law office history," notoriously pick and choose facts and incidents ripped out of context that serve their purposes. In a phrase, persuasive historical procedure dictates genuine concern for facts, sources, and context.

Id. See also Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 934 n.103 (1996) ("The politically motivated resurgence of originalism as a theory of constitutional interpretation has generated what is now a very large body of legal scholarship — history-in-law — that is (a) quite bad according to historians' standards, and (b) published in the most prestigious law reviews.").

a consequence, the proponent of a position has an incentive to look for *all* the authority.⁴⁸

This adversary dynamic does not automatically exist in academic writing. If the author does not fully and fairly present the relevant information, the reader, unlike a judge, may never learn of the unfavorable authority.⁴⁹ This, perhaps, should put an even greater ethical duty on the academic than on the litigator to seek and present all the relevant information. The dangers of incomplete information are only compounded by the fact that most of us may not be especially competent to find, present, and evaluate such information.⁵⁰

Certainly, the claim that research has shown delayed rape reports as the most trustworthy accounts of such incidents is one that should be examined closely. Such research requires the ability to determine the historical truth of an often complex event happening days, weeks, or months before.⁵¹ Any assertion that a researcher has a trustworthy method for determining historical truth will be controversial.⁵² Determining this truth is similar to determining

48. Cf. Tushnet, *supra* note 46, at 917-18 ("[L]aw-office history that disregards contrary evidence and the like is not very good advocacy . . . Truly effective law-office history acknowledges the contradictory data and explains them away.").

49. See Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 136. In writing about child custody determinations, Fineman & Opie state

[O]ne should be aware that any legal author or policy-maker who already has a strong leaning toward a particular mode of custody resolution, can easily find social science data, often researched within a different context, to illustrate and support a particular rule. Those readers without a social science background, or who lack the time to refer to the original research, are not in a position to criticize such selections adequately.

Id. See also Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. L.J. 631, 665 (1995). Ramsey and Kelly characterize Fineman and Opie's approach to empirical data as an "anecdotal approach to social science" which

judges research by its results in relation to their vision of women's interests, rather than by scientific or other epistemological criteria. This approach uses social science research like anecdotes or cases that can be employed to support a particular feminist political position. Since both the research and the selection process is value-laden, studies can be used selectively without the need to justify selection or omission in relation to scientific community norms governing research reviews.

Id.

50. Cf. NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* 164 (1995) ("[C]onducting a social science analysis proved easier than conducting it well.").

51. See Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331, 331 (1985) ("By 'historical truth' I mean the question of what really happened in the world.").

52. See, e.g., *id.* at 353 (suggesting that "the psychoanalyst is equipped neither by training nor by method for the detection of historical truth").

the cause of a medical symptom, and as hard fought litigation over toxic torts, breast implants, and Bendectin indicates, such a task is daunting.

Indeed, even divining the cause of simple symptoms for legal purposes is not easy. For example, an expert may be able to tell us that a mark on a body is a bruise. As time passes, however, it becomes less likely that the expert can tell whether the bruise came from a baseball bat or a stumble into a picnic table. The expert could state with less certainty that a bruise was inflicted without consent, and the expert would have even more difficulty saying what the intent was of the person who inflicted the bruise.⁵³ Moreover, any conclusions about the historical truth of what caused a bodily mark must be even more doubtful when the expert's data consists of only the victim's descriptions of the alleged cause. The researcher confronts a task of at least as much complexity when trying to determine the trustworthiness of delayed reports of rape.

Properly conducted studies may be able to tell us how often people delay reporting rape and what behaviors and symptoms rape claimants manifest. A whole other order of studies would be required to conclude that what was reported about an incident is accurate. If such studies exist, they should contain much valuable information, such as how often delayed reports are trustworthy and how often immediate ones are not, as well as many worthwhile correlations. For example, it would be valuable to know whether trustworthiness varies with age, extent of injury, marital status, and other factors.

I doubt that RTS and related research demonstrate the key to divining historical truth, RTS is not some sort of psychological truth machine. If Orenstein bases her proposal on RTS having these properties, then she should present all the data so we can make more significant strides in producing accurate trials than just admitting more hearsay into them.⁵⁴ In any event, the contention

53. An expert might state that a person covered with bruises was unlikely to have consented to the behavior that caused those injuries and that whoever inflicted them is unlikely to have inflicted them unintentionally. This conclusion, however, does not require expertise and could be reached just as easily by the non-expert.

54. In a footnote, Orenstein states, "[t]here is also psychological evidence that traumatic events can be emblazoned on one's memory, but for this to happen, the survivor must first have time to process the information." Orenstein, *supra* note 1, at 200 n.154. "Flashbulb memories" are the result. This reference, too, is made selectively and without context.

The flashbulb effect was coined in 1977. See Roger Brown & James Kulik, *Flashbulb Memories*, 5 COGNITION 73, 73 (1977). The term has usually been used for the crystalline memories people have for "the circumstances in which [they] first learned of a very surprising and consequential (or emotionally arousing) event." *Id.* The notion that there is a special psychological mechanism for creating and preserving such accurate memories has

that delayed reports are the "most trustworthy" accounts is not supported in her article.⁵⁵

IV. THE PROPOSAL FOR SEXUAL VIOLENCE SURVIVOR'S STATEMENT

Orenstein eventually concludes that the excited utterance exception should be altered.⁵⁶ She includes in her expanded

spawned innovative research in recent years, much of which is collected in *AFFECT AND ACCURACY IN RECALL: STUDIES OF "FLASHBULB" MEMORIES* (Eugene Winograd & Ulric Neisser eds., Cambridge Univ. Press 1992) [hereinafter *AFFECT AND ACCURACY*]. This research approaches a consensus: "[I]t seems clear that a careful analysis of [Brown and Kulik's] paper shows that the theory is inconsistent, that the data presented in the paper are not appropriate for testing the theory, and that for the few instances where there is relevant data it sometimes goes against the theory." William F. Brewer, *The Theoretical and Empirical Status of the Flashbulb Memory Hypothesis*, in *id.* at 282. Researchers testing the reliability of flashbulb memories have found that such memories, while confidently held, are inaccurate. One study concluded that only seven percent of the flashbulb memories examined were not wrong to a greater or lesser extent. See Ulric Neisser & Nicole Harsch, *Phantom Flashbulbs: False Recollections of Hearing the News About the Challenger 9*, in *id.* at 18. When "vivid and confident flashbulb recollections [are] mistaken . . . the original memories seem to have disappeared entirely . . ." *Id.* at 30.

If we are of a certain age, we have vivid memories of where we were when we heard Kennedy or Reagan was shot; but some of the details of what we "remember" are likely to be wrong, according to this research. Research on flashbulb memories indicates that there is not a special memory for traumatic events. On the contrary, such memories, like other memories, are reconstructive. See Daniel B. Wright, *Recall of the Hillsborough Disaster Over Time: Systematic Biases of 'Flashbulb' Memories*, 7 *APPLIED COGNITIVE PSYCHOL.* 129, 136 (1993).

This study is part of a growing literature demonstrating that a special mechanism of the type postulated by Brown and Kulik . . . is not supported for the class of memories which it is purported to explain. This study adds to the field by presenting data that are best explained by relying on reconstructive memory processes.

Id. All of this does not rule out the possibility of a special memory for rape, but Orenstein's article does not present information to support such a claim.

55. Cf. Steven M. Southwick et al., *Consistency of Memory for Combat-Related Traumatic Events in Veterans of Operation Desert Storm*, 154 *AM. J. PSYCHIATRY* 173 (1997). In this study of the consistency of memory for serious combat-related traumatic events, subjects completed questionnaires about their combat experiences one month after the war and again two years later. The researchers found that 88% of the subjects reported inconsistent memories with 46% of the subjects reporting one or more traumatic events after one month that they did not recall two years later. *Id.* at 174. Furthermore, 70% reported events at two years that they had not reported after one month. *Id.* The researchers concluded:

These inconsistencies raise doubts about the reliability of memory for combat. . . . That memory for traumatic events frequently changed over time suggests that the search for historical 'truth' may be fraught with complexity. . . . [T]his study suggests that the relationship between development of PTSD and level of combat exposure is not as clear as previously believed. Factors other than combat, such as childhood trauma and preexisting personality may also play an important part in symptom development.

Id. at 175-76.

56. Orenstein suggests that the rationale for the excited utterance exception is faulty,

definition: "Sexual violence survivor's statement. A statement concerning a sexual assault, made by the survivor concerning the event or its effect on the survivor."⁵⁷ This proposal raises several problems and issues apart from its wobbly foundation.

First of all, Orenstein's proposal admits survivor's statements, explaining that "survivor shall mean an adult who has experienced sexual assault as defined" by state or federal criminal law.⁵⁸ Federal Rule of Evidence 104(a), however, requires the trial judge to determine whether the elements of a hearsay exception have been met. This means that before the new hearsay can be admitted, the judge has to determine by a preponderance of proof that the declarant was sexually attacked.⁵⁹ Even though Orenstein indicates that rape victims' statements are not heard because courts are hostile to the delayed reporting of sexual attacks, she gives courts the duty to decide whether the delayed reporters were raped.⁶⁰ Like much else that is troubling in her proposal, Orenstein fails to address this apparent conflict.

Orenstein also blithely concludes that the "survivor's exception could be adopted without undue hardship on criminal defendants"⁶¹ She does this by limiting inquiry to Sixth Amendment

noting that the time necessary to fabricate a story is often only seconds while the exception routinely admits statements made thirty minutes after a startling event. Furthermore, stress, even if it does help to guarantee sincerity, may increase the likelihood of misperception and memory flaws. See Orenstein, *supra* note 1, at 178, 180. Having recognized reasons to doubt the rationale behind the excited utterances doctrine, however, Orenstein still advocates its extension.

57. *Id.* at 213. Her proposal, while adding a new category of statements to the exception, would narrow existing excited utterances by requiring that the declarant be proven unavailable or else be available for cross examination before an assertion is admitted. She also narrows existing doctrine by requiring a prosecutor to give advanced written notice to the criminal defendant of the intention to offer an excited utterance. See *id.* at 214.

58. *Id.* at 213. Although her expanded exception is limited to adults, when she discusses the practical effects of her proposal, she states, "The proposed survivor's exception would probably serve children well, particularly those deemed unavailable to testify." *Id.* at 221. Because her proposal would not authorize the admission of statements from children, it is hard to see how it would serve them well. She does not explain further.

59. See *Bourjaily v. United States*, 483 U.S. 171 (1987).

60. Cf. Baker, *supra* note 17, at 613 ("Judges, who are influenced by the same rape myths and cultural norms that affect jurors, may not use [their] discretion appropriately.").

61. Orenstein, *supra* note 1, at 216. Orenstein states she "uses the term 'survivor' rather than 'victim' to refer to someone who has experienced sexual violence. This choice reflects an attempt to avoid the stigma of victimization and to honor the people who survive the ordeal of rape." Orenstein, *supra* note 1, at 164 n.5. Using the term "survivor," however, implies that we know that the alleged victim has, in fact, been raped. She uses the word as a synonym for rape claimant without acknowledging that under her proposal the judge has to determine that the alleged victim is a survivor. For example, she says, "In *State v. Chapin*, 826 P.2d 194 (Wash. 1992), the court held that the statement of a male rape survivor did not qualify under the excited utterance exception." *Id.* at 201 n.155. She calls him a

Confrontation Clause concerns, but even this limited consideration is unclear. The major confrontation problem, as Orenstein sees it, would arise when a declarant is unavailable to testify.⁶² This problem is solved, she maintains, by her requirement that a statement from an absent declarant be admissible "only if the court finds that circumstances surrounding its making indicate the trustworthiness of the statement."⁶³ While *Idaho v. Wright*⁶⁴ indicates that evidence under a hearsay exception has to demonstrate such reliability to satisfy the Confrontation Clause, her requirement once again raises questions as to what the basis is for the expanded hearsay exception. Orenstein argues that delayed statements about a sexual assault are, as a class, reliable. Indeed, if, as a class they are not trustworthy, why admit this hearsay? If this hearsay as a class is reliable, however, then confrontation should be satisfied without any further particularized inquiry. Even so, Orenstein requires an individualized determination of reliability when the declarant is absent. On the one hand she seems to contend that the hearsay as a class is reliable; on the other, she indicates that it is not. This raises yet again the question of what the rationale is for her proposal?

Furthermore, if Orenstein is saying that before the absent declarant's statements can be admitted, a court must determine on a case by case basis that the circumstances of the hearsay's making indicate trustworthiness, then such hearsay would already seem to

survivor, but it is hardly clear that the label fits. The declarant had Alzheimer's disease and, because he frequently wandered, often had to be restrained by male attendants. Several times in the course of a day he showed anger toward the defendant, a male attendant. His wife asked why he did not like the defendant, and he responded, "Raped me." The court in determining that this was not an excited utterance concluded that the declarant

was confused, prone to confabulation, subject to persecutory delusions [and] . . . hostile in particular to male attendants. [He] made the statement . . . after calming down from being angry, not from being excited, and in response to a question from his wife. In addition, [his] anger was elicited not by any startling event, but by seeing Chapin, which was a normal part of [his] life . . . and which had occurred at least twice previously that day. These factors leave us persuaded that [his] statement was not a spontaneous and reliable utterance made while he was under the stress of excitement caused by the occurrence of a startling event.

826 P.2d at 199. At trial, the declarant did not testify because he was incompetent. Labeling this declarant with the conclusory tag "survivor" makes it seem as if the court was callously enforcing hearsay technicalities to the detriment of rape victims, when in fact the court was faced with a very difficult issue. This would have been an interesting case for Orenstein to analyze under her proposal. She did not do this.

62. See Orenstein, *supra* note 1 at 217, 219.

63. *Id.* at 213.

64. 497 U.S. 805 (1990).

be admissible under the residual hearsay exception.⁶⁵ Presumably she does not think her proposal for absent declarants is superfluous, but again she does not address this problem.

By limiting her concern for hardships to confrontation concerns, she avoids other fairness issues. Her proposal "eliminates all timing requirements"⁶⁶ and therefore permits the admission of any statement about the incident that was uttered before the testimony. Assertions to roommates, spouses, parents, children, friends, and acquaintances all become admissible, not just statements made to the police or health professionals. Indeed, even statements made to a prosecutor during trial preparation could be admitted under Orenstein's proposed changes. The possibilities of admissible hearsay are limited only by the number of times the rape claimant can tell someone about the incident.⁶⁷ Claimants can manufacture hearsay for the express purpose of having it presented at trial.

Such widespread admissible hearsay could be misleading because the jury might forget that the worth of the statements depends on the credibility of just one person and also because such evidence inevitably will be one-sided. The jury will hear statements that support the prosecution's case, but will not be exposed to comparable contradictory ones. Defendants have almost no chance of learning in a trustworthy manner about unrecorded prior statements, especially those made to roommates, spouses, lovers, friends, and acquaintances. When inconsistent statements are made to such people, the jury is unlikely to hear them. Furthermore, much of the truly important hearsay may have been uttered in a privileged setting, such as to a rape counselor. Since it will be the rape claimant who controls the privilege, we can expect the privilege to be waived only for the confirmatory statements and not the contradictory ones.⁶⁸ The jury, as a result, will hear of the

65. See FED. R. EVID. 804(b)(5). Courts, in deciding whether hearsay proffered under Rule 804(b)(5) should be admitted have been most concerned with that Rule's requirement that the hearsay have "equivalent circumstantial guarantees of trustworthiness" to other admissible hearsay. See Jonakait, *supra* note 8, at 440.

66. Orenstein, *supra* note 1, at 215.

67. Federal Rule of Evidence 403 is the only restriction proposed for this stream of prior statements, and Orenstein suggests Rule 403 should be used sparingly, if at all. "Statements by the rape or other sexual violence survivor that are merely cumulative are *probably* excludable under Rule 403, although the possibility that a survivor's additional declarations would not affect credibility seems unlikely unless they were truly numerous and entirely redundant." *Id.* at 218-19 (emphasis added).

68. See Euphemia B. Warren, Note, *She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 CARDOZO L. REV. 141, 146-47 (1995) (stating that 24 states have enacted rape crisis counselor-victim privileges, with 16 of them being absolute, in the sense that they prohibit any disclosure without the victim's consent).

consistent statement made to the roommate or the counselor because the rape claimant will tell the prosecutor. Jurors are unlikely, however, to learn of comparable, inconsistent statements. Orenstein never considers the possible unfairness resulting from this stream of incomplete, one-sided evidence.⁶⁹

What is perhaps most disappointing about the proposal is that it would give the false illusion that some major stride had been made in addressing a problem, when the real issue has not been addressed. If rape victims are wrongly denigrated when they delay reporting the attack, the mere expansion of a hearsay exception will have little effect. Attitudes need changing, but a significant change will not come from admitting on direct examination what is now elicited on cross examination. An expanded hearsay exception does not undercut the defense argument about delayed reporting; the admission of solid information about rape victims might.

Jurisdictions that allow expert testimony to dispel jurors' misconceptions about the responses of rape victims provide a way to admit solid information about rape victims.⁷⁰ Expert testimony, however, costs money and takes time, and there is a limited supply of experts. I doubt the myth-dispelling information is being presented in every trial that might benefit from it. Instead of spending time on the hearsay proposal, we ought to be devising additional ways to collect trustworthy information about rape victims and finding ways to educate juries (and police, prosecutors, and judges) efficiently, fully, and fairly about the responses of rape victims.⁷¹

69. Orenstein's proposal will also encourage more declarants to be unavailable than now. She states that "it is hard to imagine a prosecution for rape or any other violent or sexual crime where a survivor, available to testify, would not be called." Orenstein, *supra* note 1, at 220-21. She also concedes that "the proposal allows for the possibility that because of injury, intimidation, or emotional trauma the survivor will be deemed unavailable to testify." *Id.* Conviction without confrontation will then be a possible result.

While today the prosecutor who desires a conviction is unlikely to easily accept the declarant as unable to testify for reasons of intimidation or trauma and will push and reassure to get her on the stand, tomorrow the prosecutor might more readily accept that she is unavailable because multitudinous hearsay versions of her story can be admitted. Even if the declarant just refuses to testify, making her unavailable, it is hard to picture many courts meting out a serious contempt citation to an alleged rape victim. The end result is that more declarants will become unavailable under her proposal.

70. See Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1321-23 (1994) (collecting cases where courts have admitted rape trauma syndrome evidence and noting that most states only admit such evidence to correct jurors' misconceptions about how rape victims act).

71. Cf. Hunter, *supra* note 18, at 140 ("A more immediate way of challenging assumptions about consent in rape cases is to introduce expert testimony on rape trauma syndrome . . .").

V. FEMINISM AND HEARSAY

Orenstein also claims that her proposal, although limited to one hearsay issue, flows out of broader feminist principles.⁷² These tenets, however, if actually taken seriously, could produce wide evidentiary changes, which she does not assess.

For example, Orenstein gives a feminist critique of the hearsay rule and concludes that the evidence doctrine bolsters unequal relationships:

72. Orenstein maintains that acontextualism is "inimical to the feminine voice." Orenstein, *supra* note 1, at 194. Nonetheless, important context is missing from her critique of the excited utterance rule. After she notes that the excited utterances hearsay exception persists even though its rationale has been strongly criticized, she concludes that a feminist analysis can explain the tenacity of the doctrine, by showing how the exception relies on narrow and unconsciously gendered notions of how normal, honest people react to stress. In particular, the excited utterance exception subtly undermines women's credibility by endorsing social expectations and perpetuating legal and cultural norms that conflict with experiences of survivors of sexual violence . . . [It also] perpetuates stereotypes that allow society to discredit women and to deny the pervasiveness of rape and other sexual violence in our society.

Id. at 222.

Perhaps this is true, but if the feminist methodology abhors acontextualism, then excited utterances should not be treated as isolated from the rest of the evidence rules. Instead, this exception's context should be examined. *Cf.* Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 591 (1996) (stating that evidentiary provisions should not be treated as separate texts, but interpreted as part of one set of rules). That context, which includes the evidence rules as a whole and their history, presents a different, and simpler, picture.

Orenstein suggests that excited utterances have a special hold because they persist despite criticism. When taken in a broader historical context, however, it is typical that once an exception is established, it is not abolished or even narrowed. History only shows the creation of new exceptions and the expansion of existing ones. For example, the rationale for dying declarations might be questioned, but the exception continues to exist. Indeed the Federal Rules' version of dying declarations expands upon the common law. Similarly, the rationale for coconspirator statements is a farce, but they continue to exist. A historical examination would show a present sense impression exception that did not exist at the beginning of the century, and a learned treatise exception in the federal rules that did not exist at common law. The historical context would also find an expanding statement against interest exception. In this context, the excited utterance exception has no special hold. Hearsay exceptions are not abolished. They seem only to be created and expanded.

This trend in hearsay is only part of the broader context of the rules as a whole, which as a general matter, have tended to allow the admission of ever more evidence. The more interesting analysis is not why excited utterances continue, but why a handful of doctrines have been adopted which have narrowed the admission of evidence as compared to previous law. A hostility toward women in evidence law would explain little of these narrowed rules. It is hard to see a hostility to women behind Federal Rule 408, which allows less evidence regarding attempts to settle cases than the common law. Women's suppression definitely has not motivated the creation of rape-shield laws or most new privileges.

It perpetuates the power of a professional elite whose knowledge of its arcane rules makes lawyers indispensable, if incomprehensible It serves to reinforce hierarchy and to perpetuate reliance on professionals, who tend to be predominantly male [T]he hearsay rule can [also] be criticized for its complexity, rigidity, and lack of reliance on context.⁷³

There is force in these criticisms,⁷⁴ but Orenstein does not address solutions for the alienating and arcane hearsay framework. To change the situation we could either abolish the rule or establish more fluid exceptions. If the hearsay prohibition vanished, either all relevant hearsay would be admitted or a judge would make ad hoc admissibility determinations using Rule 403 or some similar rule. It is doubtful that efficiency concerns would allow the admission of all relevant hearsay; trials would become even longer. If, however, unrestricted admissibility was permitted, the system that would further favor the rich and powerful because the amount of hearsay a litigant could discover or manufacture would correlate with that party's power and wealth. While intended to eliminate hierarchy, Orenstein's proposal would only perpetuate hierarchy.

If we used a rule similar to 403 to control the broad admissibility of hearsay, or if we have more fluid exceptions, we cede more power to judges. The more open-ended a rule is, the more it is subject to differing interpretations. The more a rule can be interpreted in various ways, the more power the interpreter has. Orenstein is concerned that the hearsay rule "perpetuate[s] reliance on courtroom professionals, who tend to be predominantly male."⁷⁵ Whether judges are male or not, a hearsay structure that gives more discretion to judges increases the hierarchical power of judges.⁷⁶

Furthermore, while the simpler written rules might seem to decrease complexity, a different type of complexity would evolve.

73. Orenstein, *supra* note 1, at 192-93.

74. The criticisms are overdrawn when considering the hearsay exceptions. While rigid boundaries might be intended for them, the exceptions are about context. It is generally determined whether something falls within an exception by examining the context in which it was uttered.

75. Orenstein, *supra* note 1, at 192.

76. See Kinports, *supra* note 22, at 420 ("[L]eaving the evidentiary rules to the sole discretion of judges, most of whom are upper- or middle-class white men, will tend to perpetuate a traditional male perspective, leading to discrimination against women."). See also *id.* at 422-23 ("Although complete judicial discretion or outright abolition of the evidence rules might be even more consistent with a contextual feminist approach, imposing limits is necessary in a world where judges and jurors are infected by the society's gendered attitudes.").

Litigators would try to predict how evidence law would be applied by each trial judge. Every courtroom, even more than now, would have its own evidence law. This unrecorded law would be hard to determine. In a desire to simplify, one complexity would be supplanted by another.⁷⁷

Orenstein also states that "a feminist method can question the hearsay rule for its resulting loss of information and silencing of voices outside the formal courtroom setting."⁷⁸ She continues that "[m]uch excluded hearsay evidence consists of informal communication — gossip, casual statements to friends" and, since such hearsay has been a traditional way for women to communicate and learn about the world, "[t]he hearsay prohibition . . . sacrifices potentially useful information packaged in a form familiar to and comfortable for women."⁷⁹

The consequences of this feminist concern, which Orenstein does not explore, could be far-reaching. For example, the maxim concerning the loss of information from informal communication suggests that the general ban on character evidence should not exist, for what is a reputation if it is not gossip and casual statements among friends? Indeed, taking this principle seriously suggests that rape-shield laws should be reversed.

Feminists also ought to examine carefully the consequences of unleashing voices silenced by the hearsay rule. Orenstein wants the jury to hear the rape victim's voice, but in fact the jury now generally hears it because victims testify.

The voice often not heard at trials, however, is the criminal defendant's. This perhaps is not caused by the hearsay rule. Maybe the defendant's voice is stilled because he exercises his right against self-incrimination and because evidence doctrines allow the jury to hear about past crimes and misdeeds only if he testifies. Without the hearsay rule, however, the jury would regularly hear this frequently absent voice. If feminism is truly concerned about the loss of hearsay and inaudible voices, it should be advocating to make hearsay from the accused admissible.⁸⁰

77. *Cf. id.* at 425 ("Although the law of evidence can be made less inaccessible and therefore less hierarchical by eliminating some of the needless complexity in the rules, the most straightforward approach to evidence would be to give the judge or jury complete discretion, which is problematic . . .").

78. Orenstein, *supra* note 1, at 194.

79. *Id.* at 194-95.

80. Similarly, if these feminist principles were seriously held, feminists should try to narrow privileges. Privileges, like the hearsay rule, mute voices. People still testify, but the whole story is not presented; the information lost is, in fact, generally hearsay; and for a privilege like the rape counselor privilege, that muted hearsay voice is a woman's. *Cf.*

VI. FEMINIST PRINCIPLES AND FEMINIST POLITICS

Broad principles intended to be widely and neutrally applied, however, do not really seem to drive this proposal.⁸¹ If they did, Orenstein would show more concern for consequences. Instead, Orenstein's goal seems to be the inclusion of specific information in a specific context. She would like to be able to admit the victim's supporting hearsay in sexual assault trials. The real engine is the desire to shift the balance in rape trials.⁸² The foundation of her proposal is not principles, but politics.⁸³

That motive, instead of being hidden as if unworthy, should be recognized.⁸⁴ There is nothing wrong with advocating a power shift

Kinports, *supra* note 22, at 440 ("As a general matter, privilege rules might be seen as furthering feminist principles because they value the preservation of relationships over the admission of relevant evidence.").

81. Cf. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2153-54 (1995).

[B]road propositions do not solve concrete cases; or they solve too many case very poorly. . . . Despite the undoubted importance of theoretical insight, the most effective tools of reform at the present juncture are likely to be eclectic and atheoretical, and the most effective feminist scholarship is likely to be one that attends to the complexities of specific institutions and procedures. What is needed, I suggest, is a feminism of particulars, a recognition that real solutions are likely to lie deeply embedded in the details.

82. Orenstein comes closest to acknowledging that a power shift is her real goal when she says that feminists "argue that any attempt to identify neutral reality or objective truth is fruitless, and that the assumptions underlying the goals of objectivity and neutrality are not only unfounded, but inevitably reflect gender power differences." Orenstein, *supra* note 1, at 189. If a feminist holds these views, then she would not advocate changing evidence rules to allow trials to move towards neutral reality or objective truth because that could not be done. The rules should be modified only to alter a gender power difference. Accepting this position is dangerous for feminism because this view indicates that there is no reason to believe a woman is telling "the truth" when she says that she was raped. See Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 280 n.9 (1993).

When I refer to women's 'true stories' I am claiming, first, that women's assertions that they were sexually violated are almost always an accurate representation of what they felt. I thus reject the broadest versions of postmodern feminism that seem to assume that all descriptions are linguistic constructions with no clear linkage to material reality.

Id.

83. In using the term "politics" here I am following Robert Mosteller who describes "the increasing impact of political influences on evidence law." Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 465-66 (1996). He goes to say, "Political' is a broad term that includes not only the exercise of self-interested power by groups but also the process by which a moral component may be identified and incorporated into the law." *Id.* at 465 n.15.

84. Orenstein states, "Feminist method[s] seek . . . to examine how purportedly neutral rules may discriminate against women." Orenstein, *supra* note 1, at 162. She argues that the purportedly neutral excited utterance exception discriminates against women.

in rape trials.⁸⁵ Certainly the historic balance was wrong, and perhaps it still is. Indeed, only if we forthrightly advocate the change can we confront the truly crucial questions that Orenstein does not face. Are the scales wrongly tilted in rape trials, and if so, is this a good way to alter them?⁸⁶

Acknowledging the motivation can also help prevent unanticipated results. When we just seek to alter the balance of power in specific kinds of cases, we can cabin the consequences. The reform is naturally limited to the defined set. When, however, it is contended that general principles and methods compel a change,

Subsequently, she suggests a remedy. While she does not see the excited utterance exception as gender neutral because of its discriminatory impact, she pronounces that her proposal, whose goal is to admit more hearsay from women, is gender neutral. She asserts that this is because

in the tradition of the evidence rules, the proposal is gender neutral. Rape Trauma Syndrome is based on Post-Traumatic Stress Syndrome generally, and there is reason to believe that men experience rape and other sexual violence as traumatic and may, because of shame, exhibit many of the less powerful speaking styles associated with women.

Id. at 218. She comes to the contradictory position that a rule neutral on its face is discriminatory because it adversely affects women, even though it may also affect some men in the same way, but a remedy is neutral even if it primarily aids women because it also aids some men. Such contradiction disappears if she acknowledges that it is not neutral principles driving the proposal, but a desire to alter a power balance.

85. Professor Mosteller suggests one reason that the battered woman's syndrome has been widely admitted, even though its scientific basis is not as strong as other evidence that is often excluded, is "politics. Society has arrived at a basic political judgment: the balance of advantage should be shifted in litigation in favor of battered women who respond violently to their batterers." Mosteller, *supra* note 82, at 485.

86. Cf. David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 583 (1994).

If one thinks of rape as a crime similar to other violent felonies, comparable to homicide or nonsexual assault, for example, one is more likely to accept the idea that the character reasoning rules should be consistent across various crimes. If one regards rape as a society-defining crime, part of a system of oppression that promotes male supremacy, then one may think that the need to increase the conviction rate is greater than the need to maintain consistency across the law of character evidence and greater than the need to avoid speculative dangers of prejudice in the fact-finding process. As usual, beliefs about substance overwhelm beliefs about process.

Id. See also Nance, *supra* note 30, at 12-13. Nance states that the arguments for the special need for evidence of prior sexual assault can mean two different things:

On the one hand, they can mean that there is a special need to suppress sexual assault. Before that can be accepted as an argument for admitting evidence, one must answer the question of why the best way to suppress a given type of crime is by making it easier to convict that class of defendants, as opposed, for example, to stiffening penalties or otherwise encouraging prosecutions

On the other hand, the argument from special need can be aimed at the peculiar epistemic features of the cases under consideration.

Id.

others may actually take those principles and methods seriously and apply them elsewhere. When we offer principles to justify political decisions, reform can spring out of its initial confines into unforeseen territories.⁸⁷

For example, Orenstein's reliance on rape trauma syndrome has far-ranging implications.⁸⁸ Although she never commits herself as to what RTS is, Orenstein suggests that RTS is a form of the more general post-traumatic stress disorder, whose precipitating cause may be any kind of traumatic stress, not just sexual violence.⁸⁹ If RTS justifies her proposal, but RTS is simply a form of PTSD, then the proposal should be extended to any statement about the possible cause of PTSD by one who could be suffering PTSD.⁹⁰

Such an extension would greatly change our litigation. It should mean that the hearsay about the incident for anyone who suffered violence, or perhaps the threat of violence, should be admissible. This would cover robbery and assault victims and tort and products liability claimants. Indeed, when an accused has been hurt in the incident, his hearsay, too, should become admissible.⁹¹

Furthermore, post-traumatic stress disorder can result from trauma not leading to physical injury. Events causing psychic dread alone can trigger the condition.⁹² A soldier in combat who is

87. See Mosteller, *supra* note 82, at 498. "I would be distressed if these problematic aspects of BWS evidence were extended indiscriminately to other areas . . ." *Id.* He concludes,

I now return to a key consideration — the consequences of an acknowledgment that politics have played a role in shaping evidence law regarding the admission of BWS evidence. I suggest that such recognition is likely to yield one specific benefit: it will inhibit the expansion of the principles developed in battered woman self-defense cases to more problematic situations.

Id. 509-10.

88. Since the proposal covers every statement made by a rape claimant whether that person is then manifesting RTS or not, it seems impossible for RTS to justify the proposal.

89. "Rape Trauma Syndrome is based on Post-Traumatic Stress Syndrome generally . . ." Orenstein, *supra* note 1, at 218. "In 1980, the American Psychiatric Association incorporated post-traumatic stress disorder (PTSD) into the *Diagnostic and Statistical Manual of Mental Disorder*. While not mentioned by name in either DSM-III or DSM-III-R, rape trauma syndrome has been explicitly recognized as a classic form of PTSD." Stefan, *supra* note 69, at 1295.

90. Of course, just as there is no requirement that the declarant be suffering RTS for the hearsay to be admitted under Orenstein's proposal, there should be no need for other declarants to be demonstrably suffering PTSD as long as their assertions were about the source of what could be their PTSD.

91. See, e.g., *People v. Sostre*, 418 N.Y.S.2d 662, 70 A.D.2d 40 (App. Div. 1979) (holding that the statement of defendant that he was shot "for nothing" not an excited utterance even though defendant was shot twice and made the statement two to five minutes after being shot).

92. See Stefan, *supra* note 69, at 1296.

not physically injured can manifest the syndrome, and so presumably can the victim of an attempted sexual assault.⁹³ Victims can find burglary stressful too, as, I suspect, can those who find their checking accounts looted. Indeed, being the claimed victim of any crime could perhaps qualify the hearsay. Thus, Orenstein's principles, if taken seriously, might lead to the admission of any complaining witness's out-of-court statements.

They could lead to even more. Surely, whether guilty or not, one accused of a crime can suffer psychic harm. The person who is arrested for rape, held in jail, told that he faces a twenty-five year sentence, advised not to discuss his situation with others because they cannot be trusted, and informed that juries frequently do not believe mothers and siblings who furnish alibis, often experiences sleepless nights, becomes withdrawn, grows wary of relationships, is anxious, has fantastical thoughts, and experiences flashbacks. If Orenstein's position leads to the conclusion that hearsay should be admitted because of the possibility of suffering PTSD, then perhaps all of the accused's hearsay becomes admissible. Defense attorneys will now advise their clients to tell everyone in the cellblock of their innocence, and upon release, to find a minister, priest, or rabbi to tell it to, also.⁹⁴

Perhaps Orenstein's justification can be made to rest specifically on RTS and not PTSD generally.⁹⁵ This might be done if RTS specifically indicates that delayed rape reports are reliable.⁹⁶ RTS can indicate this only if, first, delayed reporting is part of RTS, and, second, researchers can assess the comparative validity of rape

93. In Orenstein's proposal, statements would be admissible from the "survivor" of an attempted sexual assault or the "survivor" of a conspiracy to commit sexual assault. Such people might be candidates for RTS or PTSD, but if the intended victim of a conspiracy was not aware of the conspiracy until after arrests and the end of the conspiracy, what is the justification for admitting the hearsay?

94. The conclusion that the accused's hearsay should be admissible does not require concluding that the trauma's severity is the same for the sexual assault victim as it is for the person accused of a crime. Orenstein's proposal does not depend on the severity of the symptoms manifested by the victim. The accused also does not have to actually manifest PTSD; the rape victim's hearsay is admissible without proof of such manifestation. Instead, only the possibility that those accused of crime could manifest PTSD should be required, and certainly a "social science lite" approach could find support for that proposition. See *Giamanco v. Epe, Inc.*, 619 So. 2d 842 (La. Ct. App. 1993) (affirming the damage award for a person who suffered PTSD because of a bad permanent wave).

95. Of course, if the justification is limited to avoid certain consequences, it should be clear that principles are not driving the proposal, but that justifications are being formulated to reach desired results.

96. If there is no special reliability for the delayed rape report, the rape victim's hearsay is not distinguished from the hearsay of other testifying witnesses. If this is so but only the rape victim's hearsay is admitted, then it seems clear that the proposal is a political decision to change the balance in rape cases, not a result justified by principles.

complaints. These propositions, however, should not be asserted lightly because they can also be turned around to challenge rape claimants.

If delayed reporting is part of RTS, and RTS is the usual result of being raped, then the person who reports rape immediately is not acting like a person who is a typical rape victim.⁹⁷ A person who acts inconsistently with how a rape victim usually acts is less likely to have been raped than the person who manifests the symptoms ordinarily exhibited by a rape victim. If delayed reporting really is a part of RTS, the defendant ought to be able to inform the jury that the prompt reporter is less likely to be a rape victim than a person who delayed reporting.

If RTS indicates that delayed reports are more reliable than prompt ones, then, of course, the defendant should be able to introduce that information when a report was immediate. Even if the claim is not that delayed reports are more trustworthy than prompt ones, but only that delayed reports are reliable, then the claim still carries the assertion that RTS can describe circumstances correlating with unreliable reports. Any time the rape claimant's circumstances place her in that not-reliable camp as indicated by RTS, the defendant should be able to introduce the evidence showing that the complaint is not trustworthy.

Whenever it becomes accepted that we can tell how rape victims typically behave or can tell the reliability of rape complaints, the door is open for a defendant to challenge the credibility of rape claimants who do not fit these patterns.⁹⁸ If we truly can

97. Orenstein suggests that the immediate report of rape, the excited utterance, conflicts with how women react to rape. For example, she states, "However RTS informs evidence law, we must question why a reaction to stress that is at odds with women's documented experience is nevertheless venerated by evidence law." Orenstein, *supra* note 1, at 203. She also asserts, "[T]he proposed survivor's exception actually reflects what we know about how people react to the trauma of sexual attack." *Id.* at 220. See also *id.* at 205, n.169 (suggesting that it is common for truth to develop over time when women recount a traumatic story). Orenstein does little to probe these assertions even when she presents material for their exploration.

Thus, Orenstein refers to *United States v. Haner*, No. ACM-31786, 1996 WL 520968 (C.A.A.F. Sept. 8, 1996). See Orenstein, note 1 at 221 n.216. She does not, however, discuss how this case should be interpreted in light of her apparent arguments that delayed reports are the reliable ones. The victim made statements that her husband had terrorized and tortured her which were admitted as excited utterances. She was diagnosed with post-traumatic stress disorder. Later, however, she recanted those statements and said, as she did at trial, that what had happened was part of consensual sado-masochistic sex. The delayed version was admitted into evidence as, of course, was her testimony. The later accounts, however, were not believed, and the defendant was convicted. Was the court's refusal to credit the delayed report part of the court's continuing degradation of women?

98. See Thomas D. Lyon & Jonathan Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43,

determine typical reactions and the reliability of reports, this challenging evidence should be admitted because it increases trial accuracy. But that is why feminists should be careful about claiming what RTS and other rape research shows.⁹⁹ Justifying political goals by relying on RTS can harm rape victims if the research truly does not support the claims. Such cases as *Henson v. State* present the cautionary tale.¹⁰⁰

Indiana had held that an expert on rape trauma syndrome could testify that a victim's behavior was consistent with a person who had suffered a traumatic rape, and thus, that a rape had occurred.¹⁰¹ Once that decision was reached, it was inevitable that defendants would seek to turn this around by showing that the rape claimant's behavior was not consistent with traumatic rape, and therefore, a rape had not occurred. *Henson* held that it was an error to deny the defendant such evidence. "It would be fundamentally unfair to allow the use of such testimony by the State . . . and then deny its use by a defendant here."¹⁰² Of course, where this offensive use of RTS is allowed, it is also inevitable that defendants

71 (1996). "[I]f statistics demonstrate the relevance of rape trauma syndrome for proving that abuse occurred, those same statistics demonstrate the relevance of a failure to exhibit rape trauma syndrome for proving that abuse did not occur." *Id.*

99. Cf. Maguigan, *supra* note 19, at 87. Observers who believe that cultural information is being received too readily by courts with the effect of condoning anti-woman violence often focus on cases involving male defendants accused of crimes against family members. Their call for the exclusion of cultural information ignores the impact such a rule would have on the cases of women accused of crime.

100. 535 N.E.2d 1189 (Ind. 1989).

101. *Simmons v. State*, 504 N.E.2d 575 (Ind. 1987).

102. 535 N.E.2d at 1193.

The research literature does not claim that rape trauma syndrome is a universal reaction to being raped, but that conclusion is an inevitable consequence of trying to use rape trauma syndrome evidence in court . . . This leads to an argument that the fact that a complainant does *not* suffer from rape trauma syndrome has evidentiary significance.

Stefan, *supra* note 69, at 1328. See also Myrna S. Raeder, *The Double Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 813-15 (1996) (stating that if a prosecutor can use an expert regarding battered women's syndrome, and the evidence is relevant, the defendant can use comparable evidence). Compare Mary A. Dutton & Lisa A. Goodman, *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAV. SCI. & L. 215, 224 (1994).

[A] serious risk of utilizing the presence of PTSD as an indicator that domestic violence occurred is the unintended effect of establishing it as a threshold criterion . . . [A]lthough the presence of PTSD may be construed as support for an allegation of prior domestic violence, the absence of PTSD does not likewise indicate that such violence has not occurred.

Id.

will seek to have their psychiatrists examine the rape claimants.¹⁰³ Court-ordered psychiatric examinations are an understandable anathema to feminism, but they can flow from the principles espoused by feminists. Feminists ought to be especially careful in claiming a principled justification when the real goal is the political one of shifting power in rape cases.

VII. CONCLUSION

Orenstein's proposal to expand excited utterances to admit all the prior statements of rape claimants is not supported by her hearsay analysis, and the feminist principles she presents do not drive the proposal either. It should be acknowledged that politics is the force behind the proposed change — changing the balance in rape trials. Pretending the proposed change is based on principles that do not support it can bring unforeseen, widespread changes, some of which could be harmful to rape victims.

Instead of discussing sham rationales, we should have the real debate. Should the balance be changed in rape cases, and if so, is this the way to do it?

103. See, e.g., *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984) (trial court ordered the victim to be examined by a defense psychiatrist). See also *People v. Wheeler*, 151 Ill. 2d 298, 602 N.E.2d 826 (1992) (holding that when state uses expert who examined the victim to testify that victim suffered from rape trauma syndrome to prove that a rape occurred, defendant's expert can examine the victim). See also Stefan, *supra* note 69, at 1325.

Not only can a rape complainant be cross-examined about past traumatic sexual experiences, but if the prosecution is claiming that she now has a disorder as a result of defendant's rape, pre-existing disorders also become relevant to rebut the inference created by expert's testimony In addition, she may be forced to undergo compulsory psychiatric examination by the defendant's mental health expert, which may be a particularly intrusive, unpleasant, and violating experience.