

## BEYOND KING SOLOMON'S HARLOTS: WOMEN IN EVIDENCE

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There is a tradition of beginning the law school course on evidence with the Judgment of Solomon.<sup>1</sup> The biblical version quoted by the casebook I use reads as follows:

Then two harlots came to the king, and stood before him. The one woman said, "Oh, my lord, this woman and I dwell in the same house; and I gave birth to a child while she was in the house. Then on the third day after I was delivered, this woman also gave birth; and we were alone; there was no one else with us in the house, only we two were in the house. And this woman's son died in the night because she lay on it. And she arose at midnight, and took my son from beside me, while your maidservant slept, and laid it in her bosom, and laid her dead son in my bosom.

"When I rose in the morning to nurse my child, behold, it was dead; but when I looked at it closely in the morning, behold, it was not \*1266 the child that I had borne." But the other woman said, "No, the living child is mine, and the dead child is yours." The first said, "No, the dead child is yours, and the living child is mine." Thus they spoke before the king.

Then the king said, "The one says, 'This is my son that is alive, and your son is dead'; and the other says, 'No, but your son is dead, and my son is the living one.'" And the king said, "Bring me a sword." So a sword was brought before the king. And the king said, "Divide the living child in two, and give half to the one, and half to the other."

Then the woman whose son was alive said to the king, because her heart yearned for her son, "Oh, my lord, give her the living child, and by no means slay it." But the other said, "It shall be neither mine nor yours; divide it." Then the king

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<sup>1</sup> See, e.g., Eric D. Green & Charles R. Nesson, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 4 (1983); John Kaplan & Jon R. Waltz, EVIDENCE 64 (1987) (the first sixty-three pages of Kaplan & Waltz consist of an introduction entitled *Making The Record*); Leon Letwin, EVIDENCE LAW 10-11 (1986); Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE UNDER THE RULES 63 (1988) (the first fifty-seven pages provide a broad overview). For an analysis that ties the Solomon story to issues of reproduction, see Marie Ashe, *Abortion of Narrative: A Reading of the Judgment of Solomon*, - YALE J.L. & FEMINISM (forthcoming 1992).

The Judgment of Solomon is by no means essential to evidence teaching materials. See, e.g., Jack B. Weinstein, John H. Mansfield, Norman Abrams, & Margaret A. Berger, CASES AND MATERIALS ON EVIDENCE (8th ed. 1988). Thus, its inclusion is a matter of deliberate choice.

answered and said, "Give the living child to the first woman, and by no means slay it; she is its mother."

And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice.<sup>2</sup>

In this story, two women come to the king. We are not given their names, as though their names are mere surplusage. We are not told the king's name either. But we all recognize the famous story and know the king to be Solomon. Our male character is so famous that he needs no name. Our female characters are such nonentities that they too need no names. Still, we must have a way to distinguish them from each other. The text does this by referring to the first woman as "the one" and the second woman as "the other."

Though we are not told their names, we are told that they are harlots. Why harlots, and why let us in on that particular fact? One scholar suggests that it explains how two women might find themselves unaccompanied in a house at night (for the narrative does require that there be no other witnesses) or alternatively that it demonstrates the greatness of Solomon, that he made himself available even to the lowliest of persons.<sup>3</sup> \*1267

For law professors teaching today, identifying the women as harlots serves a purpose: It spices up the problem – it makes it sexy. I know, I used the word in my title. I took cheap advantage of the word. And how many people told me this was a "great title"!

What do law students today, deprived of any historical context, picture when they hear the cue "harlots"? (What did you picture on reading my title?) Do they imagine Julia Roberts or some other charming cinematic prostitute-by-choice, a little down on her luck, but a feisty survivor, a "working girl"?

Prostitutes at the time of Solomon were usually slaves.<sup>4</sup> Solomon himself had three hundred concubines, according to the Bible, in addition to seven hundred wives.<sup>5</sup> We are told that he loved his wives dearly. Indeed, we are also told that he fell out of favor with God because God had forbidden intermarriage with non-Israelites and because Solomon allowed those women to influence him.<sup>6</sup>

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<sup>2</sup> 1 Kings 3:16-28 (Revised Standard Version). This is the version used in Green & Nesson. In the remainder of this Essay, I rely on the recently published THE REVISED ENGLISH BIBLE (1989). The newer translation, inter alia, replaces the word "harlots" with "prostitutes" in the passage quoted above. The version used in Kaplan & Waltz obscures the issue by calling them simply "women." At least one evidence professor I spoke with about this Essay used the story of the Judgment of Solomon in her class without realizing that the women were prostitutes.

<sup>3</sup> 12 Simon J. Devries, WORD BIBLICAL COMMENTARY 61 (David A. Hubbard, Glenn W. Barker, John D. Watts & Ralph P. Martin eds., 1985).

<sup>4</sup> Id. at 59.

<sup>5</sup> 1 Kings 11:3.

<sup>6</sup> 1 Kings 11:1-10.

Among other things, to please his wives, he worshipped the goddess Ashtoreth.<sup>7</sup> Worshipping Ashtoreth entailed ritual prostitution.<sup>8</sup> Solomon built a temple to Ashtoreth to please a wife, to God's displeasure.<sup>9</sup>

Does this imply that Solomon promoted prostitution? Solomon the.... I hesitate to write the word, but having already taken cheap advantage of one word, and puzzling over why one refrains from taking cheap advantage of an equally cheap term when it is aimed at a man, I feel I must write – Solomon the Pimp.

It is held in our faces that the women were harlots. Solomon's connection to harlotry is deeply submerged. What is instead held in our faces is that Solomon was King.

The Solomon story, excised and presented in a modern day evidence casebook, unconnected to its historical context, gives students little chance of perceiving the two nameless women as anything other than "working girls" who chose an occupation available to them either because of poverty and misfortune or because of a certain lusty independence. There is no sense that institutional or cultural mechanisms forced \*1268 women into this fate, certainly no implication that Solomon himself promoted it, and no glimmer of prostitution's connection to rape, a subject that commands great attention in the law school course on evidence.<sup>10</sup>

The harlots come to the king as litigants come to a court. They seek a judgment and they receive one. The testimony the king hears is scarcely a model of fair procedure, though we read no criticism of him. Indeed, we hear his judgment pronounced the "wisdom of God."

If we look to the biblical passage that precedes the familiar judgment scene, we will see that Solomon, who had recently achieved dramatic military success, and at this point had an interest in establishing his legitimacy as a leader of his people, had had a dream in which God asked him, "What shall I give you?"<sup>11</sup>

Solomon, who needed to redefine himself from military victor to rightful legal authority, requested "a heart with skill to listen, so that he may govern [God's] people justly and distinguish good from evil," so that he would be "equal to the task of governing" Israel.<sup>12</sup> The biblical context thus prepares us to adulate the king's wisdom by portraying it as a direct divine gift.

Shorn of the introductory dream sequence, the evidence casebook excerpt rests more abstractly (and secularly) on our conventional equation of Solomon with wisdom and on

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<sup>7</sup> Ashtoreth – also pronounced Ishtar. How the grand feminine traditions become submerged: Ishtar to us now means "notoriously bad Hollywood movie," but Ishtar/Ashtoreth was the Babylonian goddess of erotic love.

<sup>8</sup> Gerda Lerner, *THE CREATION OF PATRIARCHY* 126-31 (1986).

<sup>9</sup> 1 Kings 11:4-8.

<sup>10</sup> See *infra* notes 32-33 and accompanying text.

<sup>11</sup> 1 Kings 3:5.

<sup>12</sup> 1 Kings 3:9.

the perception of the peoples who witnessed the judgment and came to believe that Solomon possessed "the wisdom of God ... to render justice."

The women tell of a dead infant boy and a living one. Each woman claims that the living one is hers and that the dead one belongs to the other. Did one woman steal the other's baby during the night when she found she had somehow rolled over on top of her own child and killed it? Or did the two mothers really awaken in the morning each next to her own baby? Was the woman who woke with the dead baby trying to get her own baby back or was she now using the judicial process to get herself a live baby?

The story of Solomon's judgment presents us with a woman who has just suffered the death of her own child desperately attempting to get herself a baby – any baby! Of course this all sounds implausible, and of course it is. It is quite unlikely that this event took place. The story \*1269 appears in various forms in at least twenty-two folk tales from many cultures.<sup>13</sup> The most familiar alternate version is probably Bertolt Brecht's *The Caucasian Chalk Circle*.<sup>14</sup>

If the story is a fiction, we may fairly ask, Why was it written? Even if the event occurred, we need to ask, Why pick this event to write about, and why write it up in this particular way? The text portrays women as mothers and whores, desperately attached to babies. These women fall into two categories. There are the bad ones who will lie and cheat to get their way. And there are the good ones who will selflessly sacrifice for the sake of others.<sup>15</sup>

The man occupies center stage as the judge of women. He is the one who defines the categories and sorts the women into them. He is the one who receives the awe of the people he will rule. The story's resolution is the proof of the king's wisdom: The military victor deserves to rule. This is the reason for telling the story.

But does the story really prove Solomon's wisdom and judgment and his consequent right to be king? God supposedly gave Solomon "skill to listen," but after only a minute of testimony, including only one short sentence from the Other woman, our skilled listener calls for a sword. The would-be purveyor of reason and judgment betrays the military origins he seeks to obscure.

Compare Solomon to a modern judge who sits through hours, days, weeks, months of testimony. A judge who cut (literally) through the boredom and obfuscation of a trial by wielding a weapon would scarcely inspire the awe bestowed on Solomon. Even critics of our supposedly litigious society would not appreciate this timesaving technique. The judge

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<sup>13</sup> Devries, *supra* note 3, at 58.

<sup>14</sup> Bertolt Brecht, *THE CAUCASIAN CHALK CIRCLE* (1947). In the play, a judge decides which of two women should have the child by drawing a chalk circle and announcing that he will give the child to the woman who pulls the child over the line. The resulting tug-of-war causes pain to the child, and one woman, to spare the child this pain, lets go. The judge then awards the child to the woman who released her own claim for the sake of the child. Brecht based this play on a thirteenth century Chinese play, *The Circle of Chalk*, attributed to Li Hsing-Tao. *BENET'S READER'S ENCYCLOPEDIA* 191 (3d ed. 1987).

<sup>15</sup> Marie Ashe notes that Solomon here "rejected complexity and ambiguity," simplifying the task of judgment by structuring it in the form of "bipolar oppositions" as well as by drastically limiting the basis for the judgment to the reaction to the proposed killing of the child. Ashe, *supra* note 1, at \_\_\_\_.

would soon be out of work at the very least. But perhaps if the judge were also the king, we, like the Israelites, would feel “awe,” that handy euphemism for “fear.” Fortunately, we have separation of powers. Our judges are not kings. \*1270

Solomon, however, wields the sword without opposition. In doing so, he leads each woman to make a statement. The One gives up her claim to the baby and begs the king to give it to the Other. The Other, having heard the first woman give in, nevertheless blurts out, “It shall be neither mine nor yours; divide it.”

The king, as we all know, gives the baby to the One – the One who was willing to sacrifice, the One who backed off at the threat of male violence, the One who refrained from asserting her own needs. The good woman. Solomon says, “[S]he is [the child’s] mother.”

He does not say what the Other is. But it seems she did not deserve the label mother. Biologically, however, she was certainly a mother, if only of the dead child. And does her behavior really imply that she was not this child’s mother? One’s initial response might be that this woman cannot love this child. But what if she loves the child so dearly, so desperately, that she reacts wildly, rebelliously – driven by the king’s behavior to court death? Perhaps the first woman’s behavior shows lack of involvement; perhaps she gave up her claim when really pressed because she did not care as much.

Consider how you would feel if someone whose child had died began asserting that your child was hers, and then incredibly, her assertion led the authorities to start to kill your child as a method of dispute resolution. It would seem as if the world had gone mad. If at that point you blurted out, “Then go ahead, kill the child,” what would that say about you? Would it really mean the child was not biologically yours?

And what if we change the question and say that the issue is not who the biological mother is but who will make the better custodian for the child? This is, of course, the traditional evidence class resolution of the problem. Does everything really suddenly become clear? Does the fact that you might blurt out “kill the child” in a situation of extreme distress and coercion really mean that you would not be a good parent, a good custodian for the child? Maybe it means that you are fierce and passionate and would protect your child and love your child more than someone who backed down, someone who acquiesced. The Other would not give in to the power of a king who held a sword directly over the child. Why not infer that she would bravely and defiantly defend against any lesser marauder?

In the traditional evidence course interpretation, Solomon’s violence and impatience and radical disregard for due process recede into the \*1271 background. We are supposed to stand in awe of Solomon for anticipating the modern “best interest of the child” standard. Solomon did not have to determine who the biological mother was – that is not the “fact of consequence,” as professors like to say, using Federal Rules of Evidence

language.<sup>16</sup> He determined who should have custody, and of course, we say a woman who would have her baby cut in two if she could not get her selfish way is a worse custodian than the woman who gives up her own interests for the sake of the child. Of course.

But wait. If we revile the Other, how can we admire Solomon? Cutting the baby in two was his idea: He wielded the sword. All the Other did was to refuse to yield to his power. We expect witnesses to testify when a criminal defendant's cronies threaten to kill one of their children, and we cite them for contempt if they don't. We canonize civil rights workers who persisted in spite of the Klan. Why do we not admire the Other for sticking to her claim in spite of the threat of violence? Why do we not revile the king as we would revile the Klansmen and gangsters who use violence?

Ah, you may say, but the beauty of the Solomon story is that Solomon never intended to cut the baby in two. Solomon was not a gangster or a Klansman. He was just bluffing, using a brilliant method to extract revealing statements from the two women. But let's consider first whether he was just bluffing and then whether his bluffing should convert our contempt to admiration.

Brutal, unreasoned judgments of life and death pervade the Scriptures. For example, when David conquered the Moabites, he made them "lie along the ground, where he measured them off with a length of cord; for every two lengths that were to be put to death one full length was spared."<sup>17</sup> The "spared" Moabites became his slaves. In such a climate, the assumption that Solomon never intended to kill the infant child of a prostitute seems at least questionable. Solomon may genuinely have had no patience with the dispute and meant to end it instantly by destroying the disputed object<sup>18</sup> the way a harried parent turns off the TV when the children argue about which program to watch. Perhaps it was only after \*1272 the threat was made that he saw an easy way out of the dispute when the two women made their different statements.

But assume it was a bluff. If I drag a confession out of a man accused of a crime by holding a gun to his child's head, will you say, "Oh, okay," when I add that the gun was unloaded? The object of a threat of violence suffers extreme pain that is not mitigated by the fact that the one making the threat does not intend to carry it out. It is a form of torture, and we do not generally think much of confessions produced by torture.

Evidence professors, though, may say that these are not confessions, these are statements used circumstantially. They reveal the truth indirectly and are therefore unlike confessions, which may contain whatever lies and distortions the tortured one thinks will remove the pain. So these statements are more trustworthy. But even if we were willing to disregard the torture because it led us to the truth (and I trust we are not), using statements

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<sup>16</sup> According to Fed. R. Evid. 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

<sup>17</sup> 2 Samuel 8:2.

<sup>18</sup> According to one early historian of the American Indian wars, if two men were locked in a dispute over possession of a captive woman (or a horse), the standard Apache method of preventing dispute was to shoot the woman (or the horse). The hope was that people would quickly resolve their disputes, but the threat of murder was not a bluff. J.P. Dunn, *MASSACRES OF THE MOUNTAINS, A HISTORY OF THE INDIAN WARS OF THE FAR WEST, 1815-1875*, at 319 (1886), cited in Susan Brownmiller, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 144 (1976)).

circumstantially requires an inference. Such statements may be more truthful, but they are also more ambiguous. Do the women's statements mean what evidence teachers keep saying they mean? Or might they mean something else?

The One says, "Oh my lord, give [the other woman] the living child, and by no means slay it." The Other says, "It shall be neither mine nor yours; divide it." Evidence teachers keep saying that this means the One would be a good custodian for the child and the Other would be terrible.<sup>19</sup> We keep saying that this is quite clear, and we keep assuming that Solomon relied on his "best interests of the child" decision-making framework.

The One, the good woman, the mother (according to Solomon), yielded to the king when he flaunted his physical power and authority. The Other, whom history brands the bad, selfish woman, resists power, continues to assert her claim, and stands on principle, even in the face of great loss. We can read the Other woman's statement as an outcry against injustice and brutality, a breakdown of reason. Indeed, the Other's comment comes after the One's concession of the child and thus \*1273 does not appear to be a product of reason. If the Other were truly cold and calculating, she could have simply kept her silence and received the child.

Toni Morrison writes in *Beloved*<sup>20</sup> of an escaped slave woman, Sethe, who brutally saws off her daughter's head when she is cornered by fugitive slave hunters. Morrison does not condemn Sethe or deny her status as mother. Sethe's action takes place in a context of horrifying violence and injustice from which she could see no escape except death. At great emotional cost to herself, she bestows this escape of death on her child. Morrison shows us the intense love and strength that leads Sethe to take this frightening step. A woman with less love or perhaps only less strength would have taken the easier route and allowed the child to be taken back into slavery. One of the women who ultimately takes pity on Sethe says of her, "She love those children. She was trying to outhurt the hurter."<sup>21</sup> And as Sethe herself puts it, "I stopped him ... I took and put my babies where they'd be safe."<sup>22</sup>

So perhaps we should stand in awe of the Other in the Solomon story: She had the courage to stand up to the king's brutality and to pay the price of the death of a child she loved. *Beloved* makes it possible to see the killing of one's own child as, if not an act of courage in a brutal and unjust world, at least a forgivable act of madness, comprehensible in its particular context.

The Other refuses to bow to the king's power or to act to protect a child. She is willing to resist male power to the utmost when to do so invites grievous injury, injury that she can

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<sup>19</sup> Religious commentators follow a very similar interpretation, crediting Solomon with wisdom for having set up his trick and praising the first woman for her virtue, love, and sacrifice. See, e.g., Devries, *supra* note 3, at 61; W.A.M. Beuken, *No Wise King Without a Wise Woman* (1 Kings III, 16- 28), in A.S. Vander Woude, *NEW AVENUES IN THE STUDY OF THE OLD TESTAMENT* 1 (1980).

<sup>20</sup> Toni Morrison, *BELLOVED* (Plume Contemporary Fiction ed. 1987).

<sup>21</sup> *Id.* at 234.

<sup>22</sup> *Id.* at 164. A similar story is told by Frederick Law Olmsted:

A Negress was hung this year in Alabama, for the murder of her child. At her trial, she confessed her guilt. She said her owner was the father of the child and that her mistress knew it, and treated her so cruelly in consequence, that she had to kill it to save it from further suffering.

Frederick Law Olmsted, *A JOURNEY IN THE SEABOARD SLAVE STATES* 601-02 (Negro Universities Press 1968) (1856).

avoid by just giving in. That is, she resembles the rape victim who resists, who fights, who does not cave in to a mere threat or a show of a weapon. Interestingly enough, this sort of rape victim receives the best treatment under our law: She will bear the visible marks of a fight and her story of nonconsent will be most persuasive.<sup>23</sup> We reserve our credence for the rape victim who would have to have been crazed by circumstances into irrational rebellion. And so we find that we live in a world in which it is very hard to \*1274 convict for rape. It is hard to find women who behave in the dangerous and irrational way the law prefers.

In real life, women tend to act more like the One in the Solomon story, the woman with whom readers sympathize and identify, the woman who instantly accedes to a threat of physical injury, who fears and defers to superior male power. She is a real woman, and she gets the stamp of approval, at least in the Solomon story. But look what happens to the woman who conforms to the ideal exemplified by the One. In a rape trial, she will end up looking like a liar. She didn't resist, she gave right in, scared by a threat.<sup>24</sup> Her behavior – rational, realistic, deferential, unrebelling – sets the stage for her attacker's acquittal and her own public humiliation.

I am fascinated by the presence of the Solomon problem at the beginning of a book that will lead us inexorably to the question of rape – for in evidence we have a rule particular to the crime of rape and so can avoid rape only by blatantly skipping over it.<sup>25</sup> The Solomon problem juxtaposes male power and female behavior: man as the judge and woman as the judged. The female behavior seen here sets up two distinct and familiar stereotypes of good and bad woman: the self-sacrificing, honest woman and the self-interested, lying woman. Later, when we encounter the rape shield rule in our casebook, we will find that the stereotypical Lying Woman plays a major role.

Though the rape shield rule was designed to protect women from abusive courtroom interrogation, the teaching of the rape shield rule, judging from many of the casebooks, centers on the following problem: How are we going to uncover the Lying Woman if we cannot subject her to prying interrogation? (How could Solomon have uncovered the Lying Woman if there had been a rule against threatening to cut babies in half?)

Solomon, we are told, inspired awe. Within the biblical narrative in which the judgment of the harlots appears, this awe enables Solomon to establish a government of law, which supervenes the government of military power he had already established. The judgment of the harlots follows the dream in which God grants Solomon “a heart with skill to listen, so that he may govern [God's] people justly and distinguish good from evil.” One might imagine that this judgment is one of a series of \*1275 various judgments and wisdom-demonstrating feats. But within the biblical narrative, it stands utterly alone as the sole proof that God granted Solomon the wisdom he sought. Indeed, the judgment of the harlots

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<sup>23</sup> See, e.g., Susan Estrich, *REAL RAPE* 58-72 (1987).

<sup>24</sup> *Id.* at 18-19.

<sup>25</sup> The “rape shield” law is codified in the Federal Rules of Evidence as Rule 412. State counterparts vary. See Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 *MINN. L. REV.* 763, 773-77 (1986) (cataloguing the various statutes).



is followed by a description of the structure of the government<sup>26</sup> and a generalized paean to Solomon's wisdom: "God gave Solomon deep wisdom and insight, and understanding as wide as the sand on the seashore, so that Solomon's wisdom surpassed that of all the men of the east and of all Egypt.... He propounded three thousand proverbs.... People of all races came to listen...."<sup>27</sup> Following this is a long passage describing the building of the temple,<sup>28</sup> which included "the Portico of Judgment, the portico containing the throne where he was to give judgement...."<sup>29</sup>

So this little case of man exercising judgment over women provides the essential hinge in the narrative structure as government proceeds from sheer military power to established legal institution. How interesting that we begin our modern American law school course on evidence with the story of how bald power transmutes into the appearance of reason! The king lifts a murderous sword, and we manage to perceive it as a coup of reason, attributing to him not ruthless brutality, but amazing and *modern* wisdom.

We are asked by the very form and placement of the problem to perceive reason and not brutality. The notion that the Other saw through him and called his bluff, only to be penalized for her upstart counterwisdom, or that she understood the cruelty of power, and despaired, remains submerged. We accept as supreme wisdom, as "the wisdom of God," a process by which a powerful man tricks two powerless women and sorts them into two piles: the good and the bad, the motherly and the unmotherly, the truthful and the lying. "Reason" here (and the very beginning of law) takes the form of a simplistic rule stating that proper mothers are selfless and sacrificing, a rule applied through the emotional torture of making the alleged mother believe in the imminent death of her baby and waiting to see what she happens to blurt out.

Law professors may identify with Solomon. We already have our positions of authority, but we would like to inspire the students with awe at the beginning of the course in order to legitimate the power we have. \*1276 We would like to demonstrate "deep wisdom and insight, and understanding as wide as the sand on the seashore," appreciated by "people of all races," and presumably people of all sexes.

The Solomon problem so often seems the perfect vehicle for this demonstration. The traditional solution to the problem seems brilliant to a beginning evidence student, so, like Solomon, we create an occasion for pulling off a wisdom-demonstrating, awe-inspiring stunt. We do this year after year. But at some point, in the cyclical teaching of law school courses, the truly interesting question becomes, What are we submerging in this process?

I have taught evidence since 1985 and have spent most of this time trying to get my bearings, to master the material, to develop to the point where the students could no longer tip me off balance with an unexpected question. I have worked on solidifying my power, constructing my own temple and Portico of Judgment. But some of those unexpected

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<sup>26</sup> 1 Kings 4:1-28.

<sup>27</sup> 1 Kings 4:29-34.

<sup>28</sup> 1 Kings 5:1-7:7.

<sup>29</sup> 1 Kings 7:7.

questions, which I probably disposed of quickly in class so I could continue my planned day's journey, opened up a different path. I did not take that path for a long time; I just knew it was there.

There was the student who raised her hand and suggested that the Other in the Solomon problem might have been the real mother. I did not rebuff her, but I did not want to be swayed (on the first day!) from my major point of establishing the importance of the "fact of consequence" within the meaning of Rule 401.<sup>30</sup> The "fact of consequence" of my first class is the significance of determining the "fact of consequence" within the meaning of Rule 401. But that student was doing exactly what I wanted to credit Solomon with doing.<sup>31</sup> She was switching to a different "fact of consequence": that perhaps the issue in this law school class ought not to be what Rule 401 is, but how the law treats women.

Eventually, I began to wander down that path I had known about for a long time. I found myself struck by the depth of meaning conveyed by beginning the course with the Solomon problem. I took note of the stark contrast of good and bad women, the extreme highlighting of male power and male judgment, and the setting up of the archetypal Lying Woman, putting us on guard and preparing us to scrutinize the rape shield rule critically. When I reached the rape shield rule, I was struck by the ubiquity of the Lying Woman. The casebook I used unrelentingly \*1277 presents the interests of the potentially innocent man victimized by an inexplicably evil woman.<sup>32</sup>

But the real problem in the real world is that rape is a very serious and very prevalent crime, that it is underreported, and that, when it is reported, it rarely results in a conviction. Think of it: Why would anyone misreport rape and subject herself to the humiliation and abuse that come even when a woman tells the truth about a real rape? Lying Women are not sending Innocent Men off to prison with invented charges of rape.<sup>33</sup>

That fantasy does have some use: It highlights the right of confrontation and the importance of caring about rights. But that fantasy also prevents people from seriously thinking about rape. The unremitting indulgence in the Lying Woman/Innocent Man panic feeds the belief that women's concerns are second rate, always trumped by someone else's interests.

It is frighteningly easy for some students (and professors) to avoid engaging with the reality of rape. I have begun teaching a seminar on rape to force myself to look at this reality, and I have heard, even within the select pool of students who elect such a seminar, repeated expressions of despair. "This is so depressing," I hear again and again.

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<sup>30</sup> Fed. R. Evid. 401. See supra note 16.

<sup>31</sup> That is, Solomon was implicitly changing the "fact of consequence" from biological motherhood to "best interests of the child."  
See supra pages 1270-71.

<sup>32</sup> See Green & Nesson, supra note 1, at 184-202.

<sup>33</sup> The Lying Woman/Innocent Man stereotype haunted the recent hearings on the confirmation of Clarence Thomas to the Supreme Court. Supporters of Judge (now Justice) Thomas generated a stream of innuendo that encouraged their constituents to visualize Anita Hill through the overlay of the Lying Woman stereotype. Clarence Thomas presented himself as the outraged victim of injustice, the Innocent Man, and left it for the senators to imagine themselves endangered by the power that women could wield if only they were believed, power the Lying Woman stereotype safely constrains.

In an evidence class, professors like to keep up the pace and maintain the energy, not depress. And problems with sexual content seem spicy and lively. To view rape as sex serves our pedagogical interest. But to view rape as sex is impossible without submerging the female perspective. More exactly, to view rape as sex is impossible without believing that the woman was lying or crazy when she cried rape.<sup>34</sup> So we use problems and cases full of promiscuous women who regularly cruise singles bars or who consent to sex with their boyfriends but invent rape accusations when their parents find out or they become pregnant. We use prostitutes, revengeful because they haven't been paid. \*1278

If we look more closely at our Solomonic self-image, we may see Solomon the Pimp.

Consider this: One in four college women has been raped.<sup>35</sup> That means that many law students have experienced rape. How do they perceive a class that gleefully gets its energy from depicting rapes as just sex and women as liars? How are they to break into a conversation dominated by students who have jumped at the teacher's invitation to debate about rights?<sup>36</sup> The students who respond to the teacher's invitation can feel good about understanding the question (being "relevant"), talking like lawyers about constitutional rights, and looking like the kind of good, generous-minded people who champion the rights of the accused.

The rape survivor or woman who cares deeply about feminist matters may want desperately to talk but feel the weight of a burden of doubt: I want to care about rights, she may think. I don't want to look like some hard line proponent of criminal law enforcement. What I want to say doesn't fit the tone of the class – it is too emotional, too biased. It won't sound lawyerly. It will seem as though I don't understand how rights function in legal analysis. It will seem as though I haven't understood the question or that I'm trying to derail the discussion. I'm afraid people will criticize me, even criticize me personally, questioning my mental health. I'm afraid they'll speculate about my sexuality and about whether I have been raped. This woman will probably not speak.

Law professors may benefit, or feel we benefit, from not having our fun spoiled, our energy sapped, our journey detoured, our Portico of Judgement demolished, by hearing what she has to say. But maybe we all need to wish, as Solomon did, for "a heart with skill to listen."

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<sup>34</sup> For the classic presentation of rape as violence and not sex, see Brownmiller, *supra* note 18.

<sup>35</sup> See Robin Warshaw, *I NEVER CALLED IT RAPE* 189-210 (1988). This number can never be made precise. "Rape" is a legal concept that is never fixed. Even if the definition of rape were not subject to the vagaries of statutory interpretation and the behavior of police, prosecutors, and juries, women whose experience fits the definition might not realize it or admit it. Moreover, it has been proposed that the concept of rape ought to focus on the defendant's forceful behavior without requiring proof of lack of consent. Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399 (1988); Estrich, *supra* note 23, at 80-91. If we posit this eminently reasonable expansion of the meaning of rape, the number of women who have experienced rape would probably exceed one in four.

<sup>36</sup> The casebook I have used in the past, for example, begins its treatment of rape with an excerpt from a law review article that concludes - "reluctantly" - that most rape shield rules violate the criminal defendant's sixth amendment rights to confrontation and compulsory process. Green & Nesson, *supra* note 1, at 187-93 (quoting J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 544 (1981)).