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The Thomas Hearings: Watching Ourselves

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ESSAY

THE THOMAS HEARINGS: WATCHING OURSELVES†

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For three days last October millions of Americans watched their television screens in appalled fascination as the Senate Judiciary Committee considered Anita Hill's charges against Clarence Thomas. Did we recognize something about ourselves in those fleeting, disturbing images? I believe that we saw symbolic confirmation of the common intuition that there is a newly emerging American self-definition comprised of everyday indecency, personalized self-interest, and weak character. Such a conceptualization is not only dismaying in itself but also saps confidence in our capacity to cope with virtually all problems. Hence it is only natural that in the course of ordinary life, we often attempt to downplay generalized claims about cultural deficiencies. But in the focused, theatrical setting of the televised hearings, grim self-doubt could gain a foothold.

Of course, this unhappy interpretation could have represented a misleading moment of self-doubt rather than a significant insight. Ironically, however, it is the Supreme Court, that faithful barometer of our times, that provides some evidence of the substantiality of the bleak cultural image that drew us so fitfully to our television sets. Decades of constitutional decisions tell us that what we saw of ourselves in those proceedings must be taken seriously.

OFFENSIVENESS AS VIRTUE

Consider, first, the most obvious reason that Anita Hill's charges riveted us. The words she attributed to Thomas were startlingly graphic and crude. They would be offensive to many people in many settings. However, a central principle of the Supreme Court's free speech decisions is that offensive communications are valuable. The

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Court has said that "one man's vulgarity is another's lyric." It has praised tumult, discord and offensiveness ("verbal cacophony") as a "sign of strength." In contrast, the Court has repeatedly referred to impulses toward reflection and self-discipline with forbidding words like "timidity," "chilling effect," and "self-censorship."

As a consequence, a drawing that depicted a minister as having had sexual intercourse with his mother in an outhouse is constitutionally protected. So is the word "fuck" on bumper stickers. So are concerts featuring songs that glamorize sexual brutality. So are pornographic magazines that contain pictures and words offensive enough to make the words attributed to Thomas sound, by comparison, tamely clinical. This cacophony, we try to convince ourselves, is desirable; indeed, if the Court is right, it is one of our defining virtues.

How, then, did the American public manage to be shocked by the sexually explicit conversation described by Professor Hill? The answer is, of course, that while vulgarity is legally protected on public streets, in commercial theaters, on the radio, in public parks and elsewhere, it is not acceptable in the workplace. What is "robust expression" in most settings is "sexual harassment" at the job site. As a society, our choice is that it is more important to protect women from sexual pressure and vulgarity on the job than at the newsstand or along the street or in the home. Thus the hearings were premised on an assumption that the workplace implicates uniquely important values. Simultaneously, however, they caught us up in watching Hill talk of her own career—which raised to the surface misgivings about whether careers, as they are now defined, can have much moral significance for anyone, male or female.

CAREERISM AND RESPONSIBILITY

Hill testified that, despite Thomas's offensive behavior, she followed him from the Education Department to the Equal Opportunity Commission. Her explanation was partly that Thomas's behavior had improved and partly that she thought her position at Education was insecure. This issue was of obvious interest because, to the extent that her explanations seemed weak, it became more difficult to believe that Hill could have been mistreated by Thomas. But the issue was also important in a less obvious way. Even if the explanations seemed believable, her behavior was disturbing. In casting her professional lot with Thomas, Hill had decided that her job was more important than her obligations to the public.

Those obligations were considerable. If Thomas was guilty of sexual harassment, Hill certainly knew that he should not have been

appointed to head the agency charged by law with preventing sex discrimination in employment. Nor should he have later become judge on the United States Court of Appeals. As a lawyer and a public official, Hill had a responsibility to citizens at large; as a feeling person she had an obligation to those women who might work for Thomas and might suffer in the ways that Hill said she had suffered. As it was, Hill waited some nine years to make her allegations publicly. Her own explanation for this delay was that "telling at any point could adversely affect my career." In fact, during those years her career benefitted more than once from Thomas's position and connections.

If Hill had appeared to be an inept or venal person, this course of conduct might have seemed somewhat blameworthy but only narrowly significant. However, Hill's decision to testify at the confirmation hearings cast her in a heroic role. Moreover, she impressed her audience as an intelligent, decent, strong individual. She was well-educated and successful. Therefore, Hill's prolonged silence could not be seen as a sign of any special weakness. If such an admirable person had placed her career ahead of her sense of civic responsibility, what can be expected of the rest of us? Bravely occupying center stage in a national drama, Hill paradoxically drove home a discouraging message about how little selflessness we can expect of one another.

Four other respectable people—Susan Hoerchner, Ellen Wells, Joel Paul, and John Carr—testified that in years past Hill had privately confided information about Thomas's alleged misbehavior. All of these witnesses were lawyers, but not one had pushed her to make her accusations to the appropriate authorities. Their conversations with Hill had focused on her feelings and her career. To be sure, these attorneys had only limited responsibility. The decision to remain silent was Hill's to make and the advantages were hers to enjoy, but the privatization of concern among four separate, sophisticated lawyers was striking. It seemed during the hearing as if an entire profession—indeed, the profession that dominates much of government service and has almost monopoly control over our system of justice—had lost its sense of public obligation.

A reduction in the civic aspirations of the legal profession has in fact occurred. This has not been concealed. It has been woven right into our constitutional law. As long ago as 1977, the Supreme Court declared that the advertising of lawyers' fees is protected by the free speech clause of the First Amendment. After analogizing legal services to commercial goods, the Court said that the listener's interest in commercial advertising "may be far keener than his concern for urgent political dialogue." With commercial purchasing thus elevated to

(or, perhaps, above) the level of political decisionmaking, the Court addressed the possibility that a constitutional right to advertise might adversely affect lawyers' sense of professionalism. The Justices acknowledged the historic view that law is a form of public service rather than a commercial trade but dismissed it as an "anachronism."

The sense of diminished professional expectations that Anita Hill and her four supporting witnesses conveyed to us, then, has been authoritatively present in our culture for many years. The reduction of law to a trade is important in itself, but it is more significant as a symptom of a widespread loss of idealism. This deeper loss is especially evident in our disdain for the politicians that we elect to office. Recall the scorn directed at the twelve senators who comprised the Judiciary Committee. We knew that Hill's charges were serious and relevant, and we knew that these Senators were obliged to hear evidence and to come to some determination. Yet we were angry with them for doing their jobs. Our resentment did not arise only in reaction to the fecklessness and hypocrisy that eventually characterized some of the performance of some of the Senators. It began the instant we saw these politicians sit down to judge the credibility and morality of Thomas and Hill. It began visually, not substantively, for what angered us was the spectacle—the idea—of politicians presuming to apply ethical standards.

Distrust of politicians can of course, indicate independence and vigor among the citizenry, but in recent decades skepticism has grown into a massive drag on representative government. In 1976, for example, the Supreme Court came to the rather astonishing conclusion that local patronage systems violate the free speech rights of government employees. The Court emphasized that patronage penalizes political affiliation and this is true. But the Court's approach, focusing on how much public employment and political affiliation matter to individuals, privatized free speech. Speech is not merely a matter of the gratifications associated with self-expression or economic security. Speech has public functions which include helping to make government responsive to the people.

Rather than being antithetical to these public purposes of freedom of speech, patronage in many respects furthers them. It encourages party affiliation and activity, thus promoting political participation. It vastly increases the operational control newly elected officials can have, thus enabling electoral results to be translated into altered policies. Patronage, in short, is an affront to thoroughgoing cynicism because as a system it links politics in its most materialistic form to high public purposes. The Court, however, found this vision

of politics to be another anachronism, outdated by the Justices' opinion that merit systems can satisfactorily coexist with accountable government. By constitutionalizing civil service the Court opted for a clean but despairing definition of the work of the politician.

The modern idea that ordinary, crass electoral politics are unconnected to high public functions has lead to far-reaching changes in our institutions. The famous and acclaimed Watergate tapes case provides a sobering illustration. This decision, as everyone knows, helped to drive an elected President from office. Until that dramatic event, it had been the common assumption that the constitutional remedies for misconduct in the Oval Office were all political—presidential oversight or (failing this) impeachment and removal by the Congress, or (failing this) repudiation by popular ballot. At the time of the Court's decision, the first of these had failed but the second was underway; an apparently serious and responsible Committee of the House was investigating the conduct of President Nixon and his aides. The decision in *United States v. Nixon* proved to a relieved nation that this uncertain and prolonged process could be short-circuited. Corruption at the presidential level, we discovered, can be exposed and rectified by using independent grand juries and unelected federal judges.

The discovery of a nonpolitical solution to executive branch wrong-doing was so delightful that Congress soon set up a kind of prosecutorial civil service largely under the control of the Judicial Branch. This solution was fully institutionalized by 1988 when the Court validated the "Ethics in Government Act," despite a range of strong constitutional challenges. With this, we Americans had successfully neutered some of the most subtle and significant political judgments imaginable—judgments about when, how far, and at what cost high executive officials should be investigated and prosecuted. In determining that these decisions are not fit for elected leaders, we said how little we expect of our politicians. We also said how little we expect of each other.

The devaluation of politicians' work is graphically displayed during every judicial confirmation proceeding. The Senate's "advice and consent" function could ideally provide an opportunity for Americans to connect their ordinary experiences, values, and perceptions to fundamental issues of principle and wisdom. Through our elected representatives our felt-interests and aspirations could be communicated to judicial candidates who will eventually determine the direction of our fundamental law. How is the right to abortion affecting family life? Do our public schools still indoctrinate students with religious precepts? To what extent are religious beliefs now penalized and

driven out of our public life? Is affirmative action essential to racial equality or a threat to the self-respect of minority group members? Such are the questions raised by the nomination of people like Sandra Day O'Connor, Robert Bork, Anthony Kennedy, and Clarence Thomas.

Instead of debating pivotal questions of value and fact, questions that involve politicians in their high role, members of the Judiciary Committee pretend they are not senators. Like Justices or law professors, they talk about penumbras and natural rights, the intent of the framers, the place of *stare decisis*. Or, like trial court judges, they try to conduct trials about individual guilt or innocence. Or, like a civil service board, they weigh professional qualifications. Any role can be imagined and played during this period of massive transition on the federal bench except a role that would invest politics itself with real stature and significance.

MORALISM AND OPPORTUNISM

Although they conveyed to us how far we have devalued the public responsibilities of lawyers, politicians, and citizens, the Thomas hearings nevertheless had an aura of sticky moralism. Senators claimed to be appalled by the sexual explicitness in Hill's allegations. (Senator Simpson referred to "this foul, foul stack of stench.") The nominee was stern in denouncing invasions of his privacy, and at one point he condemned the whole process as a "high-tech lynching." The Chairman was boyishly eager in his efforts to keep the proceedings "fair."

The combination of political cynicism with personal self-righteousness was vividly captured by an exchange that occurred late on Sunday night during the testimony of John Doggett. A sense of anticipation had been building for this witness. Earlier press accounts made his story sound both excitingly strange and potentially important. Had Hill fantasized about romantic relationships with men? Had she displayed inappropriate anger at imagined rejections? As tantalizing as such questions were, Doggett's testimony turned out to be a dud. After spending an inordinate amount of time talking about himself, Doggett told a story that did more to confirm his own egoism than to discredit Anita Hill. Most observers knew at once that Doggett was not a crucial witness, but not Senator Howard Metzenbaum.

Metzenbaum thought Doggett worth discrediting. When his moment to ask questions arrived, the Senator turned immediately toward his aide to get a damning piece of evidence. He then demanded to know whether nine years earlier Doggett himself had not sexually

harassed a young woman. This question and the "evidence" that it was based on quite appropriately sent Doggett into a fury. The question was a smear. It was based on an aide's telephone conversation with someone who had not testified, had not been sworn, and would not appear for cross-examination. Worse, as Doggett himself angrily pointed out, the smear was an unwitting re-enactment of one interpretation of the basic structure of the hearings themselves: If a black male appears as a political threat to white liberals, locate someone who will make charges of sexual misconduct. Metzenbaum's reflexive, casual use of this tactic appeared to confirm the worst suspicions of Thomas and his allies.

No amount of scurrying by Chairman Biden to shut off Metzenbaum's line of inquiry could suppress the wider implications of this play-within-a-play. Senator Metzenbaum's self-assured ideology had been vividly communicated in this and earlier confirmation hearings. It was clear that, for him, there could be only one acceptable direction for the Supreme Court; for him, the judicial role was simply and only to advance a particular political agenda. The morality of this position being certain, Senator Metzenbaum felt free—indeed, he felt obliged—to pursue his ends by all available means. Thus, in the image of this earnest man we all saw the depressing truth that the genesis of much of our political immorality is in our simplistic moralism.

Americans are a legalistic people, and we especially revere our fundamental law. But our own impatience for results is causing us to doubt that there is security in rules or integrity in processes. If we want, for example, a right to privacy, that is enough ground for finding it where the constitutional text is silent. We hardly even think of the amendment process; that procedure, which is workable and authoritative and available, would require something of ourselves.

For decades now we have demanded that the Courts expand, delete, and distort the Constitution, and the judiciary (honored by the significance of the invitation) has complied. As a result, whole libraries of modern constitutional interpretations can be reduced to this sentence: Anything can be forbidden or permitted if there is sufficiently good justification. If impeachment seems impractical or uncertain, it is permissible to substitute the criminal process. If the president seems unwilling to see that the criminal law is faithfully executed, we can entrust this executive function to a new hybrid branch of government. If there is a good reason for the government to regulate the speech of participants in the electoral process, principles of free speech are not offended. If there is not a sufficiently good reason for the government to regulate flag desecration or pornography, principles of free speech

are offended. If it seems necessary, federal judges can raise taxes, operate public schools, or administer state prison systems. If it seems unnecessary, newly elected mayors cannot install employees of their own politician persuasion. All means must be justified, but the end is always the justification.

As a society, we have demanded so much of law that the idea of law is in disarray around us, replaced by expediency and desire. In the end, law requires us to believe in ourselves, in our strength as individuals and as a culture. We are fast losing this belief. That is what we knew as we watched Clarence Thomas's confirmation hearings and that is why the opportunity for public deliberation about who should sit on our Supreme Court has become such an eerie spectacle.