

ON LIVING LIES FOR PROFESSIONAL REASONS

The faculty lounge hadn't seemed so buoyant since Watergate: true, the "good guys"—whoever one thought they were—might lose, but there was so much to *talk* about. I'm afraid I was something of a wet blanket, skulking in and out merely to get my coffee, as from the outset the whole thing seemed so sad that talking about it made me want to weep.

I wondered whether I wasn't overreacting. I don't weep easily, and I kept asking myself just whom it was I was feeling so sorry for. The Senate's reputation? The public reaction there seemed well deserved. The Supreme Court's? Okay, this wasn't their fault, but (thanks largely to the choices of Presidents, not Justices) that institution's reputation had seemed in decline for some time now. Judge Thomas's and Professor Hill's? Something there, to be sure, but at least one of them was lying to the committee, and both had at least implicitly lied about important matters earlier.

Certainly I worried, as many did, about the effect the proceedings would have on the agonizingly slow struggle to define and get rid of sexual harassment in the workplace and elsewhere. Would the assaults on Professor Hill's stability and character make women even more reluctant than they are now to make such charges public? It was a genuine concern, although in retrospect it seems possible that by educating the public about the subject, the hearings may actually have helped in that regard—I'm not so sure their example won't actually increase the incidence of harassment charges.

That prediction has a sinister backspin on it, though. The example of the hearings may also help slow another sort of glacial progress we were making, in terms of the willingness of male supervisors to hire women as assistants to work in close proximity to them. After law school I was a law clerk to Chief Justice Earl Warren, whom history rightly regards as a powerful force for equality. The candidate I thought best qualified to succeed me was a woman, but at the time (1964) no Supreme Court Justice had ever had a woman clerk. I argued my candidate's virtues to the Chief Justice, who heard me out with admirable restraint, but noted (among other things) that he worked very closely with his clerks and wondered

what this might put her (and others) in a position to charge him with.

Now I knew this man and knew he wasn't afraid he'd be tempted to harass her. He was afraid she'd misunderstand something or otherwise level some damaging accusation against him. Still his attitude seemed wrong to me. We (at least I) didn't have the word "sexist" in 1964, though that was the gist of my indictment—apparently delivered more loudly than I realized, as Warren's long-time secretary, obviously shaken, announced on my exit from his office that in all her years she'd never heard a law clerk shout at a Justice. (Now that I'm middle-aged myself I'm prepared to plead guilty at least to insensitivity in one argument I made, that he was seventy-three years old and thus no one would listen to charges of sexual impropriety anyhow.)

The question isn't whether he or I was right about the propriety of his concern—either way Earl Warren did a lot more for the world, particularly for oppressed groups, than any of *us* have done. Today's question, I fear, is whether scores of men less devoted to equality than he (and less candid about their concerns) won't at least on some unconscious level be moved by the Thomas-Hill tangle back toward the attitude Warren expressed in 1964. I hope not, but I fear so. On the other hand we're told that this is the event that will finally mobilize women and those who share their concerns to elect more females to public office. If that's true it will have made it all worthwhile, though I note with dismay that even the defeat of the Equal Rights Amendment, which I thought would surely have that effect, did not.

I also worried that this ugly public swearing contest between two African-Americans might help retard the already slow pace of interracial understanding, and Blacks I talked to did as well. In retrospect, thank God, I'm not so sure about this one either. The parade of articulate and otherwise impressive African-Americans who testified before the committee probably helped *combat* certain racial stereotypes, or at least it should have. True, either Judge Thomas or Professor Hill (or both) had to be lying, but as I've thought about it I've realized that in doing so, he or she (or they) were merely assimilating into mainstream American culture.

And it is *there*, I'm now inclined to think, that the real tragedy lay. No matter who was telling the truth about the sexual harassment charges, both Judge Thomas and Professor Hill, by their own testimony, were people prepared at least to live a lie and then defend it on the ground that doing so was necessary to their career

development, and the supporters of neither one seemed to think there was anything unacceptable about such an explanation.

Before Professor Hill's charges surfaced, Judge Thomas had testified that he had never taken a position, or even formed an opinion, on the merits of *Roe v. Wade*. I can't imagine that anyone who believed that could conceivably think the man qualified for judicial office at any level; the kindest characterization of his supporters must therefore be that they thought the testimony excusable perjury. And indeed "I haven't thought about the abortion decision" seemed even before Thomas's appointment to have been officially deemed an acceptable lie, perhaps even only a fib: a couple of his predecessors had gotten away with much the same testimony, and equal protection seemed to demand that he do so too. However that may be—in my eyes it is not good enough—Clarence Thomas is a man who had captured the White House's attention by a series of blistering attacks on liberal judicial activism, but at the hearings was permitted to disavow them essentially on careerist grounds, that they had been the statements of a young man seeking political attention and promotion, and thus weren't really relevant to the question how he'd perform as a Justice. You can't hold a person accountable for what he says or does in trying to get a job, can you?

Obviously I don't know whether Professor Hill's charges of sexual harassment were true, but I'm bound to say that on this central issue she seemed like a basically credible witness to me. I'm bothered by a couple of things, though. The first is that enough of her supporters have essentially argued to me that a little truth stretching on her part would have been justified, since Thomas himself so obviously had lied at least about *Roe v. Wade*, as to make me wonder whether that "fire with fire" inference didn't also influence some of those responsible for her testimony. I discount that concern, though. While it might apply to some of the Senate staffers and others who induced her to testify—some of whom already have much to answer for, though one suspects that they won't—it seems not to apply to Professor Hill, whose participation in the hearings was reluctant and whose credibility (rather than that of the staffers) was what was ultimately in issue.

The concern I do *not* dismiss is essentially the same concern I voiced respecting Judge Thomas's testimony: that much of her behavior prior to the hearing was at least implicitly dishonest, but nonetheless justified or at least excused by her supporters essentially on grounds of careerism, that it was what she had to do if she was to maximize her chances of professional advancement. She testified that she was sexually harassed by Clarence Thomas at the Educa-

tion Department. But she didn't file a complaint; she didn't quit; she subsequently took a job on Thomas's personal staff at the EEOC; after she left she telephoned to wish him well with some frequency; she got him invited to speak at the law school at which she was then teaching, where she gave third parties the appearance of seeking and enjoying his company.

Don't misunderstand me here. I am not reiterating the argument we've heard repeatedly, that such behavior is inconsistent with his having said to her the things she said he said. I fear it isn't, and that's what concerns me. Rather, I'm prepared to believe her account and that of her supporters, that she said and did all these things because she felt her career would fare less well if she didn't. (Thus I believe the characterization of apparently social phone greetings as professionally motivated; that's what scares me.) There were brief private expressions of concern to a few friends, but for a decade, vis-a-vis Judge Thomas and the public at large, this woman was essentially living a lie (note that we are not talking about actual perjury here) by representing her feelings as something far different from what she now says (and I believe) they were. Thomas was her meal ticket, the star to which she'd hitched her wagon. But what I find most distressing—here as in the case of Judge Thomas—is that none of her supporters seemed to find such behavior troubling. Can't I get it through my head that she did it *for professional reasons*? She "had to"—or her career would have suffered. You can't hold a person accountable for what she says or does in trying to get a job, can you?

Plainly I don't mean to be singling these two people out. Careerism is "in" these days, and I've tried to make clear that what troubles me so deeply is that *as a society* we seem so willing to accept it as an excuse for at least implicit dishonesty. Recall that this particular affair was begun by a President prepared to assert that he had chosen Judge Thomas because he was the person in America best qualified to serve on the Supreme Court, that race had nothing to do with the appointment. Now I'm not laying all this at President Bush's feet either: he too is a product of the times. You can't hold a person accountable for what he says or does in trying to keep a job, can you?

John Hart Ely*

* Robert E. Paradise Professor of Law at Stanford University.