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Carol Sanger

Columbia Law School, csanger@law.columbia.edu

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THE REASONABLE WOMAN AND THE ORDINARY MAN

CAROL SANGER*

Nineteen ninety-one was a seismic year for sexual harassment. The first localized shift occurred in January, when the Ninth Circuit established that the standard by which sexual harassment in the workplace would be judged was no longer the reasonable man or even the reasonable person but rather the reasonable woman.¹ In October a larger audience felt a much stronger jolt when Anita Hill spoke before the Senate Judiciary Committee.

Hill testified that Supreme Court nominee Clarence Thomas had sexually harassed her while she worked for him at the Department of Education and at the Equal Employment Opportunity Commission. Her testimony was graceful and firm and was supported by a superb panel of four corroborating witnesses, "witnesses to die for," in the words of one court watcher: impressive credentials, no motive to lie, none overstating their case.² But never mind. Thomas denied all of it and was confirmed by the Senate fifty-two votes to forty-eight.

Polls taken after the hearings showed Thomas would have been confirmed by popular vote as well. Some people thought that even if Hill had been telling the truth she simply waited too long to speak up. Others thought that Hill was telling the truth but that what had happened just wasn't that bad. And in the end more people believed Thomas's testimony (*nothing* happened) than Hill's (something rotten happened).³

The poll results, the ferocious attempts to discredit Hill, the difficult memories her testimony evoked for many women of similar workplace

* Professor of Law, Santa Clara University. A version of this article first appeared as *Caution: Women at Work*, in CALIFORNIA LAWYER, Jan., 1992, at 96.

1. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

2. Barbara Babcock, *Panel Still Facing a Crucial Question: Who Has the Burden of Proof?*, L.A. TIMES, Oct. 14, 1991, at A12.

3. Clay Richards, *Majority Backs Thomas in Polls*, NEWSDAY Oct. 15, 1991, at 18; Ronald Brownstein, *Public Tends to Believe Thomas by 48% to 35%*, L.A. TIMES, Oct. 14, 1991, at A1, & 3; Richard Morrow & Thomas Pedsall, *More Americans Believe Thomas Than Accuser, Poll Indicates*, WASH. POST, Oct. 12, 1991, at A21.

encounters long filed away—not to mention the confirmation of Thomas himself—suggest a glum legacy for feminists. It is therefore tempting to minimize the importance of the hearings. Indeed, much posthearing damage control took the form of assurances to other women that nationally televised hearings using Biden's Rules of Evidence are not the usual form or forum for charges of harassment. Some minimizing is fair; the hearings were more mock law than real. The issue before the Senate Judiciary Committee was not whether Thomas had violated Title VII but whether he should be confirmed, a political decision. Neither the reasonable woman standard nor any other was invoked to guide the Committee or the public on such issues as assessing the testimony, locating the burden of proof, and evaluating whether Thomas's conduct was sexual harassment.

And so the hearings were not completely disheartening. At their best—and as effectively as a good episode of *Donahue* or *L.A. Law*—they clarified to a national audience how commonplace sexual harassment is for women at work. Even witnesses for Thomas testified that they had been harassed by other men on the job, and subsequent surveys confirmed that the sexual harassment of women—in government, in the trades, and in the professions—is rather ordinary.⁴ The hearings also introduced to viewers and senators alike the idea that harassing is no longer as safe as it once was; brave women may come forth despite the costs.

But while public education about sexual harassment as a regular workplace phenomenon is all to the good, the hearings also made clear that harassment is still tolerated and still trivialized. The popular polls found Hill to be incredible, oversensitive, and too late. These determinations about her failings—as witness, as worker, as woman—are judgments, however casual, about the reasonableness of Hill's testimony and her conduct and so also about the reasonableness of *other* working women who respond to their bosses in much the same way as Hill did. Thus for many women the hearings served to confirm not just Thomas but the wisdom of continuing with the kinds of behavior (patience, silence, and hard work) that pass for "reasonable" by women at work.

So where's the Ninth Circuit when we really need it? Could the reasonable woman standard have made a difference to Hill's alleged failings? With regard to Hill's credibility, the answer is probably no. The reasonable woman test addresses only whether the defendant's conduct

4. Elizabeth Kolbert, *Sexual Harassment at Work Is Pervasive, Survey Suggests*, N.Y. TIMES, Oct. 11, 1991, at A1.

was experienced by the victim as intimidating, hostile or offensive. Because Thomas denied every charge, every sentence, and every event, and because he was believed more than she, the reasonable woman standard does not come into play.

Of course, nonlegal notions of what it means to be a reasonable woman victim were hard at work. For example, Hill's testimony was attacked for being too "emotionless," the current characterization in American public discourse of conduct that might once have been called "dignified." A public trained on appropriate emotional responses by watching game shows might well have found Hill too somber and stoic. Emotionally unembellished testimony by women about difficult personal events was a problem well before the Senate hearings. We know, for example, that rape victims should not be too stoic or too emotional.⁵ (They should also not be too pretty—"she brought it on"—or too ugly—"who'd rape her?") Similarly, the testimony of Lindy Chamberlain, an Australian mother accused and convicted of murdering her baby, was not believed in part because she didn't cry on the stand and because she wore different outfits to court.⁶ What mother would mourn like that? But crying and lots of affect are not *always* the ticket to credibility. Most recently battered women have come up against expectations of how they should testify. Having learned about "learned helplessness," a passive state of mind that sometimes prevents some women from leaving their batterers, some police and prosecutors are now unsure whether *angry* battered women are telling the truth.⁷ Hill faced both assaults at once; on the one hand she was attacked for stoicism, on the other for being delusional.

Would the reasonable woman standard have made a difference to whether Thomas's conduct was properly characterized by Hill as sexual harassment? Here the answer is yes. Recall that the standard assesses the harasser's conduct from the perspective of the reasonable victim. Because almost all victims of sexual harassment are women, the standard in most cases is the reasonable woman. Are an employer's unwanted descriptions of pornographic movies and his sexual abilities oppressive or

5. Tony Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985).

6. Adrian Howe, *Chamberlain Revisited: The Case Against the Media*, 31-32 REFRACTORY GIRL 2 (1988); see generally, JOHN BRYSON EVIL ANGELS (1985). Lindy Chamberlain was played by Meryl Streep in the movie *A Cry in the Dark*.

7. Laura Crites & Donya Coker, *What Therapists See that Judges Miss*, JUDGES J. 9, 41 (1988); see *McKee v. City of Rockwall*, 877 F.2d 409, 411 (5th Cir. 1985) (police declined to arrest alleged batterer in part because the woman looked angry rather than hurt).

intimidating when told to a junior woman assistant? The question is no longer answered in the abstract. Instead we listen to the answers of such a woman, in this case Anita Hill.

Objections to the reasonable woman standard combine doctrinal concerns with practical ones. The doctrinal question is something like, Whatever happened to gender neutrality? How are men supposed to know what conduct strikes their victims as intimidating, hostile, or offensive? After all, women are so sensitive—take Anita Hill. Why, as men often ask, can't women be more reasonable? These are questions that I suspect often stand in for Professor Henry Higgins's more honest lament in *My Fair Lady*: "Why can't a woman be more like a man?"

The answer is that at least in determining what behavior is sexually harassing, women are not like men. As many feminists have explained, women commonly experience as fearful what men find fun. In the Ninth Circuit case "all" the plaintiff's harasser did was hang around her desk (uninvited) and send her a series of (unwanted) love letters declaring his devotion ("I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away."). This example of sexual harassment was recently derided in *The New Republic* as "trivial."⁸ But it was experienced by the woman as terrifying: "I just thought he was crazy. I didn't know what he would do next."⁹

In other hostile-work-environment cases the harassment makes no pretense of courtship or, as Hill testified, of the aftermath of "courtship" rejected. For example, a federal district court recently found the plaintiff quite reasonable to think herself harassed in a workplace plastered with sexually frank images of women, never mind hammer handles carved into penises.¹⁰ Focusing on gender differences is crucial when the discrimination is based on sex; as the Ninth Circuit recognized, a gender neutral standard "tends to be male-biased and to systematically ignore the experiences of women."¹¹

A second objection to the reasonable woman standard is that it takes no account of whether the defendant-actor *meant* to harass. Many men may ask, "Have I harassed?" and may again identify with Professor Higgins, who was, as you recall, "just an ordinary man—the sort who never would, never could let an insulting remark escape his lips." Indeed, sociologist Orlando Patterson offers a cultural overlay to the defense of "no

8. *Talking Dirty*, NEW REPUBLIC, Nov. 4, 1991, at 7-8.

9. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

10. *Robinson v. Jacksonville Shipyard*, 760 F. Supp. 1486 (M.D. Fla. 1991).

11. 924 F.2d 872.

harm intended." Patterson is "convinced that Professor Hill perfectly understood the [Southern working class] psychocultural context in which Judge Thomas allegedly regaled her with Rabelaisian humor (possibly as a way of reaffirming their common origins), which is precisely why she never filed a complaint against him."¹²

But sexual harassment is not some white, college-educated feminist trick. Class solidarity aside, many complaints in hostile-environment cases are filed by workers against coworkers of similar rank. The reasonable woman standard locates authority about how "perfectly" the harassing conduct has been understood in the victim, not her harasser. The standard does not replace the jury with the victim; the jury decides if the woman is reasonable or not. But it is *her* experience, not *his* intent, that focuses the inquiry.

Some insulting remarks may well be made by ordinary men with no intent to cause harm (though many of the reported cases go far beyond insult to acts of overt degradation and sexual aggression). But limiting sexual harassment to cases in which harm was intended offers no security to women who work and fails to secure the nondiscriminatory workplace for men and women workers that is the point of Title VII. As another court explained, the reasonable woman standard "enables women to participate in the work force on an equal footing with men."¹³

Why is it so hard for men to figure out which comments, requests, and behavior are harassing? One reason may be that in most instances there is no comparably threatening version of an unwelcome sexual advance by a woman toward a man. Unwelcome advances from a woman secretary or associate are something men can joke about, perhaps because they don't find the woman pretty. Such advances serve to enhance a man's preexisting power. In contrast unwelcome sexual advances simply reinforce a woman's subordination.

Another reason may be that until recently there was no need for men to distinguish suggestive conversation or friendly pats from sexual harassment. Men commonly outrank the women who work for them, and gender dissonances in how "compliments" are received, favors requested, or jokes taken are compounded by these differences in workplace power. For it is power disparity, feeding with a familiar vengeance on gender differences, that lies at the heart of sexual harassment.

12. Orlando Patterson, *Race, Gender, and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, at A1, A15.

13. *Radtke v. Everett*, 471 N.W.2d 660, 664 (Mich. Ct. App. 1991).

Because women have less job (and physical) security, they are more susceptible to harassment. And in America sex is a familiar mechanism through which power relationships are maintained.

Would the reasonable woman standard have made a legal difference with regard to Hill's delay in coming forward publicly? Probably not. As with other legal actions there is a statute of limitations for charges of sexual harassment, and even assuming that the cause of action existed in 1982, Hill missed it.

But here important nonlegal notions of what it means to be a reasonable woman come into play. If this stuff really happened, Hill's disbelievers say, she would have done something more than tell her closest friends: She should have taken notes, told higher-ups, filed a complaint, quit her job. What? Most of us do not live our lives in anticipation of (or with any desire for) litigation. And picture or remember a man you know coming home in frustration and telling his wife that his foreman/sergeant/managing partner was harassing him again. "Honey," she says (in the why-Hill-wasn't-reasonable scenario), "you just *quit* that job. You'll find another one just as good."

But people don't quit. They wait, they hope it will stop, they diminish its importance, they (women especially) blame themselves, we try to forget it happened. These reasons are familiar and make sense to most of us. The argument here is not that one should have forever to bring a legal claim but rather that it is not unreasonable *not* to have brought one. There is simply nothing mysterious (or delusional) about the course of professional prudence and self-preservation that Hill and many other women have chosen to follow.

The reasonable woman standard might have made a bigger difference to Hill had it been in place ten years ago. It acknowledges not just that women work but that they work under the disadvantage of gender. Women work for the same reasons as men—income, benefits, a sense of accomplishment. The reasonable woman standard lets them get on with the job.

The standard is meant to influence the attitudes as well as the conduct of employees. Not all federal courts agree this is necessary. The Sixth Circuit, for example, found that Title VII was not "designed to bring about a magical transformation in the social mores of American workers"¹⁴—a curiously mean view of American workers. Happily the

14. *Rabidue v. Osceola Pcf. Corp.*, 805 F.2d 611, 620-21 (6th Cir. 1986) (quoting *Rabidue v. Osceola Ref. Co.*, 584 F.Supp. 419, 430 (E.D. Mich. 1984)).

Ninth Circuit takes a different view: "When employers and employees internalize the standards we establish today, the current gap in perception between the sexes will be bridged."¹⁵

Of course, bridging is something less than abolishing. And even this reshaping of attitudes and conduct will not be easy. But a rule that discourages employees from touching one another (even in California) may lead some men to think of physical distance as a sign of respect rather than a lost opportunity.

Rules, guidelines, and penalties are *part* of the process. But the non-magical transformation of the workplace now under way goes beyond personnel directives. It contemplates new ways for working men and women to relate to one another.

To this end, men might also take a page from feminist practice. Women have made progress in understanding the world around them through consciousness-raising, talking honestly with one another in non-hierarchical ways. So too might men get together and begin to discuss such questions as, How should I behave when I am attracted to someone at work? What do I do when I see a colleague moving in on a secretary? Would I behave differently if this were an all-male office?"

As with a real earthquake, the underlying configuration that we once took to be solid has now been changed. In one respect, Henry Higgins had it right: "Let a woman in your life and your serenity is through!" The old serenity, the comfort of a workplace where boys can be boys and girls can either keep quiet or stay home if they don't like it, *is* through. A new workplace order is under construction. One hopes that reasonable men and reasonable women are now at work.

15. *Ellison v. Brady*, 942 F.2d 872, 888 (9th Cir. 1991).