

# Journal of Civil Rights and Economic Development

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Volume 7

Issue 1 *Volume 7, Fall 1991, Issue 1*

Article 10

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September 1991

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### Recommended Citation

Gregory, David L. (1991) "Judging the Justice in the Television Age," *Journal of Civil Rights and Economic Development*: Vol. 7: Iss. 1, Article 10.

Available at: <http://scholarship.law.stjohns.edu/jcred/vol7/iss1/10>

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# JUDGING THE JUSTICE IN THE TELEVISION AGE

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With the sensational debacle of the Senate's rejection in 1987 of Judge Robert Bork to become an Associate Justice, the process of confirmation to the United States Supreme Court irrevocably and radically changed.<sup>1</sup> The 1987 fiasco over Judge Bork proved to be but a coy prelude to the events of 1991, which tumultuously culminated in the Senate's narrow 52-48 vote to confirm the nomination and appointment of now-Associate Justice Thomas.

For better and worse, pervasive television has dramatically influenced life during the past three decades, especially in politics since the Kennedy-Nixon debates, and now in judicial politics as well. If the media were as intrusive decades ago, would John Kennedy have won the Presidency, given the disintegration in 1988 of the presidential aspirations of then-Senator Gary Hart for personal indiscretions? In 1991, most of the national television audience apparently did not believe a tenured law professor's graphic allegations of sexual harassment. It is difficult to believe that Donna Rice was somehow more credible than Anita Hill. Television, and to a somewhat lesser extent, other media, are the instruments for bringing Willie-Hortonized campaigning—augured by the media-intensive lobbying campaign against Robert Bork—into the judicial nomination and confirmation process. Given the pervasive influence of media and sophisticated polling techniques, we are fast approaching *de facto* elections of our Justices by the national referendum that the confirmation proceedings have been transmogrified into.

Throughout the eternally long weekend of October 11-15, 1991, television captured the nation in fascinated agony. In many

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<sup>1</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); E. BRONNER, *THE BATTLE FOR JUSTICE* (1989).

quarters, the agony will not soon abate. Television will remain with us—the question is whether it can co-exist with norms of basic decency. Television especially has the power to transfix and mesmerize; it also has the ability to inspire dialogue, thought, and reflection (on all-too-rare occasions) for the good.<sup>2</sup> What possible good may come of this?

The lives of Associate Justice Thomas and of Professor Hill have changed forever. One hopes that their personal pain will abate over time, that scars will heal, and that happiness and fulfillment will soon come again to these highly accomplished individuals. Structurally, the national consciousness of the issues and pervasive realities of sexual harassment has been raised. Whether women will feel more or less confident in enunciating allegations of sexual harassment and whether more perpetrators will be deterred remains to be seen. If the highly credentialed Professor Anita Hill ultimately was not credible in many quarters, it unfortunately may have a chilling effect on women trying to decide whether to voice complaints, while the harassers may continue unlawful conduct with impunity.

Although deliberately not considered by the Senate in its proceedings regarding Clarence Thomas, perhaps the nation may finally examine and consider more fully the intersections of the public and the private spheres of life. Does possibly pervasive consumption of pornography—an annual multi-billion dollar international industry—inexorably influence public conduct, public policy, and the thought (and actions!) of the nation's most important decision-makers?<sup>3</sup> The national consciousness of the continuing social pathologies of sexism and racism has been raised by the televised national seminar of October 11-15, 1991.

The processes of nomination and confirmation of Justices will undoubtedly be refined and probably removed from television's unyielding glare. As the *New York Times'* immediate post-confirma-

<sup>2</sup> <sup>3</sup> As this modest missive is being written longhand on a yellow legal pad at the kitchen table at 2:00 a.m., Eastern Standard Time, October 16, 1991, Ted Koppel of ABC-TV is moderating Senators Bradley, Simon, Simpson, and Specter in a dialogue with a live audience in a *Nightline* "Town Meeting."

<sup>3</sup> C.A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); C.A. MACKINNON, *FEMINISM UNMODIFIED* (1987).

## Judging the Justice

tion analysis most sufficiently stated: "About the only point of agreement between supporters and opponents of Judge Clarence Thomas is that the distinctly American system of picking Supreme Court justices has gone awry."<sup>4</sup> But can "human nature," also "gone awry" by the scourges of sexism and racism, improve? This risks reintroducing the timeless query of what is "natural." One hopes that goodness and basic decency will prevail over deeply embedded social pathologies. A minimally coherent exposition of the salient themes of natural law unfortunately seemed to elude the Senate Judiciary Committee completely in the fall of 1991. Whether Justice Thomas (re)introduces the nation through his jurisprudence to the natural law traditions of Thomas Aquinas and Martin Luther King may be the most interesting development of all. He will probably have decades to do so. To borrow from Thomas Jefferson in the Declaration of Independence, "Nature's God, the Supreme Judge of the world for the rectitude of our intentions," will be watching and ultimately judging us all. The television lens will never see that which only God judges—the heart of the Justice. Even in the television age, as Clarence Thomas sharply reminded his Senate interrogators, God, not the Senate, is his ultimate judge. Well said. So be it!

<sup>4</sup> David Rosenbaum, *Selection Process for Court Under Attack on All Sides*, N.Y. TIMES, Oct. 17, 1991, at A22.

