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BOOK REVIEW

BECAUSE OF SEX – ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK

Gillian Thomas

(St Martin's Press, US, 2016) $US 26.99 (Hardback), pp 291
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A LAW OF HER OWN – THE REASONABLE WOMAN AS A MEASURE OF MAN,

Caroline A. Forell and Donna M. Matthews

(New York University Press, US, 2000) $US 27.00 (Paperback), pp 260, ISBN 0-8147-2677-1

Jocelynne A Scutt[*]

Though published more than ten years apart, it is timely to review these volumes together. Both books adopt an historical perspective on women under men's laws, with a strong message for the contemporary world. *Because of Sex* traces developments constituting, and bringing about, advances in how the law addresses women's work and roles, and consequent change in society. *A Law of Her Own* proposes how the law should adopt a revised approach, substituting the 'reasonable woman' standard for the existing - generally ubiquitous – 'reasonable man' or 'reasonable person' standard – which *Because of Sex* indicates has at least to some degree, in some instances, occurred.

Both books are applicable to addressing women's work in male-dominated industries and the reception of women into non-traditional fields. The frontispiece quotation from Judge Francis X. Hennessy of the Connecticut Court of Appeals, appearing in *A Law of Her Own*, is apposite for both books, if the words 'a world of law' are replaced, in the context of *Because of Sex*, with the words 'a world of work':

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> Imagine if you will a world of law in which women are the predominant players and where the male is the exception to the norm: *A Law of Her Own*

> Imagine if you will a world of work in which women are the predominant players and where the male is the exception to the norm: *Because of Sex*

Women are not the predominant players in the work-world of industries such as engineering, 'technical' trades, science, road haulage or transportation, and construction. The world of management and the corporation board remains sparsely populated with women. As for industry, as workers comprising only 4% of the total UK oil and gas workforce, they mostly labour alongside male workers. This impacts on their work, their reception as workers, their opportunities for progression and promotion, and their retention in the industry. Similarly in the world of law, women are not the predominant players. Far fewer women than men appear in the courtroom on the bench, as judges, or at the bar table as barristers, solicitors, or attorneys. In criminal cases, women appear mostly as victim/survivor witnesses. In the employment field of civil law women appear mainly as litigants in workplace discrimination cases. Both *A Law of Her Own* and *Because of Sex* take as their template the urgent need to ensure that the legal system operates as it should (and it is professed albeit falsely to operate) fairly, consistently, without stereotyping or unconscious or blatant bias – particularly where women are concerned.

Because of Sex analyses ten cases where women and women's rights in non-traditional fields made a difference to women, the law and employment:

Phillips v Martin Marietta Corporation (1971)[1] – Ida Phillips (a mother of a three-year-old) applies for a job at missile manufacturer Martin Marietta, one of the largest city employers, paying more than double what she earned as a waitress … to be told that the company "wouldn't hire women with kids that young".

Dothard v Rawlinson (1977)[2] – applying to join Alabama's Department of Public safety, Brenda Meith is told that women are incapable of working as state troopers – insufficient brawn, not enough strength, no capacity for arresting dangerous criminals. Kim Rawlinson is refused a job with Alabama Board of Corrections as a prison guard because "at 115 pounds, she didn't meet the position's 120-pound weight requirement".

[1] 400 US 542 (1971) (No 73), 411 F 2d 1, 4 (5th Cir 1969).
[2] 433 US 321 (1977) (No 76-422).

City of Los Angeles Department of Water and Power v Manhart (1978)[3] – women working with the Los Angeles Department of Water and Power have second-class status under the DWP pension plan, contributing more than men, yet that greater contribution not translating into greater pension benefits: upon retirement, "they still got the same monthly check as their male counterparts".

Meritor Savings Bank, FSB v Vinson (1986)[4] – Michelle Vinson is sexually abused for more than three years by her supervisor at Capital City Federal Savings Bank. Sidney Taylor, her supervisor, forces her to perform oral sex, have intercourse, view his erect penis, and submit to having her breasts groped. "Getting my dick sucked" is a constant refrain, as well as alerts: "You are going to fuck me this evening".

California Federal Savings & Loan Association v Guerra (1987)[5] Lillian Garland returns to work from three months' pregnancy leave – at least she wants to return to work. 'No,' she is told, "your job's been taken over by the young lady you trained in your place." Four years as a loyal employee doesn't count: the bank will let her know, says the human resources head, if another job comes up, but she'd be advised to look elsewhere.

Price Waterhouse v Hopkins (1989)[6] – having "generated more business and billed more hours than any of the other eighty-seven candidates" – all men, Ann Hopkins is nominated for partnership in laudatory terms by her Price Waterhouse division. Seven out of the 662 partners are women, and despite her outstanding qualifications and performance, Hopkins does not make it eight. More than half the candidates are promoted, but hers is "put on hold". She is told she has "consistently irritated senior partners of the firm", she "needs a course in charm school", is "overly aggressive, unduly harsh, difficult to work with and impatient with staff" as well as "overcompensating for being a woman".

International Union, United Auto Works of America v Johnson Controls, Inc (1991)[7] – women working in the Global Battery Division

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[3] *Manhart v City of Los Angeles Department of Water and Power* 435 US 702 (1977) (No 76-8610), 387 F Supp 980 (CD Cal 1975).

[4] *Vinson v Taylor* 477 US 57 (1986) (No 84- 1979), No 78-1793, 1980 US Dist LEXIS 10676 (DDC 26 February 1980).

[5] 758 F 2d 390 (9th Cir 1985), No 83-4927R, 1984 US Dist LEXIS 18387 (CD Cal, 21 March 1984).

[6] *Hopkins v Price Waterhouse* 490 US 228 (1989) (No 87-1167), 618 F Supp 1109 (DDC 1985).

[7] 499 US 187 (1991) (No 89-1215), 886 F 2d 871 (7th Cir 1989) (en banc), 680 F Supp 309 (ED Wisc 1988).

(GBD) of Johnson Controls are told, via memo, that pregnant women and those capable of child bearing will "not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights". Capability for child bearing is deemed a characteristic of women up to 70-years-of-age, requiring medical proof of infertility. The best paying jobs all happen to be located in the GBD.

Harris v Forklift Systems, Inc (1993)[8] – skilfully negotiating leases with contractors of the company's cranes, trucks and equipment fleet, in her first year doubling the rental revenue, Teresa Harris is constantly told by her boss that she "has a racehorse ass", should not wear a bikini because her "ass is so big, if you did there would be an eclipse and no one could get any sun", comments constantly on her and fellow female employees' clothing and bodies and tells her she and he should "start screwing around" and she "should fish for quarters out of his pants' pocket".

Burlington Northern & Santa Fe Railway Company v White (2006)[9] – a 43 year-old mother of three, Sheila White gains a job as forklift driver, replacing a man. As the only woman amongst some one hundred employees in the department, she is told on her first day, via an 'announcement' during her boss' orientation speech welcoming her along with five others (all male): "Sheila, when you come on your period, you let somebody know so we can make your job lighter on you." Later, he tells her constantly that the railroad is "no place for a woman", refuses her overtime hours, and denies her a company-issued raincoat whilst allocating her frequently to work in inclement weather.

Young v United Parcel Service, Inc (2006)[10] – working as an 'air driver' for United Parcel Service (UPS), Peggy Young delivers packages throughout Annapolis and surrounds. Completing her rounds, she punches out, going to her second job delivering flowers for Floral Express. With two older children and following two miscarriages, she becomes pregnant for the fifth time. At the end of her first trimester, discussing with UPS' occupational safety and health manager a resumption of duties, she is told to obtain a medical practitioner's letter "outlining her 'restrictions'". No

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[8] 510 US 17 (1993) (No 92-1168), Nos 91-5301, 5871, 5822, 1992 US App LEXIS 23779 (6th Cir Sept 17, 1992), No 3:89-0057, 1990 US Dist LEXIS 20115 (MD Tenn Nov 28, 1990).

[9] 548 US 53 (2006)(No 05-259) <http://www.oez.org/cases/2000-2009/2005/2005_05_259> accessed 21 July 2016, *White v. Burlington Northern & Santa Fe Railway Company* 364 F 3d 769 (6th Cir, 2004), *White v. Burlington Northern & Santa Fe Railway Company* 310 F 3d 443 (6th Cir, 2002), No 99-2733, 2000 US Dist EXIS 22799 (WD Tenn, Aug 28, 2000).

[10] 135 S Ct 1338 (2015) (No 12-1226).

'restrictions' were advised her by her doctor and her pregnancy is not "high risk", her job had involved delivering small, light packages, and throughout one of the successful pregnancies she'd lifted and carried a far heavier 'package' (her three-year-old son). Because of the manager's instruction, Young's doctor provides a note recommending Young lift no more than 20 pounds. She is told UPS policy means that her lifting restriction "being operative" she cannot continue working at all. "Light duty" jobs are allocated to workers with "on-the-job injuries" – not pregnancy. She is told not to 'come back in the building' until no longer pregnant as she is 'way too much of a liability'.

In addition to analysing the cases and judgments, Gillian Thomas writes engagingly of each of the women who took on the establishment in the context of their respective workplaces – or places refusing to contract them as workers. She includes, also, information about the advocates who took on the clients and the cases to bring about resounding change. Albeit a book for the lawyer – practising or academic – and written in concise terms explaining the law, its interpretation and its impact, *Because of Sex* is also a book for the interested general reader, bringing to life, as it does, each of these cases in content, context and human interest. The law should always be able to be understood by the non-lawyer, and Thomas has worked to ensure this outcome. So much so, that readers today will be bemused at the need for women to fight these cases – when the answer seems so obvious from a 21st century perspective. Yet arguments that today shock for their troglodyte perspective (no other adjective seems apt) were run in all seriousness – and judges accepted them, albeit fortunately for social advancement in the end the more enlightened view prevailed.

The notion that sex discrimination could not include pregnancy discrimination or family responsibilities – because no man could be pregnant, and no man undertook childcare (of his young children) and hence there could be no application of a law founded in the notion that sex discrimination needed a male-female comparator – has a "sort of logic" whilst simultaneously being difficult to understand (ridiculous some may say – then and now). Similarly the idea of bona fide occupational qualification (BFOQ) applying to jobs which clearly women could do as well as men, or vice versa, yet traditional thinking could not contemplate much less accept.

Nevertheless judges not only "understood" these contentions but subscribed to them (this where *A Law of Her Own* is essential – of that, more later). This is the tenor of *Martin Marietta* (1971) and *United Auto Works* (1991). Questions by Supreme Court justices in the course of the *Martin Marietta* argument are notable for their time – although there can be no assurance that some of today's judges in all common law

jurisdictions, at least, do not continue to subscribe to the same philosophy. As Thomas says:

> "The notion that Title VII had done away with distinctions between 'men's jobs' and 'women's jobs' seemed to confound some of the justices. 'Does the law require that the employer give the woman a job of digging ditches and things of that kind?' Justice Hugo Black asked … while Justice Harry Blackmun [implored counsel for Phillips] 'educate me' … (p 24)".

on, effectively, whether men could be nurses or not.

What is instructive is the narrowness in the winning margin of all these cases – sometimes revealed by Thomas' including references to the justices' discussions not appearing in the judgments. Chief Justice Burger was outvoted by his brethren in *Martin Marietta*, his argument that (amongst other matters) a woman could never be a clerk (associate) to a Supreme Court justice because she "would have to leave work at 6 P.M. to go home and cook dinner for her husband …" fortunately failing. Nonetheless, Justice Blackmun believed a hiring policy incorporating discrimination against any woman with pre-school age children had '"some rationality behind it" (p 29-30).

Sexual and sexist harassment loom large as an area where the Supreme Court grappled with legal argument making sex discrimination law applicable. *Meritor Savings Bank* (1986), *Harris v. Forklift Systems* (1993) and *Santa Fe Railway* (2006) illustrate well the hostile environment confronting too many women in too many workplaces, particularly in workplaces, trades and professions dominated by men and seen as 'male' environs – and (purportedly) 'rightly' so. The notion that sexual and sexist harassment constitute 'jokes', are "what women simply have to put up with" or, being a consequence of women's move into a male world (for some, an 'invasion'), are women's fault, hence not unlawful conduct, continues to find support in some offices, factories, workrooms, workshops – indeed, almost all (all?) places of work and some judicial outcomes. For Forell and Matthews, the way to address this and other limitations of the law in its duty to extend equal protection and rights to women, is by introducing the "reasonable woman" into the courtroom.

Against an acceptance that women and men are not 'different' in the sense of women's being 'fragile' or requiring "special protection" so as to be equal, *A Law of Her Own* contends that recognising women's "viewpoints and experience in areas where women are primarily on the receiving end of violence aids in achieving equality". This follows because "perceptions and conduct generally associated with women – *gendered* female – in our culture are simply better for everyone in addressing these

areas". (p xxi) There is no sense, they say, in embracing an equality which applies a "male" standard to women and men: permitting women "to 'equally' injure, terrorise, and kill men" advantages no one. Rather:

> "… holding everyone to a reasonable woman standard of behaviour when it comes to assessing violence against acquaintances and intimates could be transformative and foster meaningful and positive equality … (p xxi)".

Forell and Matthews advocate, therefore, "that *everyone* be held to this more respectful standard of conduct associated with, and expected of, women in our culture".

A Law of Her Own points out that because society remains essentially patriarchal, where women's and men's interests conflict the tendency is to lean towards a male analysis or perception of what the law is or should be. This is simply a natural consequence rather than a conscious effort to privilege men over women, male over female. Both male and female judges are likely to take this route unless explicit instructions are applied in the courtroom. The book canvasses the issues and their proposed standard through sections devoted to "The Idea and the Reality" of the reasonable person and the meaning of equality, 'Sexual harassment in the Workplace', 'Stalking', 'Domestic Homicide', and 'Rape'. What would the 'reasonable woman' do in each of these settings or circumstance is the question that should be to the fore in legal analysis and application of laws.

In the context of traditionally 'male' industries, where so many sex/gender discrimination and equal opportunity cases are fought, Chapter 4 "How and Why Different Perspectives Matter in Hostile Environment and Sexual Harassment Cases" is particularly apposite. As Forell and Matthews observe, sexual harassment cases frequently "arise in male-dominated workplaces such as heavy industry … and construction [where] women are clearly 'the other'". Here, "at best" women are "ornamental", or "at worst" are "intruders":

> "Antiwoman sentiment is deeply embedded in the culture of these workplaces [where] derision and disbelief often greet a female employee's claim that she was sexually harassed [for] what she perceives as debilitating harassment her male coworkers and supervisors perceive as normal, acceptable behaviour. Women … are seen as overly sensitive or vindictive – as troublemakers … (p 34)".

This influences judicial outcomes, for "what appears unreasonable and therefore unlawfully discriminatory from a woman's perspective, based on

women's experience, often looks harmless and lawful from a man's perspective" or from the perspective of judges of whatever sex/gender, having been schooled in a traditional (that is, patriarchal) legal system.

Returning, then, to *Because of Sex* it becomes clear that the original trial in *Meritor Savings Bank*, *Vinson v. Taylor* would not have been the rout it was, with a judge purportedly "inspired by the civil rights movement" determining there was no sexual harassment, that if there were any sexual relations between worker and boss they were voluntary, and that there was no connection between any alleged conduct and Mechelle Vinson's retaining her job or being dismissed. This was "just another 'inharmonious personal relationship' caused by 'personal proclivity, peculiarity of mannerism', a 'natural sex phenomenon' that just 'happened to occur in a corporate corridor rather than a back alley". (p 93) In other words, teller trainee Vinson was no more, no less than a prostitute. Ultimately, on appeal, the Supreme Court in a unanimous judgment declared that when a supervisor sexually harasses a subordinate "because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex", with harassment causing "purely emotional or psychological harm [being] just as illegal as harassment [resulting] in tangible economic loss" (p 102).

Application of the reasonable woman standard from the outset would have seen Vinson affirmed in her dislike of groping, exposure, 'dick sucking' comments and demands for 'fucking' (carried to fruition). Requiring courts to apply this standard would enable a change in workplace culture, one in turn enabling women and men to get on with the job. In industries such as construction, engineering, road haulage, transportation, oil and gas, where conditions can be particularly dangerous, eradicating workplace harassment is not only a laudable but a necessary prerequisite – for women workers and male workers too. No one mindful of workplace safety, when working in conditions of danger, surely wishes the danger to be exacerbated. Adopting a 'reasonable man' or (as presently constructed) 'reasonable person' standard runs the risk of maintaining conditions exacerbating the danger. A workplace where sexist and sexual harassment are endemic or even where they occur intermittently is one where risks of harm arising out of the conduct inflicted upon the woman worker are inevitable, adding to already existing risks founded in the industries themselves.

Apart from a readership in general, those working in male-dominated industries, particularly in human resources, would be well advise to read *Because of Sex* and *A Law of Her Own* – to properly digest them, referring to and applying them in their work and workplaces.