

Advance Sheet

IS THERE ANY VIRTUE IN HYPOCRISY?

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Few events during the early days of the Trump administration were more unsettling to the legal community than the personal attack our new president unleashed on Judge Gonzalo P. Curiel, the judge handling two of the legal proceedings against Trump University and Mr. Trump himself. *Low v. Trump Univ.*, No. 3:10-cv-00940; *Cohen v. Donald Trump*, No. 3:13-cv-02519 (S.D. Cal.). The cases, now settled, were serious matters, class actions arising from a for-profit educational program said to be fraudulent and even a form of racketeering. The jurist in question had done nothing to justify any opprobrium. In fact, nothing irregular was or could even be claimed. All reports of Judge Curiel's handling of the cases were that it had been nothing short of exemplary, and fair, despite considerable provocation. President Trump attacked him merely because of a presumed bias, not any bias shown.

Such an unprovoked, indeed pre-emptive, attack can hardly be said to be

advantageous to the legal system. Courts depend in part on trust. Undermine their reputation and you undermine faith in the judicial process. A chief executive questioning the integrity of the courts could have no impact but to lower the esteem with which ordinary citizens hold judicial proceedings, no longer believing that what happens there is proper, let alone just. And the seeming attempt, by the president of the United States no less, to bully the courts could hardly have set a less favorable model for how to approach our legal system.

The Logic Behind the Criticism

Especially invidious, the legal community seemed to agree, were the underlying grounds for the attack. President Trump merely assumed that because of the Latino ancestry of Judge Curiel, he would never give the president a fair shake in the courtroom, given the latter's outspoken criticism of immigration and

immigrants from Latin American countries into the United States. Some blindly partisan observers, inveterately hostile to the president's policies, may have been cheered by that prospect, wanting the president to get exactly what he feared and, they thought, deserved. Far better thinking it was to condemn the logic behind the criticism.

What was it? Ethnic or racial heritage, according to the president, necessarily leads to ethnocentric bias. Because Judge Curiel was Latino he necessarily would be favorable to Latinos and hostile to a man expressing views hostile to them. And in any judicial proceedings, Judge Curiel would necessarily allow that prejudice to influence his judgment. Forget that Judge Curiel, as a judge, presumably knows well how to espy and suppress any such tendencies in himself. It is part of the essence of judging to first judge oneself, rooting out in the name of justice every unreflective tendency and ensuring that everyone is getting an equally fair opportunity to present her case and have it decided fairly on the merits, rather than on any prejudicial basis, ethnic or otherwise.

Still, it is not difficult to see where President Trump got his idea, however outsized his presentation of it was. It is rooted in contemporary "identity politics." It can be seen most easily in the habit of political pundits of referring, for example, to "the Latino vote," as if all Latinos, because they are Latino, have the same biases and views. Leave aside that a person born in Mexico may be as unlike his fellow Spanish-speaker from Puerto Rico as an Oregonian is from a South Carolinian, or that even two people of Mexican origin may themselves have very different views. Our contemporary political habits often cause us to treat all voters of a single ethnic origin—in this case, all Latinos—as a monolithic group solely because of their ethnic identity.

In this respect, our revulsion at the Trump University experience should serve as a helpful reminder that our

identity politics is fundamentally flawed to begin with. Its fundamental assumption is that a person of a certain heritage is likely to vote in a certain way, not much moved by the political speeches and campaigning of persons who don't regularly appeal to this minority or that one. How far we have traveled from the days of the American Founding. The Founders viewed political opinion in a way that was, to say the least, a good deal more nuanced. Shared political opinions or a "faction," Madison suggests in *Federalist 10*, arises from a set of common ideas, themselves arising from a plethora of factors, such as location, age, religion, education, and many other individual elements that are the product of our liberty. It would hardly depend solely on ethnic identity alone. Of course, you mostly had to be a certain ethnicity to vote in early America to begin with, perhaps for reasons not too far distant from the origins of our identity politics today.

A Series of Instructive Examples

That President Trump was building on the prevailing political cant is, of course, no excuse. And it was roundly and justly condemned. But the high dudgeon that greeted the president's comments might have concealed an even greater lesson, arising from closer inspection of our own prejudices. Has any of the following happened to you?

Example 1: A young male associate returns from court somewhat shaken by his experience in front of a difficult female judge. When he and his female adversary appeared before the court, she exploded at him for some procedural peccadillo, entered a completely unmerited default against your client, and set a prove-up hearing. A moment's reflection settled his and your panic, as you realize that the default could never stand and a motion to vacate would surely be entertained. But the judge's reaction made you wonder, particularly in that no similar nastinesses

were directed at your colleague's opposite number. You resolve to send only female associates to appear before this judge thereafter.

Example 2: You are scheduled to try an employment case for a client in Washington, D.C. The client is a southern company and your principal witness is a good ol' white southern boy. The plaintiff is African American. So is his lawyer. Although you believe there is no merit to the case, a colleague asks nothing about the facts when she comes in to ask you how you are going to get the case settled before trial. When you demur, she implies you are insane because your willingness to try the case in a location where the jury

will almost certainly comprise a majority of African Americans is suicide.

Example 3: You have a brand-new client that is run by a gruff and imperious older eastern European immigrant founder. The best person in your office to handle the matter is a rather small, timid-looking Hispanic woman who you know is fearless, is never pushed around, and is as smart as a whip. But you balk at sending her by herself to meet the client. You send along a white male associate who lettered in football in college.

Example 4: Your client, a retailer, had a white male store manager who got into an altercation with a Japanese customer and blurted out some racial epithet in the

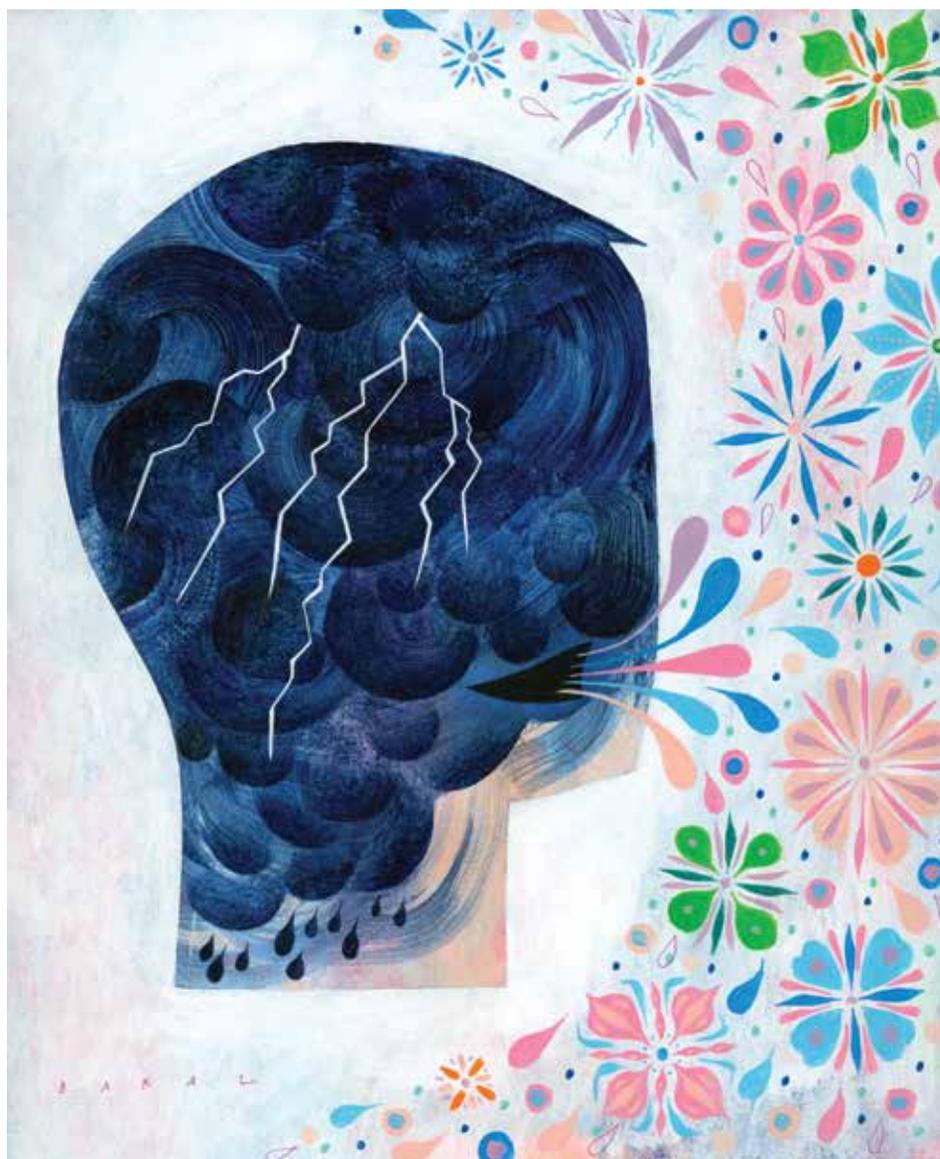


Illustration by Scott Bakal

midst of the fracas. The Japanese online community is up in arms, particularly because an ill-considered press release issued after the incident had spoken inartfully about the melee. Although intended to explain what happened, the document could, as your client realized only later, be taken to mean that Japanese customers were regular troublemakers. A class action is filed against your client, and it is assigned to Judge Kobayashi. A colleague asks you how you are going to get away from the judge.

If you insist that nothing like this has ever happened, and it really hasn't, congratulate yourself on what appears to be an ideal working environment, enviably free of the ordinary assumptions that people, Trump-like, often make about others. For the rest of us mere mortals in ordinary law offices, a little more analysis is necessary. At first blush, each of these

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examples shows a not-too-subtle set of assumptions that resemble, without exactly duplicating, those of our president. In Example 1, with very little proof whatsoever, you've assumed that a female judge may be more favorably inclined toward female lawyers. Yes, she unfairly excoriated your male colleague, but what evidence do you have that this arose from his being male?

In Example 2, your colleague has assumed that African American jurors, because they are African American, will necessarily decide for an African American plaintiff, regardless of the merits, merely because he is African

American. Example 3 has you assuming that a blustering white eastern European male will necessarily reject a physically slight Hispanic female associate, despite her aptitude and bearing. And Example 4 seems to have you making exactly the same judgment President Trump did. A Japanese judge is likely to favor Japanese customers, at least giving them—and not your client or both sides equally—the benefit of the doubt. Are these kinds of reactions so rare? Doubtful. Indeed, if you seriously contend that you've never had one of these experiences in your practice, you may want to see whether you can pass a lie detector test.

The Lessons

All four examples contain some element of the idea that ethnic identity determines point of view. Worse, each suggests that ethnic identity will cause one to make decisions that are fundamentally wrong or unfair. They are not all the same, however. Example 1, unlike anything that happened in the Trump University case, contains an actual example of something irregular occurring. As you go searching for an answer, the possibility of what we call gender bias is not a crazy one. It may be worth exploring. Just like male judges 20 years ago sometimes treated female lawyers differently from male lawyers, there is no reason not to experiment with the possibility that this particular judge treats men differently from women. You didn't start out with the idea that, because she is female, she is biased toward females. It's just a working, and not altogether unreasonable, hypothesis for otherwise inexplicable behavior.

Skip to Example 3, which is a little dicier. You've assumed your older eastern European immigrant client is likely to do poorly with a smallish Hispanic woman. Why? Because eastern European men may not have had a lot of experience with Hispanics, who are rather rare in that part of the world. So long as you've

not removed the woman from the front lines, and merely sent her with a colleague, you can perhaps excuse yourself as being cautious and looking out for her interests too. The client is unlikely to know what you're thinking, and there is no harm done, even if there is an element of bias in your approach.

Example 2 is far trickier. Why is the assumption that your white southern client cannot get a fair trial in front of a panel of African Americans? Condemn the example as much as you want, you cannot deny that many lawyers think in exactly this way and discuss the racial makeup of juries in all of their cases. How is this different from President Trump's tirade? Part of the answer may lie in the difference between a judge and an ordinary citizen. A judge is trained to root out her own biases. An ordinary citizen, particularly if lacking an elite education, may not be. But isn't the matter unsettling nonetheless? Is it really fair to the African American community to assume that ordinary citizens there cannot get a fair trial unless African American themselves? And now reverse the example. Don't we routinely assume that an African American defendant cannot get a fair trial before a panel of whites? And are we wrong? Does ethnic bias run only in one direction?

Example 4 is the most similar to President Trump's outburst. But a good number, maybe even a majority, of lawyers will have exactly the same reaction as your colleague. Japanese class members, Japanese judge. Not a good combination. But why not? Because we assume that a Japanese judge is going to be more likely to favor the class? Are we willing to bet that he will not? What do you tell your client when she asks you how you can prevail under such circumstances? To just get over her prejudices? Assuming you are able to persuade her, will you persuade yourself?

There's really very little you can do about it. And so you will do nothing, even

if the client questions your abilities for not finding some way out. You just keep your fingers crossed and do nothing. But the hypocrisy, a difference between what you say and your underlying thinking, is still there. Maybe you start to think that you and President Trump are not so different after all.

Thinking Versus Saying

But you are. There's a big difference between you and him. The reason is that you may have thought about the possibility of bias, but you didn't say anything out loud about it, neither making any public statement (not that you'd really have a reason to do so) nor taking any affirmative action on that basis. You may have been hypocritical, thinking one way and saying something else, but in this instance such hypocrisy would seem to be good. Your belief that it shouldn't be that way not only quells your fears but reinforces a social notion that we all wish would be true, and often is true, and will become more true, the more we allow the idea to operate.

Consider how different is the Trump view, with its absence of any difference between thinking and saying. To understand it better, consider an older schemer, Niccolo Machiavelli, often viewed as the founder of our modern dishonest and self-interested power politics. When thought of in this way alone, Machiavelli is rather uninteresting, as it was long understood before his own day that power and dishonesty, the activities of lion and fox, were necessary for effective rule. So, too, Machiavelli was hardly an innovator in noting that people were self-interested and self-directed. Political thinkers since time immemorial had noticed this quotidian characteristic of human beings.

Machiavelli's novel view was not that people were selfish, but that they were only selfish. And if this were not enough that they *should* be selfish, that selfishness was both the reality and what was good. All human conduct was

reinterpreted this way, and in the interest of "straight talk," the individual self-interested desires of humans were celebrated and encouraged. No longer was selflessness treated seriously. The person who showed mercy or love, or sought wisdom, was, in this understanding of human life and society, a fool.

It is not a very long distance between this view of the world—our view of the world?—and the exaggerations of President Trump. He too wants to tell it like it is. Human beings are a miserable lot, in his view—of course exempting himself, as Machiavelli encourages us to do. Judge Curiel, according to President Trump, is no better than the rest of us. He will pursue his own selfish interest, which includes an interest to strike back at those who threaten him and his clan. Mr. Trump appeals to that side of human beings that not only causes us to act selfishly but understands all others as acting that way exclusively too. And he encourages the belief that, as selfishness is the only true human motive, there is no reason not to act that way to begin with.

To understand the impact of this "straight talk," one need only consider those poor maligned Victorians of the end of the 19th century. We condemn them for the utmost in hypocrisy. They bespoke a very strict moral code. But behind the scenes, their social interactions often bordered on debauchery. Hypocrites, we are quick to label them, and the comment sticks. They said one thing but thought and did another. But then ask yourself whether there was not a value in this. By saying the moral thing, regardless of their thinking, they were encouraging others to think in a better way, even if they themselves didn't. True, when found out, the hypocrisy tended to erode those moral principles, which perhaps were too severe to begin with. But at least while the hypocrisy lasted, their verbal comments had the tendency to reinforce good morals.

We have now turned this upside down. Condemning the Victorians, we tend to

want to say clearly how people really are, and people are not good. President Trump himself tells this to us sharply. And given our habit of viewing other humans as selfishly inclined, he reinforces the already existing tendency to look behind the veneer of decency to a far less appealing picture of human life. We are all inclined to this. President Trump just seems an exaggerated example of the tendency. And he constantly says it out loud, as president of the United States.

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This is at least one of the differences between the attack on Judge Curiel and the partner in your office who asks you what you are going to do about Judge Kobayashi. That partner may at least be embarrassed to say such things out loud. Shame restrains her, the shame of attributing to Judge Kobayashi, or Judge Curiel, the basest of human motives, even amidst so much talk that human motives are so base. In short, it is important to remember that hypocrisy, if that is what it is, or shame, can serve the best of ends, a reminder that there are reasons in human life to expect, or say you expect, the best of a person—and particularly a judge—even in a world in which selfishness and the worst of human motives may always seem to reign supreme. Or where our chief executive encourages us always to think so poorly of each other. ■