

THE AUSTRALIAN

Thumbs down for Trump's man? it's spiteful theatre

By **HENRY ERGAS**, COLUMNIST
12:00AM SEPTEMBER 28, 2018 •



Illustration: Eric Lobbeke

It is hard not to feel uneasy about the treatment being meted out to Brett Kavanaugh, Donald Trump's nominee for the US Supreme Court.

He is, no doubt, a victim of the ever greater politicisation of Supreme Court appointments. Until the Democrats rejected the appointment of Robert Bork in 1987, the process was reasonably uncontentious; since then it has become increasingly acrimonious, reflecting the pervasive polarisation of American politics.

Were that all it involved, one could dismiss the way he was being treated as par for the course. But that hardly goes to the heart of the matter, which is the weight being placed on allegations that — at least at this stage — are unsubstantiated and that Kavanaugh strenuously denies.

Had similarly unsubstantiated allegations of theft been made against Kavanaugh, they would have been cast aside as lacking in merit.

However, with allegations of sexual assault, the threshold for giving claims credence seems to have been set far lower.

Supporters of thus lowering the bar argue that many sexual assaults go unreported, which is certainly true today and would have been even truer 30 years ago. They also point out that the circumstances under which those assaults occur often make them hard to prove, with the passage of time compounding the difficulties.

The conclusion they draw is that imposing the same threshold on those claims as on others would lead to an unusually high share of “false negatives” — that is, of cases in which allegations that should have been accepted are rejected. Taking the population of accused assailants as a whole, a greater proportion would be exonerated than deserves to be.

But claims about populations are a morally abhorrent basis for making adverse findings about individuals.

The mere fact a relatively high proportion of the African-American population has been convicted of violent crimes scarcely means that an individual African-American should more readily be held to be a violent criminal than a similarly placed person who was Asian, white or Hispanic.

Equally, it may be that teenage boys are especially likely to be sexual assailants, but that cannot justify concluding that a particular middle-aged man was once a sexual assailant merely because he is now said to be.

Allowing that to occur would have far-reaching implications. It would amount, in effect, to giving those who might make such claims an unchecked power to destroy the reputation of men they disliked.

That power implies a drastic curtailment of freedom: it vests in others the ability to capriciously deny a person choices and options that they should have had.

It is for that reason that Immanuel Kant, who thought about this issue especially deeply, insisted in the *Doctrine of Right* that if a “human being’s quality of being his own master” is to have any substance, it must entail an “innate right” to a good name; that is, a right, in the absence of compelling evidence to the contrary, to be “held to be beyond reproach”, not merely when accused in court of wrongdoing but when being considered for public office.

To abrogate that right, said Kant, would place those seeking office in the position of having to prove their moral innocence. But by its very nature, that is an impossible task; one cannot bare one’s heart, any more than one can genuinely bare one’s soul. To demand proof of purity is to leave each person’s fate at the mercy of potential accusers, replacing arbitrariness for liberty and law.

Kant expressed himself in his usual, rigorously dry, style. But as he was completing the *Doctrine of Right* in 1796-97, he saw grim evidence of his propositions in nearby France.

Only a few years earlier, in 1789, the French Revolution had given the presumption of innocence its first modern statutory basis in the Declaration of the Rights of Man and of the Citizen, which asserted that: “Any man (must be) presumed innocent until he has been declared guilty.”

However, by 1793, that presumption had been eliminated, with all those who could not prove their revolutionary ardour being presumed guilty of treason.

Unable to establish that they were not morally culpable, tens of thousands perished in the bloodbath that followed as the Jacobins sought to rid the nation of the “morally tainted”; their efforts then set the pace for the many millions murdered by the Russian and Chinese revolutions and for the genocide committed — under the banner of revolutionary morality — by the Khmer Rouge.

It would be foolish to claim that Kavanaugh's accusers, and the #MeToo movement more broadly, are intent upon such horrors — but, like those horrors' perpetrators, they see themselves as revolutionaries. And smouldering with revolutionary righteousness, they believe they are serving a greater cause whose merits outweigh any collateral damage it may inflict.

Prepared to trample on justice in their quest for justice, they show, once again, how much easier it is to be righteous than to be right.

Where the Kavanaugh affair will end is difficult to say. Having called for more allegations, it may be that his opponents, like the judges of the Inquisition that Voltaire mocked, will “add up half proofs, quarter proofs and even eighths of a proof” until they succeed in weaving out of a pile of doubts “the perfect proof (that) sends a man to his death”.

Or perhaps, Kavanaugh, whether guilty or innocent, will decide to “confess” to youthful transgressions, hoping — again, as in the Inquisition — that abject repentance will convince his tormentors to strangle him before they burn him to a crisp.

But regardless of Kavanaugh's fate, what is clear is that a new standard is being set: one that demands men be so free of sin as to be capable of rebutting any accusation hurled against them.

That standard is plainly irrational: no one would wish to have it applied to themselves, and hence, to put it in Kant's terms, it cannot be the basis for a universal law.

But even leaving ethics aside, it invites a politics of denunciation and suspicion, corroding what little trust and civility our societies have left.

This is not a uniquely American disease. On the contrary, it is the symptom of a new age of intolerance, driven by Twitter mobs that love their ideas but love them too much to offend them by giving them serious thought. As those mobs swirl, screech and swoop, an old Romaniote phrase from the Aramaic comes to mind: “Barminan” —may it not happen to us.