

KAY: Should Brett Kavanaugh have stepped down after being confirmed, as Jordan Peterson suggests?

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Some Facebook threads I started by posting pro-Kavanaugh pieces ended up occupying a good part of my time last week. With comments split pretty evenly between sympathy for him and sympathy for her, the subject became a kind of gender Rorschach test for the #MeToo era.

What impressed me in these exchanges was the absolute faith invested in personal demeanour as a litmus test for arriving at moral certainty. And interpretation of said demeanour aligned pretty decisively with political leanings. My conservative friends hooted at Ford's feathery "little girl" delivery, while a liberal friend saw her as "studiously shy." Ironically, another liberal friend (who would be the first to assert his belief in the absolute equality of men and women) contemptuously referred to Kavanaugh's emotive pushback as "girlish," but Ford's literally girlish behaviour apparently did not strike him as "unmanly."

I'll state the obvious for the record, because it kept getting lost in the shuffle: Nobody knows if Ford's memory is accurate, and if what happened to her 36 years ago – I will stipulate that something memorable did happen, and that she sincerely believes Kavanaugh featured in the incident – has anything to do with Brett Kavanaugh.

So our ignorance of the absolute truth should have been the starting point for everyone. And let's remember that these hearings were supposed to uncover that truth if possible, and that alone. Any objective observer will also have to stipulate that there were untruths on both sides: Kavanaugh's recollections of his youthful drinking habits, Ford's assertions regarding an alleged flying phobia, and most significantly (to me): her lie about the reason for the "second front door" in renovating her home.

Temperament and demeanor as the ultimate judge

Instead, it became a trial about temperament. And the litmus test for deciding whose personal truth was the Truth became their respective demeanours. Ford couldn't lose on that front. It doesn't matter how strong and confident women are. They know that when society is judging between men and women – as for example in family court, when custody of children is contested terrain – the chivalric instinct is strong, and, if duplicity or revenge or material reward is the end game, projecting vulnerability comes easily and instinctively to many women.

(I can personally attest to this phenomenon. In a courtroom where I was the plaintiff in a fraud suit, the defendant was a confident and normally pretty brassy woman, but she was also petite, her pretty face framed by a mass of tumbling chestnut curls, and convincingly girlish when she needed to be. Testifying, she indulged in a wide-eyed, Ford-like performance, replete with outright lies, that amazed and chilled me. Yet she had the crusty old judge eating out of her hand. My experienced lawyer had told me I would be a bad witness, because I was too articulate and confident, which astonished and offended me. But he was right. The judge loved little Miss Muffet and was very cool to me. He judged in her favour, even though my evidence-based case was strong.)

Kavanaugh reacted as any normal human being would when being falsely accused

Kavanaugh was in a no-win situation. If he kept his cool, he would have been considered slick and cynical, and guilty; but when he got angry, which to many people was the understandable response of an innocent person, he didn't have the "judicial temperament" for the job. As if judges are not also human beings. By the standards of his detractors, Moses – who famously broke the first set of tablets inscribed with the Ten Commandments in a rage when he saw the Israelites had returned to their pagan ways while he was on Mt Sinai – didn't have the "prophetic temperament" necessary to forge a people out of former slaves, nor did Jesus, blasting the moneylenders out of the Temple, have the "godly temperament" required for a religious role model. And unlike Kavanaugh, Moses and Jesus both "lost it" while on the job!

Nobody is ever going to know the whole truth about this alleged assault, unless late corroboration for the story arrives as a deus ex machina, or Ford recants. Meanwhile, the U.S. is stuck with a SCOTUS justice that half the country thinks ill of for reasons that have nothing to do with his competence or judicial record. What is to be done about that?

Jordan Peterson thinks Kavanaugh should step down for the good of the nation

Jordan Peterson, with whom I almost never disagree, but do in this case, thinks that Kavanaugh, having been vindicated by the confirmation vote, should have then stepped down voluntarily as a means of healing the schism his appointment had caused. Peterson says in his blog:

"So I thought, "What might I do in such a position?" Withdrawing, prior to a full investigation, did not constitute an acceptable option. But it's not clear that accepting the position, given the scale of opposition to my candidacy ("my," in my simulation of his situation). So what if the FBI cleared me, I received the nomination, but then decided that it might be

best for medium- to long-term peace and the good of the country if someone who shared my views but who had not been contaminated, rightly or wrongly, by the horrors of the nomination process in question be put forward as a candidate in my stead?”

In this scenario, Kavanaugh immolates himself for the greater good of the country. That at least will be his motivation. But what will be its effect? Half the country will pay lip service to his nobility while exulting “We won!!” while the other half will be enraged that such nobility was called for in the first place.

Kavanaugh only became “contaminated” because political fanatics have demonized him as a misogynistic monster who seeks the return of back-room coat-hanger abortions, an absurd and pernicious distortion of Kavanaugh’s views and record of professional gender relations.

What guarantee is there that the next putative appointee who “share[s] my views” will be treated with greater respect? What guarantee is there that in the background of the potential replacement there is not some youthful peccadillo waiting to be saddled up and ridden to similar “contamination”?

A Kavanaugh resignation would only lead to more chaos

If Kavanaugh were to step down as a noble gesture of healing, then at the very least he should feel assured that the healing would take place. There is no assurance of that at all. It could make things much worse. Kavanaugh’s enemies are so high on their own political Kool-Aid, and they have shown such malice and such militancy in opposition to him, it is difficult to believe they would feel chastened by his high-mindedness, or remorseful for the part they played in making such a gesture necessary.

And his supporters, far from feeling awed by his saintliness, would feel enraged at what they might see as a betrayal of a greater cause: the entrenchment of respect for constitutional principles and a bulwark against social-justice activism in the highest court of the land, for a significant number of Republicans the reason they voted for Trump in spite of his many personal deficits.

No, stepping down would have been too high a personal price to pay for too little benefit to anyone. It is true that questions will linger around his judgment, and people will continue to say that SCOTUS’s dignity has been impugned. But they said that about Clarence Thomas too, when Anita Hill’s accusations almost derailed his appointment. And nobody really knows the whole truth about that story either.

But that is the nature of institutions. They are made up of fallible human beings, not saints or gods. The important thing is not how much beer a judge drank in his salad days. The important thing will be his judgments from the bench. I am betting Kavanaugh will acquit himself well in that regard. In ten years, social justice warriors will still be bitter about Kavanaugh’s appointment. But in 50 years, the judgments will still be important, while the Judicial Hearings hysteria will be a footnote to history.