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## Electing Trump and Breaching Norms

Politicians often extoll the common sense of running government like a business. Indeed, business acumen was arguably the principal qualification of then-candidate Donald Trump to become president of the United States. Likening government to a business, however, invites another analogy: voters as employers. Employers are constrained by practical and legal considerations in choosing employees. For example, it's almost impossible to imagine a board of directors selecting Donald Trump as its CEO after the revelation of the *Access Hollywood* tape on which he boasted of grabbing women by their genitalia without their consent. The reputational and legal exposure for the business would be too great. Yet American voters elected Trump as the nation's CEO.

Imagine as an employer you hired Trump, a businessman who had declared bankruptcy six times, over a woman who had served as secretary of state, U.S. senator, and first lady. Our nation's laws prohibiting gender discrimination would not take at face value your explanation for such a suspect hiring decision.<sup>1</sup> Even if the *Access Hollywood* tape had not surfaced, Hillary Clinton was the more qualified candidate by any objective measure. Indeed, a September 2016 *Washington Post* poll mirrored other pre-election polling in finding by 62 percent to 36 percent that Trump was not qualified to serve as president.<sup>2</sup>

Yet there is ample evidence that it was not gender discrimination alone—or even primarily—that shaped the election results. Although misogyny infected the 2016 presidential election, Trump's behavior during the 2016 election was foregrounded by an eight-year campaign to racialize and delegitimize the first African American president. That orchestration was, in turn, part of the decades-long tradition of GOP race-baiting in American politics.

If you believe that antidiscrimination norms apply to voting decisions, then you should also believe that people have no right to base their votes on discriminatory animus. It makes little sense that Donald Trump, for instance,

could not legally refuse to rent property to African Americans because of their race—for which he was sued by the federal government—but that race can be allowed to infiltrate white voters' decision to support Trump. It makes even less sense that a candidate for public office, let alone the presidency, can traffic in racial stereotyping that we would never allow in other public deliberative settings such as juries or legislative debates.

In this chapter, after sketching the racialized milieu in which the 2016 campaign transpired, I demonstrate how in various legal contexts, this conduct would constitute evidence of illicit discrimination. I then address—and debunk—the notion that voting in candidate elections is different than the other areas in which we as a society prohibit racial discrimination. Left unanswered in this chapter, but addressed going forward, is the question of how we can ascertain whether voters have based their decision at least in part on race—that is, whether they have engaged in whitelash.

#### WHITELASH AND FEAR

Whitelash is the reaction of many white Americans when they believe that strides toward racial equality have run amuck, to the point of threatening their own material well-being, even as they remain far better-off economically than people of color. The phenomenon is anchored in a fear and resentment of cultural change, change that will eventually render the white majority a racial minority. This fear manifests itself through individual and collective efforts to retain the benefits of a structure of racial inequality, efforts that erroneously cast equality for people of color as discrimination against whites. Thus, the default position—the social baseline—from which too many whites define the normalcy of race relations is racial inequality. When viewed as the privilege-hoarding tactic that it is, whitelash is a contempt of citizenship, a violation of societal norms, and even a violation of law.

A salient feature of whitelash is the construction of equality as zero-sum: the advancement of racial minorities must necessarily come at the expense of whites.<sup>3</sup> Or, as Senator Jeff Sessions put it before his elevation to Attorney General of the United States, “Empathy for one party is always prejudice against another.”<sup>4</sup> Forty-five percent of Trump voters believed that whites face greater discrimination than blacks, Latinos, or Muslims.<sup>5</sup> A majority of white Americans now believe that discrimination against whites is at least as big a problem as discrimination against blacks and other minorities.<sup>6</sup> Yet, few white Americans report being the victims of discrimination. In a poll conducted by NPR and Harvard University in 2017, only 19 percent of whites reported being discriminated against because they are white when applying for

a job, and 11 percent when applying for college admission.<sup>7</sup> In contrast, 56 percent of African Americans surveyed reported personally experiencing racial discrimination when applying for a job.<sup>8</sup> For white Americans, and certainly for Trump voters, race discrimination against whites is more a meme than a personal reality. Whitelash thus requires an alternative reality of its perpetrators because the facts on the ground do not generally support their grievances.

#### NO DOG WHISTLES NEEDED

Somewhat ironically, it has become common practice to avoid using the term “racism” to describe words and actions that convey racial prejudice. Progressives have been as complicit in this counterintuition as anyone, coining terms like “subtle discrimination,” “unconscious discrimination,” and “implicit bias” that elide the harsh, accusatory tone of racism. The problem is not just one of nomenclature. As Professor Michael Selmi has argued, allowing this distinction in language means also ceding conceptual territory to the dangerous notion that discrimination which requires indirect or inferential proof is different in kind from overt prejudice.<sup>9</sup> From judicial opinions to everyday discourse, there is an assumption that if an action or statement does not look like historical racism (think Jim Crow laws), then we should label and treat it differently.

Yet even historical racism was denied as being racist in its day. In *Plessy v. Ferguson*, the U.S. Supreme Court rationalized the segregation of blacks and whites in railway passenger cars by noting, “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>10</sup> Thus, benchmarking the definition of racism to historical racial practices may constitute little more than the ongoing practice of denying racism’s existence in its present-day form.

In electoral politics, the term *dog-whistle politics* is often a stand-in for the more pungent term *racism*. Dog-whistle politics are racial appeals targeted at whites primed to hear such messages but masked in code so as not to offend the median white voter.<sup>11</sup> Lee Atwater, the infamous Republican strategist, provided the textbook explanation of this brand of politics in 1981:

You start out in 1954 by saying, “Nigger, nigger, nigger.” By 1968 you can’t say “nigger” — that hurts you, backfires. So you say stuff like, uh, forced busing,

states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites . . . "We want to cut this," is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than "Nigger, nigger."<sup>12</sup>

In the age of Trump, Atwater's understanding of the impermissibility of direct racial appeals may be outdated.

Trump's campaign was the first of its kind in the post-Civil Rights era. Gone was the adroit racial symbolism of Ronald Reagan, who used the backdrop of Philadelphia, Mississippi, a destination fraught with antagonism to black civil rights, to convey to white voters that they were free to disregard the interests of African Americans.<sup>13</sup> Where Reagan railed against welfare queens to cue white stereotypes of blacks as wards of the government, Trump openly advocated a ban on admitting Muslims to the United States.<sup>14</sup> Where Reagan indirectly stoked white resentment by opposing affirmative action, Trump crudely called for a wall along the southern border to keep out Mexicans, whom he had characterized as rapists and drug traffickers.<sup>15</sup> In short, Trump's campaign left little to the imagination; it was festooned with unadulterated racism.

Thus, when Donald Trump announced his candidacy for president on June 16, 2015, his stereotyping of Mexican immigrants was hardly off-the-cuff:

When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.<sup>16</sup>

Trump was playing to a partisan base in which the majority of Republicans (53 percent) believed that immigrants make America worse off in the long run, while less than a third (31 percent) said immigrants made the nation better-off.<sup>17</sup> And his reference to Mexicans as drug dealers and "rapists" was even more finely tailored to the Republican base. Seventy-one percent of Republicans believed that immigrants to the United States make crime worse.<sup>18</sup> Yet immigrants are one-half to one-fifth as likely to be incarcerated for a crime as a native-born American.<sup>19</sup>

But Trump had no monopoly on racial tropes during the Republican primaries or the 2016 general election. Nor was 2016 a departure from recent history. Table 1–1 culls some of the more glaring racial infelicities from major Republican candidates who sought the presidency in 2012 or 2016. (There's simply nothing comparable among Democratic contenders.) The comments range from the portrayal of the first African American president as

TABLE 1-1 *Racial Rhetoric—Presidential Candidates*

Subject	Speaker	Comment and Date
Nativism	Senator Marco Rubio	“We sometimes feel like strangers in our own land.” January 2016
Barack Obama	Senator Marco Rubio	“It’s now abundantly clear: Barack Obama has deliberately weakened America.” January 4, 2016
Responding to a question about increasing the number of African Americans in the GOP	Former Gov. Jeb Bush	“Our message is one of hope and aspiration . . . It [is not] one of division and get in line and we’ll take care of you with free stuff. Our message is one that is uplifting—that says you can achieve earned success.” September 24, 2015
Whether Barack Obama is a Christian	Governor Scott Walker	“I don’t know.” February 21, 2015
Barack Obama	Former Mayor Rudy Giuliani	“I do not believe, and I know this is a horrible thing to say, but I do not believe that the president loves America . . . He doesn’t love you. And he doesn’t love me. He wasn’t brought up the way you were brought up and I was brought up through love of this country.” February 18, 2015
Explaining Republicans’ loss of the 2012 presidential election	Mitt Romney	Romney talked about “big issues for the whole country” while Obama targeted “gifts” to specific groups, “especially the African-American community, the Hispanic community and young people.” November 14, 2012

TABLE 1-1 (continued)

Subject	Speaker	Comment and Date
Responding to a question about government entitlement programs	Rick Santorum, runner-up in 2012 GOP primaries	“I don’t want to make black people’s lives better by giving them somebody else’s money. I want to give them the opportunity to go out and earn the money.” January 1, 2012
Barack Obama	Former House Speaker Newt Gingrich	“We are going to have the candidate of food stamps, the finest food stamp president in American history, in Barack Obama, and we are going to have a candidate of paychecks.” December 6, 2011
Barack Obama	Former House Speaker Newt Gingrich	“What if [Obama] is so outside our comprehension that only if you understand Kenyan, anti-colonial behavior, can you begin to piece together [his actions]? That is the most accurate, predictive model for his behavior.” September 11, 2010

a Manchurian agent out to destroy the country, to the depiction of blacks and Latinos as freeloaders. Each lines up with salient views among the Republican base. For instance, at the start of the presidential primary season in 2015, 43 percent of Republicans believed President Obama was a Muslim.<sup>20</sup> To appreciate the potency of this falsehood, it helps to understand that in 2015, fully 55 percent of all Americans had a negative view of the religion of Muslims, Islam.<sup>21</sup> Candidates’ comments portraying racial minorities as inveterate freeloaders likewise dovetailed with popular Republican misconceptions. A 2016 General Social Survey found that 55 percent of white Republicans believed that blacks “just don’t have the motivation or willpower to pull themselves up out of poverty[.]”<sup>22</sup>

These quotations merely glide the surface of the racial stereotyping which Republican politicians engaged in during the Obama era and continue to traffic in today. There have been even more tawdry insults, such as a congressman's reference to Obama as a "tar baby," a slur repeated in reference to Obama's policies by former Mississippi governor and GOP national chairman Haley Barbour.<sup>23</sup> One Republican congressman referred to Obama as "uppity," while another referred to him as a "boy."<sup>24</sup> Training on Obama's middle name, Hussein, Representative Steve King of Iowa forewarned that if Obama were elected, "Then the radical Islamists, the al Qaeda, the radical Islamists and their supporters, will be dancing in the streets in greater numbers than they did on Sept. 11 because they will declare victory in this War on Terror."<sup>25</sup> Although President Trump's press secretary deemed it a "fireable offense" when a black ESPN sports commentator called him a "white supremacist" in 2017, in 2012 Trump, then television host of *The Apprentice*, labeled Obama a "racist" for favorably referencing Obama's former pastor, Rev. Jeremiah Wright, in a 2007 speech.<sup>26</sup> The list goes on and on. The era of Obama ushered in a racial promiscuity among Republican politicians and officials that gave them license to utter miasma that would get the average employee terminated from a job.

Even before he became a candidate, Donald Trump stirred this pot of racial contempt. In Trump's fertile imagination, the first African American president could not have been born a citizen of the United States and therefore, under the Constitution, was not entitled to be President. Trump taunted President Obama over the made-up issue of his birthplace for years. "Why doesn't he show his birth certificate? There's something on that birth certificate that he doesn't like," Trump mused in 2011 on the program *The View*.<sup>27</sup> Trump even fabricated statements by Obama's family: "His grandmother in Kenya said, 'Oh, no, he was born in Kenya and I was there and I witnessed the birth.' She's on tape. I think that tape's going to be produced fairly soon. Somebody is coming out with a book in two weeks, it will be very interesting."<sup>28</sup> No such tape was ever produced. What was produced, by Obama, was his long-form birth certificate verifying that he was born in Hawaii. This, however, did not ground Trump's flight of fantasy. Trump tweeted more than a year after Obama supplied his birth certificate, "An 'extremely credible source' has called my office and told me that @BarackObama's birth certificate is a fraud."<sup>29</sup>

Although Trump tried to put the birther controversy behind him when he became the Republican nominee by admitting Obama was born in the United States, the issue figured dramatically in his first debate with Hillary Clinton. Clinton portrayed Trump as being outside acceptable norms for an American

president, essentially calling him a racist. Noting that Trump had been sued by the federal government in the 1970s for refusing to rent apartments to African Americans, Clinton inveighed: “He has a long record of engaging in racist behavior. And the birther lie was a very hurtful one.”<sup>30</sup> It marked the first time in the history of televised presidential debates where one major-party candidate so pointedly insinuated that the other was a racist.

Trump left so little to the imagination that by the conclusion of his campaign, most Americans (52 percent) believed he was a racist.<sup>31</sup> Race was in the air. In the run-up to the 2016 election, a series of high-profile killings of unarmed black males by white police officers had given rise to the Black Lives Matter movement and nationwide protests against police brutality. Republicans trained on the protests and the protesters rather than the police killings. Trump described Black Lives Matter as “divisive.”<sup>32</sup>

During the first debate with Clinton, Trump exploited the unrest caused by the police killings to channel a mantra from Richard Nixon’s 1972 reelection campaign. Trump insisted that the nation needed “law and order” and “stop and frisk,” even though he was responding to a question about how to *heal* the nation’s racial divide.<sup>33</sup> More than four decades after this Nixonian speak had been decoded as racist, this was no dog whistle; it was an explicit disregard of African Americans.

If more law and order was needed, it would be imposed on their backs and those of Latinos. After all, a supermajority of blacks (61 percent) believed that police are more likely to use excessive force on an African American than a similarly situated white person.<sup>34</sup> These views align with the statistics. A 2015 *Washington Post* analysis concluded that unarmed black men were seven times more likely to die from police gunfire than whites.<sup>35</sup> A separate analysis by *The Guardian* concluded that in 2015, while racial minorities made up 37.4 percent of the U.S. general population, they constituted 62.7 percent of unarmed people killed by the police.<sup>36</sup> In his book *Chokehold*, Georgetown University law professor Paul Butler presents a staggering array of use-of-force statistics demonstrating that blacks are far more likely than whites to be on the receiving end of coercive police tactics.<sup>37</sup> Indeed, as Butler writes, “Police brutality is so widespread, and so predictable, that many small and medium-size cities actually purchase insurance policies to pay money to people who have been subject to police abuse.”<sup>38</sup> No rational listener could conclude that Trump was appealing to blacks and Latinos for their votes with his rhetoric on crime. His audience was white voters in whom he could stoke fear.

Doused in Trump’s racial rhetoric, the Clinton–Trump contest unfolded not merely in the backdrop of an eight-year campaign to racialize and delegitimize President Obama, and national discord over police mistreatment of



minorities, but also alongside a convergence of white nationalist ideology with mainstream political and judicial thought. The latter had been in the making years before Trump's political ascent, but its enabling of his rise and its contributions to whitelash are greatly underappreciated. I will return to the subject of white nationalism in Chapter 4, but a brief explanation is in order here. White nationalism is white identity politics.<sup>39</sup> It summons whites to coalesce around their interests as a racial group in the same way minorities have had to do to combat their historical racial disadvantage. The Ku Klux Klan is the most violent and antiquated representation of white nationalism.

Yet, the problem with assuming that white voters will no longer tolerate classical forms of racism in politics is that there is no daylight between their beliefs about the discrimination to which whites are subjected and those of white supremacist leader David Duke. A basic premise of white supremacist ideology is that whites are being discriminated against in favor of less qualified, less deserving people of color. According to Duke, "The fact is that in the United States of America, Canada, the UK and in many other areas of Europe Whites face a powerful state-sanctioned, and often mandated, racial discrimination against White people who are better-qualified than their non-White counterparts."<sup>40</sup> In a political environment in which this kind of convergence of thought could occur between everyday white Americans and racial extremists, Reagan-era political strategist Lee Atwater's preoccupation with maintaining a veneer of racial respectability seems quaint.

Events in Charlottesville, Virginia, in the summer of 2017 clearly demonstrated the direct links between the new white nationalism and its ancestry. Throngs of neo-Nazis marched through the college town of Charlottesville with lit torches, chanting anti-Semitic slogans in protest of the removal of Confederate monuments. Two days of confrontations culminated in the death of Heather Heyer when a member of the neo-Nazi protestors drove his car into a counterdemonstration. Instead of instantly condemning the neo-Nazis, President Trump contended that there were "some very fine people" marching among them.<sup>41</sup> America had lurched back in time.

I argue that white voters could reasonably have anticipated this reversion when they voted overwhelmingly for Trump. Trump's campaign slogan was "Make America Great Again," a phrase whose ambiguity was greatly reduced coming from a candidate who proposed to deport millions of illegal immigrants, to ban Muslims from entering the country, and to limit legal immigration to those with a "likelihood of success" in the United States.<sup>42</sup> White voters either did not care about the racial overtones of Trump's campaign or were drawn to Trump because of them. Either sentiment violated their duty of citizenship.

## THE ANTIDISCRIMINATION NORM

It is not an exceptional or even debatable proposition that racial prejudice has no place in the American legal system. In *Peña-Rodriguez v. Colorado*, a juror in the sexual assault trial of a Latino defendant infused the deliberations with harmful stereotypes such as “I think he did it because he’s Mexican and Mexican men take whatever they want.”<sup>43</sup> The Supreme Court held that in instances of overt bigotry, the Sixth Amendment right to an impartial jury trumps the rule against use of a juror’s testimony to invalidate a verdict.<sup>44</sup>

If *Peña-Rodriguez* applied to candidate elections, the case might render illegitimate the victory of Donald Trump, who, like the juror in *Peña-Rodriguez*, stereotyped Mexican-Americans and blacks in ways that were indisputably racist. When Trump claimed that a federal judge could not be impartial in a fraud case brought against “Trump University” because of the judge’s Mexican heritage, House of Representatives Speaker Paul Ryan, a fellow Republican, called Trump’s comments “the textbook definition of a racist comment.”<sup>45</sup> In a democracy in which elections are as rudimentary an institution as jury trials, why should we tolerate racism from a major-party candidate for president of the United States, but not from a juror in a criminal trial? Certainly in the past, courts have intervened in elections where the court has concluded that voters’ choices were guided by racial discrimination or other impermissible animus.

In *Romer v. Evans*, the Court held that state voters could not adopt by referendum a law that prohibited the Colorado state legislature or localities from passing legislation barring discrimination on the grounds of sexual orientation. To do so, according to the Court, “withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination . . .”<sup>46</sup> The Court concluded that Colorado voters had acted with irrational “animus” toward their fellow citizens; thus, the law violated the federal Constitution’s guarantee of equal protection under the law.<sup>47</sup>

The Court took a similar stand against majoritarian malice in *Reitman v. Mulkey*, in which California voters ratified an initiative that prohibited state or local governments from passing legislation regulating the sale or rental of housing.<sup>48</sup> The initiative, Proposition 13, was designed to overturn state fair housing laws and to enable private discrimination that would be prohibited by the Fourteenth Amendment if it were engaged in by a government. Yet, because Proposition 13, with its allowance and encouragement of private discrimination, was now California policy, the Court found that voters’ passage of this initiative violated the Equal Protection Clause of the Fourteenth Amendment.<sup>49</sup>