

Combating the Rot in America's Law Schools

by David Lewis Schaefer

Lawless: The Miseducation of America's Elites, Ilya Shapiro, Broadside Books, 2025, pp. 272, \$24.00 hardcover.

In the first volume of *Democracy in America*, Alexis de Tocqueville described “the spirit of the lawyer” as a critical “counterweight” to the threat that our system of government would degenerate into a “tyranny of the majority” over the rights of unpopular minorities. As he explained, those who have devoted themselves to the study of law derive from it “habits of order,” or a “taste for forms,” that “render them strongly opposed to the revolutionary spirit and unreflective passions” to which democracies are prone. It is not that lawyers are *inherently* conservative, Tocqueville adds: indeed, they played a crucial role in the French Revolution. (Think of Robespierre.) But that was because, acting out of their interest as a class, lawyers sought a *political* role that the monarchy and aristocracy denied them. By contrast, under American democracy, lawyers constitute the closest thing to a *learned* class, whose skills are

needed by the public, who are likely to achieve positions of political influence, and who will therefore find it in their interest (if not necessarily their taste) to help preserve our political regime, infusing its operations with a spirit of order that its preservation requires.

How things have changed. In *Lawless*, legal scholar Ilya Shapiro documents the way in which, far from resisting the mobocratic spirit of “wokeism” that has swept American universities in recent years, our law schools have been in its forefront. They have participated in the disregard of established legal and institutional procedures, the suppression of dissenting voices, and in consequence, the inculcation of a more general disrespect for our system of government. While this spirit can be witnessed throughout most of American higher education, its potential consequences are far more dire when it dominates legal education, precisely be-

cause, as Tocqueville observed, lawyers are the closest thing we have to a governing class—whether as elected representatives, executive officials, prosecutors, defense attorneys, or corporate operatives.

Shapiro begins with the tale of how he was forced to resign a position he had accepted only four months earlier as executive director of Georgetown Law School's Center for the Constitution, owing to an untoward remark he had posted on Twitter in response to Joe Biden's having announced during his 2020 Presidential campaign that he was narrowing the pool of candidates he'd consider to fill any Supreme Court vacancy to black females. When a Court opening did arise in January 2022, Shapiro tweeted his regret that while the "objectively best pick" to fill the spot, from a progressive/Democratic perspective, would be the "very smart" Sri Srinivasan, then chief judge of the U.S. Court of Appeals for the DC circuit, Biden's prior commitment meant that instead "we'll get a lesser black woman."

Shapiro's tweet, particularly those inapt three last words, immediately triggered a "firestorm" on social media, which Shapiro's "ideological opponents" grotesquely misread to mean that he thought *all black women* made inferior candidates for judgeships. (In fact, Shapiro meant only that Biden's prior commitment to basing his judicial choice primarily on race and gender—and Srinivasan, aside from being male, represented the *wrong kind* of racial minority—meant that whoever the President

selected would be less qualified than Srinivasan (whose court ranks second in status to the Supreme Court). And as Shapiro added in his tweet, since Biden had stated that he would consider only a black woman for the Court, "his nominee will always have an asterisk attached," rightly or wrongly, as *not* having been selected on the basis of merit.

Despite Shapiro's immediately having deleted his tweet and apologized for his "inartful choice of words," Georgetown Law's dean William Treanor, surrendering to the firestorm, adopted its misreading of the tweet and immediately placed Shapiro on what turned out to be a four-month paid leave (before he'd even undertaken his duties), stalling the decision until after students had left campus. Trainor then "reinstated" Shapiro to his position on the ground that Shapiro hadn't formally taken office at the time of the tweet, and hence was exempt from disciplinary sanctions under the law school's "policies." But Shapiro concluded from the report of Georgetown's "Office of Institutional Diversity, Equity, and Affirmative Action" on his case (reproduced as an appendix to *Lawless*)—which asserted that his tweet "had a significant negative impact on the Georgetown Law community," including "current and prospective students, alumni, staff, and faculty"—that he had no choice but to resign.

While purporting to "respect" Georgetown's "commitment to the free and open discussion of ideas," so long as it "does not violate the University's non-discrimination or anti-harassment

policy,” the report comically judged that Shapiro’s remarks “could have the effect of limiting Black women students’ access to courses” he taught and thus “undermine” the law school’s “commitment to maintain inclusive learning and working environments,” while “discourag[ing] Black women and their allies from seeking internships and employment” at the Constitution Center.

Shapiro’s decision to resign, given the demonstrated limits to which his speech and writing would henceforth be subject (like that of other faculty, one would assume), is fully understandable. But while he immediately took a position instead as director of constitutional studies at the Manhattan Institute, his Georgetown experience led him to use his “platform” to “shine a light on the rot in academia—and at law schools in particular,” where “academic freedom” is most “under threat” and where “free speech [is] in retreat, and civil discourse a thing of the past,” in favor of “the illiberal forces of woke justice.”

In the remainder of the book Shapiro surveys a number of instances of speech suppression at other law schools, of which perhaps the most notorious is the breakup of a lecture by Judge Kyle Duncan of the U.S. Court of Appeals at Stanford Law School in 2023, sponsored by the school’s Federalist Society, on account of his various “apostasies” against the “new-age religion” of wokeness, such as writing law review articles “defending the traditional definition of marriage and advocating other social-conservative positions.”

Duncan had previously committed such offenses as representing (as an attorney) “schools that wanted to maintain bathrooms segregated by biological sex,” and as a judge, “refus[ing] to use a convicted prisoner’s preferred pronouns.”

After Stanford’s Federalist chapter refused to accede to the demands of “a number of left-wing student groups” including “Stanford OutLaw,” which aims to combat “homophobia, transphobia, heterosexism,” and similar offenses, that it move Duncan’s lecture to Zoom or off-campus, Stanford’s “associate dean for DEI,” Tirien Steinbach, emailed all SLS students warning that Duncan’s “threats” to “healthcare and basic rights for marginalized communities” made his presence on campus “a significant hit” to such people’s “sense of belonging.” Hence, she encouraged offended students to “protest” the lecture while complying with Stanford’s “policy against disrupting speakers.”

Far from obeying such a policy, protestors began booing and jeering as soon as Duncan started his talk, including obscenities directed at both him and the Federalist Society, along with expressions of hate and accusations of racism. Throughout the event, Steinbach made no effort to silence the protestors, expressed her “pain” at the “disenfranchisement of [students’] rights” Duncan’s speech caused, “questioned the wisdom and continuing legitimacy of Stanford’s free-speech policies” that had allowed Duncan to be invited, expressed doubt that “the juice” of the speech was “worth the squeeze” of pain

it caused, and subsequently claimed that the event was “exactly what the freedom of speech was meant to look like: messy.” (Among other questions Shapiro raises is why the DEI dean, rather than that of the law school, should have been presiding at the event in the first place.)

Having surveyed these and other instances of the suppression of speech at America’s law schools—in the name of “diversity,” no less!—Shapiro (whose parents fled the Soviet Union 40 years ago) observes their parallel to China’s Cultural Revolution of the 1960s, when students were encouraged to abuse and attack their teachers and peers for violations of “groupthink,” in favor of “absolute ideological purity.” However, he also celebrates, as a glorious exception, the University of Chicago, whose university-wide Chicago Principles upholding free speech and free inquiry were expressly applied to its law school by Dean Thomas Miles in 2023, and which have been systematically enforced.

Shapiro even notes signs of hope in recent reforms by such previously egregious offenders against free speech as the law schools at Yale, NYU, and Harvard. (This despite the fact that “many legal faculties” still “refuse to hire non-progressives.”) But the restoration of an environment of free inquiry in higher education as a whole will require above all, Shapiro stresses, such nationwide *institutional* changes as abolishing “DEI bureaucracies,” “mandatory diversity training,” “political coercion,” and “identity-based preferences” in admis-

sions and hiring (the last-named having been ruled unconstitutional by the Supreme Court in its 2023 *Fair Admissions* ruling, but easily evaded by bureaucrats sufficiently committed to the cause).

Shapiro’s judgments and recommendations are eminently sound. I would, however, go beyond them in plumbing the reasons for the surrender of law schools in particular to the “woke” environment that has surrounded our universities—in contrast to Tocqueville’s expectation. At the outset, Shapiro mentions that Georgetown’s Center for the Constitution “was renowned for advancing originalism, the idea that constitutional provisions should be interpreted according to their original public meaning.” Elsewhere, to instantiate the political bias that now infects America’s law schools, he cites a 2018 poll of 10,000 law professors showing that two-thirds rejected originalism, supporting instead the doctrine of “living constitutionalism,” according to which the meaning of our nation’s fundamental document “changes over time.”

This poll result reflects a remarkable alteration over time in the way that American law professors (and in consequence, judges) understand their powers and their duties. The term “originalism,” it must be noted, was an *invention* of one of its critics, Stanford professor Paul Brest, in a 1980 law review article. In rejecting the notion that judges, in interpreting the Constitution, should be bound to follow the original meaning of its text, Brest was openly assigning to judges an essentially *legislative* author-

ity unanticipated by the authors of that document. In effect, judges, on Brest's understanding—which according to the poll cited by Shapiro has become the dominant view among American law professors—now regard themselves as constituting a super-legislature, not simply defending the Constitution against violations by Congress, the President, or state governments, but *correcting* the judgment of those elected officials on the basis of the judges' own, ostensibly superior, personal understanding of justice or the public good.

I shall not of course undertake to examine here the process by which this transformation in the understanding of the judicial power took place, other than to note its roots in two movements of jurisprudential doctrine that originated much earlier in the twentieth century: Oliver Wendell Holmes's legal positivism, and the so-called "legal realism" enunciated by Columbia and Chicago professor Karl Llewellyn, who has been said by legal historian Stephen Presser to have possibly done "more than anyone else to make it the dominant jurisprudence of the Warren Court and the American legal academy." (For a deeply informative account of the transformation in judges' self-understanding, I recommend Christopher Wolfe's 1986 classic *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*.)

The point I am seeking to make here is that law professors' and deans' willingness to use their positions to impose their own, typically fashionable, views

of justice on their pupils reflects, in part, this greatly enhanced view of judicial authority, which imposes on the professors themselves the need to supply the students with the "correct" political and moral views. If the Constitutional text can no longer be said to provide future judges and lawyers with such guidance, where else could they look?

None of this is to deny the radical change in the *behavior* of law professors and deans towards one another and towards their students that has taken place in the era of DEI, as Shapiro amply documents. Until quite recently, virtually none of them would have encouraged their students to physically shut down the expression of alternative views, let alone bring about the dismissal of professors with whose opinions they disagreed. But in Tocqueville's time (and well beyond it), we must recall, both lawyers and judges in America were thought to perform an essentially *conservative* function. (The term "conservative" is meant here not in necessary opposition to "liberal," inasmuch as the Founders themselves were essentially liberal in the sense of being advocates of ordered liberty and of economic and intellectual progress.) Once we no longer understand the Constitution, or for that matter the laws made in obedience to it, as having a fixed, if broad meaning, have we not reduced legal study to a pure struggle for power?

Ilya Shapiro has performed an invaluable service in *Lawless*, as well as in his courageous challenge to the DEI legal bureaucracy both at Georgetown

and at other schools where he has lectured, towards the restoration of respect for law and for free intellectual inquiry. But ultimately, challenging the imposition of DEI in legal education, or through lawless bureaucratic edicts from outside our law schools, may point to the need to recapture an originalist understanding of the Constitution itself, an enterprise which Shapiro's appointment to the Georgetown faculty was to have enabled him to facilitate.

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