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# Joshua Dressler and “The Incident”—More Evidence of Liberal Bias?

Michael Vitiello\*

“Have you heard about the Incident?” said Joshua, in an unusually subdued manner, during a phone conversation. I confessed that I had not. As soon as our conversation ended, I Googled “Dressler Incident,” and quickly found a couple of articles.

According to Joshua’s detractors, former Arizona State Representative Adam Kwasman put Joshua in his place for supposedly making the “outlandish” statement that then-Presidential candidate Ted Cruz was anti-Semitic during a discussion in Joshua’s criminal law class at Arizona State University’s law school.<sup>1</sup> Specifically, Joshua was discussing language in context, where words take on a larger meaning than they might otherwise when viewed out of context. The discussion turned to the statement Cruz made on the campaign trail that Donald Trump has “New York values.”<sup>2</sup> In expanding the discussion, Joshua suggested that some listeners understood Cruz’s comment to be anti-Semitic.<sup>3</sup> Perhaps in anticipation of confronting Joshua, Kwasman taped the conversation,<sup>4</sup> happily for those of us interested in what actually took place.

Some of Kwasman’s supporters portrayed him as calling out a typically liberal professor for an obvious falsehood about the right-wing Cruz.<sup>5</sup> Indeed, one prominent right-wing radio talk show host called Kwasman “Captain Arizona.”<sup>6</sup> In response to Joshua’s remark, according to James T. Harris, Kwasman “tears off his suit and tie, and becomes Captain Arizona! Kwasman, in his role as Captain,

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<sup>1</sup> David Ahumada, *Former Arizona Lawmaker Calls Out ASU Prof for Cruz Insult*, ARIZ. DAILY INDEP. (Jan. 21, 2016), <https://arizonadailyindependent.com/2016/01/21/former-arizona-law-maker-calls-out-asu-prof-for-cruz-insult/> [<https://perma.cc/M9D4-4W4J>].

<sup>2</sup> *Id.*

<sup>3</sup> Frank Horowitz, *Law Professor Implies Cruz “New York Values” Comment Anti-Semitic*, YOUTUBE (Jan. 22, 2016), <https://www.youtube.com/watch?v=iZnqiE1IJfc> [<https://perma.cc/Z5GL-YDFF>] (What Professor Dressler actually stated was, “I don’t want to get into Trump and Cruz and Clinton and Sanders and all that stuff, but I will tell you that a whole lot of people in my milieu took ‘New York values’ to also mean Jewish.”).

<sup>4</sup> James T. Harris, *Professor Implies Cruz’ ‘New York Values’ Statement Was Anti-Semitic, Captain Arizona Puts Him in His Place!*, JAMES T. HARRIS (Jan. 22, 2016, 5:01 AM), <http://jamestharris.com/latest/276-professor-implies-cruz-new-york-values-statement-was-anti-semitic-captain-arizona-puts-him-in-his-place> [<https://perma.cc/HAZ7-2N9U>].

<sup>5</sup> *See, e.g., id.*; Ahumada, *supra* note 1.

<sup>6</sup> Harris, *supra* note 4.

interrupts Professor Dressler in an epic smack down and puts him in his place.”<sup>7</sup> Apparently, Kwasman was proud that he put Joshua in his place.<sup>8</sup>

Beyond just the act of calling out a liberal professor for an allegedly inappropriate statement, Kwasman’s supporters also found in Joshua’s remarks more evidence of liberal bias in legal education<sup>9</sup> (and in all education, depending on the critic).<sup>10</sup> As David Ahumada claimed in an extensive article about “the Incident” in the *Arizona Daily Independent*, college professors feed “subtle manifestos towards [their] political viewpoints.”<sup>11</sup> Seeming to endorse his account, Ahumada quoted Kwasman that Joshua should have been ashamed of himself for his comment.<sup>12</sup> Had Joshua merely taken “a potshot toward Republicans or Conservatives,” Kwasman would have let it slide.<sup>13</sup> Supposedly, that was the case because such conduct is commonplace in higher education.<sup>14</sup> Only when Joshua intimated that Cruz was anti-Semitic did Kwasman, a member of Cruz’s Arizona election committee, have to counteract Joshua’s brainwashing.<sup>15</sup> Apparently, Kwasman or others pushed the law school and university administrations to sanction Joshua.<sup>16</sup>

Perhaps not surprisingly for reasons explored below, “the Incident” got national attention.<sup>17</sup> Fox News host Sean Hannity posted a link to Kwasman’s tape of the event. In typical fashion, Hannity cited “the Incident” as “more evidence of liberal bias in academia.”<sup>18</sup>

My gut response, even before I followed the link on Hannity’s website to the taped conversation, was that there was some mistake. As reported, this was not typical Joshua behavior. He is one of the most fair-minded people I know. *Could he have had a moment of weakness?* I might have been tempted to make a

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Ahumada, *supra* note 1 (“The world of education has become progressively heavy in the constant liberal rhetoric that is discussed between students and their professors in the difficult world of college life.”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Ahumada’s article includes an even more detailed discussion of how Kwasman further put Joshua in his place after the two men continued their conversation in the hallway. For example, when Joshua attempted to defend himself, Kwasman told him that “you cannot out lawyer a politician.”

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., Sean Hannity, *Listen: Professor Implies Cruz’ ‘New York Values’ Statement Was Anti-Semitic, Student Puts Him in His Place*, SEAN HANNITY SHOW (Jan. 22, 2016), <http://www.hannity.com/articles/election-493995/listen-professor-implies-cruz-new-york-14301230/> [<https://perma.cc/7P82-BWG6>].

<sup>18</sup> *Id.*

derogatory remark about Ted Cruz, a politician so extreme and unpleasant that many of his colleagues despise him,<sup>19</sup> but was less likely to believe that Joshua would do so.

Before turning to the contents of the tape, which document the in-class part of the confrontation between Kwasman and Joshua, I want to put "the Incident" in context. Claims about liberal bias in higher education in general and legal education in particular are part of a long-term attack. Its modern variation dates back to the 1980s, when a string of young conservatives at Dartmouth College began the *Dartmouth Review*. Although largely considered a well-written newspaper, some of its supporters have been at the center of various controversies, including open contempt and disruption of one African-American professor's class. Right-wing author David Horowitz captured some of the hostility towards liberal academics in his book *The Professors: The 101 Most Dangerous Academics in America*.<sup>20</sup> Similar hostility is not hard to find among right-wing pundits like Sean Hannity and Ann Coulter, who attack academics as well. Right-wing politicians have started to do more than attack academics verbally. For example, Wisconsin Governor Scott Walker is only one of a number of governors who have proposed getting rid of tenure, undoubtedly out of hostility for views expressed by "liberal" faculty.<sup>21</sup> Republican legislators in other states have proposed similar tenure-eliminating bills as well.<sup>22</sup>

At times, critics of liberal academics point to an empirical study purporting to show liberal bias in the legal academy.<sup>23</sup> A decade ago, three professors published a study, largely based on political donations made by law professors, demonstrating what they believed was a liberal bias in the legal academy.<sup>24</sup> Elsewhere, I have criticized that study. My criticisms are implicit in the title of my article: "Liberal Bias in the Legal Academy: Overstated and Undervalued."<sup>25</sup> But

<sup>19</sup> See, e.g., Caroline Bankoff, *Why Everyone (in Congress) Hates Ted Cruz*, N.Y. MAG. (Dec. 20, 2015, 9:32 PM), <http://nymag.com/daily/intelligencer/2015/12/why-everyone-in-congress-hates-ted-cruz.html> [<https://perma.cc/EF83-U72H>].

<sup>20</sup> DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* (2006).

<sup>21</sup> Steven Salzberg, *Wisconsin Gov. Scott Walker's Dual Attacks on the University of Wisconsin*, FORBES (June 12, 2015, 8:00 AM), <https://www.forbes.com/sites/stevensalzberg/2015/06/12/wisconsin-gov-scott-walkers-dual-attacks-on-the-university-of-wisconsin/#7d05eee1c2df> [<https://perma.cc/5B2A-Y6DM>].

<sup>22</sup> See, e.g., Jeff Charis-Carlson & William Petroski, *Iowa Lawmaker Looking to End Tenure at Public Universities*, DES MOINES REG. (Jan. 12, 2017, 8:35 PM), <http://www.desmoinesregister.com/story/news/education/2017/01/12/iowa-lawmaker-looking-end-tenure-public-universities/96460626/> [<https://perma.cc/P95X-W8E7>].

<sup>23</sup> See John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1170-71 (2005).

<sup>24</sup> *Id.*

<sup>25</sup> Michael Vitiello, *Liberal Bias in the Legal Academy: Overstated and Undervalued*, 77 MISS. L.J. 507 (2007).

the study had currency in the debate, in part, because it relied on a quasi-objective methodology to “prove” what many members of the right “knew” in their hearts.<sup>26</sup>

Ironically, critics of liberal academics accuse them of suppressing speech of conservatives,<sup>27</sup> but seem quite intent upon silencing liberal voices, as Kwasman, Hannity, and others appear to be.<sup>28</sup> An exploration of the internal inconsistencies of the right-wing attack on liberal academics is beyond the scope of this celebration of Joshua. Nevertheless, it is worth noting that the right often shouts down liberals<sup>29</sup> (like Kwasman tried to do) and excoriates liberals for suppressing right-wing speakers.<sup>30</sup>

In the article cited above, I argued that the authors of the study overstated the extent of liberal bias in the legal academy.<sup>31</sup> So too with “The Incident.” As I mentioned, Kwasman must have been gunning for Joshua—why else would he have taped the class? Thankfully, fair-minded folks can listen to the conversation for themselves to determine if Joshua was out of character, exhibiting his liberal bias in his criticism of Cruz. Take a minute and listen to the conversation.<sup>32</sup>

Exactly what did Joshua say? Did he subscribe to the view that Cruz is anti-Semitic? Quite the contrary, Joshua merely described what others in his circle might believe when they heard Cruz accuse Trump of having “New York values.”<sup>33</sup> Hannity and Kwasman insist that Joshua implied his agreement.<sup>34</sup> Wow. Desperate for proof of their thesis, I suspect that Hannity and Kwasman would infer Joshua’s liberal bias from the fact that he wears bow ties.

Kwasman’s tone and comments after-the-fact suggest a kind of bullying.<sup>35</sup> That is distinctly not Joshua’s demeanor or affect. I have seen Joshua teach, lecture, interact with students, and debate colleagues (including me) on a variety of topics and in a variety of settings. The settings have varied; the constant is

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<sup>26</sup> See McGinnis et al., *supra* note 23, at 1172–74.

<sup>27</sup> See, e.g., Chris Sweeney, *How Liberal Professors Are Ruining College*, BOS. MAG. (Jan. 2017), <http://www.bostonmagazine.com/news/article/2016/12/20/liberal-professors/> [<https://perma.cc/BP8L-A3UJ>]; Emma Green, *Do American Universities Discriminate Against Conservatives?*, ATLANTIC (Apr. 30, 2016), <https://www.theatlantic.com/politics/archive/2016/04/conservatives-discrimination-universities/480372/> [<https://perma.cc/8ABU-GAK9>].

<sup>28</sup> See, e.g., Ahumada, *supra* note 1.

<sup>29</sup> *Id.*; see also comment to *id.* (“Adam [Kwasman] is trying to shame teachers that he disagrees with into being quiet.”).

<sup>30</sup> See, e.g., David French, *Yes, Universities Discriminate Against Conservatives*, NAT’L REV. (Apr. 1, 2016), <http://www.nationalreview.com/corner/433559/yes-universities-discriminate-against-conservatives> [<https://perma.cc/5TGE-BKRE>].

<sup>31</sup> Vitiello, *supra* note 25, at 527–43.

<sup>32</sup> Horowitz, *supra* note 3.

<sup>33</sup> *Id.*

<sup>34</sup> Hannity, *supra* note 17; Ahumada, *supra* note 1.

<sup>35</sup> Ahumada, *supra* note 1 (According to Kwasman, “[Professor Dressler] acknowledged the fact that, well actually at first he was saying ‘I wasn’t saying I thought that, I was saying that other people thought that,’ and I gave him one of those looks of I’m calling BS on that.”).

Joshua's remarkable level of civility. Other than someone capable of finding liberals under their beds, like the right-wingers during the McCarthy era,<sup>36</sup> few of Joshua's students can guess his political leanings when they attend his classes.<sup>37</sup> He poses questions designed to force all of his students to question their premises, whether they are liberals or conservatives.<sup>38</sup>

More evidence of Joshua's encouragement of intellectual diversity is his selection of his co-authors for his widely adopted casebooks. For example, as George Thomas, Joshua's co-author for his *Criminal Procedure* casebook, often states in the teacher's manual, Thomas is the more conservative of the two on a host of constitutional rights questions.<sup>39</sup>

In closing, I appreciate Steve Garvey's willingness to include this reflection because of the enormous respect that I have for Joshua's work and for his personality. (I am considerably less enthusiastic that Joshua is retiring!) By way of concluding, I want to quote comments about Joshua in my article on liberal bias in the academy:

I also want to single out three left leaning professors who inspired many of the thoughts in this article. My...former colleague Joshua Dressler demonstrate[s] the best traits of [a] liberal law professor[.]. Both in the classroom and in private discussions, [he] ask[s] hard questions and do[es] not accept superficial answers. [He has] helped me repeatedly in casual conversations, at works-in-progress, and in comments on drafts of articles.<sup>40</sup>

Many other colleagues and many of Joshua's former students echo respect for Joshua. Most of us who have worked with him, read his works, and studied with him recognize not only the extraordinary impact that he has had on criminal law, but also the grace and dignity with which he has conducted himself. He has had an exemplary career and small-minded critics cannot detract from that reality.

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<sup>36</sup> See 'Reds Under the Bed,' ALPHA HISTORY, <http://alphahistory.com/coldwar/reds-under-the-bed/> [<https://perma.cc/YV2Y-3FF2>] (last visited Mar. 10, 2018).

<sup>37</sup> See, e.g., 2nd Former Student Comment to Ahumada, *supra* note 1 ("I am a conservative and I never felt as though my views weren't welcome."); Bill, comment to *id.* ("Dressler is one of the most cited Profs in the field, his political opinions aren't part of teaching.").

<sup>38</sup> See, e.g., Former Student Comment to *id.* ("I am a student of Dressler's from last semester at OSU...There were several very conservative students in our class and they never had an issue with Professor Dressler. . . . His personal political beliefs never became a part of the class and he openly encouraged us to speak about how we personally interpreted statutes or case decisions.").

<sup>39</sup> See, e.g., JOSHUA DRESSLER & GEORGE C. THOMAS III, TEACHER'S MANUAL TO CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 55–56, 61 (6th ed. 2017) ("[A]sking an officer to interrupt what has become a crime investigation rather than knock on a door is taking the warrant requirement too far for Thomas. (Dressler feels it is great to have a casebook in which co-authors don't always see eye-to-eye. It makes the casebook better!)" ).

<sup>40</sup> Vitiello, *supra* note 25, at 507.

