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Free Speech Doesn't Mean Free Rein to Shout Down Others

David French

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If you pay any attention to legal news at all, you're familiar with the Stanford Law School shout-down. The story is simple and disturbing. The Federalist Society chapter at Stanford Law School invited Judge Kyle Duncan of the U.S. Court of Appeals for the Fifth Circuit to speak on a fascinating and important topic (for legal nerds, anyway): How do lower courts decide cases on legal issues in which Supreme Court case law is unsettled or changing?

It's a particularly important topic for aspiring litigators, many of whom will argue cases in front of judges like Duncan, one of the hundreds of Republican-appointed originalists who account for a high percentage of the federal judiciary. After all, a lawyer's job is to try to win over judges, no matter who appointed them and no matter their ideology.

Insights into a judge's thinking are especially valuable if the judge is coming from a different ideological perspective. We often instinctively know how to reach people who share our views. It can be a struggle to understand our philosophical opposites.

But a number of progressive Stanford students weren't interested in listening to Judge Duncan. They wanted him to hear from themselves.

To be clear, there's nothing inherently wrong with that. Students objected to a number of the judge's views and court rulings. Before he became a judge, he defended Louisiana's same-sex marriage ban, for example. In addition, he wrote an opinion denying a transgender inmate's motion to be referred to by feminine pronouns in court proceedings.

Robust protest should be welcome in the academy, and it is entirely appropriate to ask any judge difficult questions during the question and answer session after a speech. But protests that go so far as to shout down or disrupt speeches or events aren't free speech but rather mob censorship.

This is an ancient principle of American liberty. My right to protest does not encompass a right to silence or drown out another person. As the abolitionist Frederick Douglass wrote in 1860 after an antislavery event was disrupted in Boston by a violent mob, "There can be no right of speech where any man, however lifted up, or however humble, however young, or however old, is overawed by force, and compelled to suppress his honest sentiments."

He continued, "Equally clear is the right to hear. To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker. It is just as criminal to rob a man of his right to speak and hear as it would be to rob him of his money." By shouting down Judge Duncan, the Stanford protesters violated his right to speak and the attending students' right to hear his speech.

But I'm less interested in what happened than why it did. This isn't the first disruption incident in recent years at an elite American law school. Last March, students at Yale Law School attempted to disrupt an event featuring Kristen Waggoner, then the general counsel of Alliance Defending Freedom. (Disclosure: I'm a former senior counsel for A.D.F.) Less than two weeks earlier, students at what is now the University of California College of the Law, San Francisco, shouted down a former Cato Institute lawyer, Ilya Shapiro, so completely that he couldn't deliver his prepared remarks.

The fundamental problem in top schools like Stanford and Yale isn't so much the individual choices of the students themselves (though they're certainly responsible for their actions) but rather that the institutions are often prisoners of a social dynamic they helped create. America's elite law schools are overwhelmingly progressive, and ideological dominance of any kind can breed groupthink and intolerance.

American lawyers tend to lean left compared with the general public, and a comprehensive 2018 study by Adam Bonica of Stanford University, Adam Chilton and Kyle Rozema of the University of Chicago and Maya Sen of Harvard University found that elite law school graduates are to the left of the legal profession and that law professors are to the left even of elite law school students.

There's no real evidence that there are too few qualified conservatives to increase their presence in the faculties of America's best law schools. In fact, there is evidence that conservatives in the legal academy tend to be extremely qualified. A 2016 study found that conservative law professors were more likely to have graduated from top law schools, more likely to have made law review and substantially more likely (68.2 percent more likely) to have clerked for the Supreme Court than their liberal peers. (They were less likely to have a Ph.D. in addition to a J.D., however.) There is no need for ideological affirmative action to begin to alter the ideological balance in elite legal education.

Moreover, there's a cost to the status quo. One of the most helpful frameworks for understanding American division and polarization comes from Cass Sunstein at Harvard Law School. In a 1999 paper he identified and described a phenomenon he called the "law of group polarization." The law is well stated by the first sentence of the abstract: "In a striking empirical regularity, deliberation tends to move groups, and the individuals who compose them, toward a more extreme point in the direction indicated by their own predeliberation judgments."

In other words, when like-minded people gather, they tend to become more extreme. If you're opposed to gun control and gather with other gun-rights advocates, you're likely to become more committed to gun rights. If you're attempting to raise awareness of climate change and gather with other climate activists, you're likely to become more committed to your cause.

This law of group polarization helps, as Sunstein writes, "to explain extremism, 'radicalization,' cultural shifts and the behavior of political parties and religious organizations; it is closely connected to current concerns about the consequences of the internet; it also helps account for feuds, ethnic antagonism and tribalism."

The tie to the academy is obvious. A coalition of like-minded people who study together, often live together and learn from other like-minded people can often radicalize. And when they radicalize, they have trouble not just understanding opposing points of view but also seeing their opponents as decent human beings.

In a strange way, the culture of the legal academy is at war with the culture of the legal profession. While the profession is left leaning, it channels conflict into rules-based legal arguments that feature forced civility and grant each side the full opportunity to make its case. There is no such thing as shouting down opposing counsel in court. You certainly cannot heckle a federal judge into silence. There is no option but to fully understand your opponents' legal arguments and grapple with them on their merits.

But an ideological monoculture doesn't prepare students for these kinds of confrontations. Instead, they're provided with a mountain of confirmation bias divorced from real-world context. This is not a new problem. I keenly remember arriving at Harvard Law School in 1991 as a young conservative evangelical, only to meet a number of classmates from other elite institutions who said they'd never spoken to an evangelical in their life, and their baseline level of ignorance (and, sometimes, hostility) reflected their lack of experience.

There is no quick or easy fix for the problem of group polarization — in the academy or elsewhere. Law schools should make sure that they're not discriminating against conservative applicants, either in admissions or in hiring, and as the Claremont McKenna College professor Jon A. Shields wrote eloquently today in The Times, progressive professors should intentionally start teaching the best of the conservative intellectual tradition.

Given the left lean of the entire legal profession, however, conservative students and scholars should expect to be in the minority. Yet no matter the ideological composition of the faculty or student body, students can still take the initiative to seek out the best expression of opposing points of view and listen respectfully even if they intend to challenge their opponents firmly.

That was not, however, the course that Stanford students chose. In addition to the efforts to drown out Judge Duncan, he said that one of the protesters screamed at him, “We hope your daughters get raped!” He reacted angrily to the heckling and the taunts, and the entire event deteriorated into chaos.

At the height of the commotion, a Stanford associate dean, Tirien Steinbach, addressed the students. She delivered a short series of remarks in which she pointedly asked Judge Duncan and the Federalist Society students who invited him, “Is the juice worth the squeeze?” Was the event worth the trouble? The answer should have been clear. When an ideological monoculture exists, dissenting speech can be more valuable, not less.

Thankfully, the dean of Stanford Law School recognizes the gravity of the educational challenge. On Wednesday she sent a long letter to students explaining that shouting down speakers in a school setting is not an exercise of free speech. While she declined to punish any students involved in the shout-down, she announced that Steinbach is on leave and that students will be required to attend a mandatory half-day session “on the topic of freedom of speech and the norms of the legal profession.” This is a good start, but it’s only a start.

The legal case for free speech often rings hollow without also making a moral case, and for that, let’s return to the words of Frederick Douglass: “Liberty is meaningless where the right to utter one’s thoughts and opinions has ceased to exist. That, of all rights, is the dread of tyrants. It is the right which they first of all strike down.”

Those who strike down free speech aren’t liberators; they’re oppressive (even when they silence powerful men). And when aspiring lawyers act oppressively, they don’t just undermine liberty; they undermine the very profession they seek to join.