TELLING STORIES FOR LIBERTY

YOU CAN'T SAY THAT: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS. By David Bernstein.[1] Washington, D.C. Cato Institute. 2003. Pp. 198. $20.00.

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Restrictions on expression present a harder case for libertarian-leaning scholars than we seem to want to admit. Expression does things. It informs, provokes, offends, cajoles, coerces, calms, deceives, degrades, entreats, and so on. Some people experience some of these things as harm. When A's expression harms B, even those who believe the government should not penalize "harmless" conduct, but may intervene to prevent harm to others, must reconcile a principle of free expression with whatever version of a harm principle they endorse.[3] The law recognizes some harm from expression and treats it as harm. Causes of action protecting a reliance interest, such as fraud or malpractice, exemplify the point, as do laws against blackmail, extortion, or threats.[4] In other cases, the law disregards even plausible claims of expressive harm. A person of-

1. Associate Professor of Law, George Mason University School of Law.

2. Associate Professor of Law and 2003-04 Julius E. Davis Professor of Law, University of Minnesota Law School. My thanks to David Bernstein, Brian Bix, and Dan Farber for their comments. Remaining mistakes are my fault.

3. For debates regarding what is now known as the "harm principle" has to say about offense as harm, see Richard Vernon, *John Stuart Mill and Pornography: Beyond the Harm Principle*, 106 ETHICS 621 (1996); Robert Skipper, *Mill and Pornography*, 103 ETHICS 726 (1993); David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, 102 ETHICS 534 (1992). A sensible harm principle has to take into account at least some utilitarian concerns. *See* John J. Donohue, III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1589-90 (1992).

4. *E.g.*, United States v. O'Hagan, 521 U.S. 642 (1997) (affirming a conviction on the misappropriation theory of insider trading); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (affirming a malpractice verdict against a lawyer based on a comment in an initial interview with a person who did not formally retain a lawyer); United States v. Khorrami, 895 F.2d 1186 (7th Cir. 1990) (affirming a conviction based on threatening mail and telephone calls).

fended by Cohen's "fuck the draft" message,[5] or Robert Mapplethorpe's images of certain sexual practices,[6] may well suffer subjectively genuine trauma, as might a public figure depicted as having had sex with his mother in an outhouse.[7] In these cases, disregarding harm is the affirmative policy of the First Amendment.[8] These points remind us that in a heterogeneous society any free speech principle, no less than any other principle, has to be defended both in terms of its rightness and its results.[9]

The question of what should count as expressive harm is central to *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws*, written by Professor David Bernstein of the George Mason University School of Law and published by the Cato Institute. As the book's title implies, Professor Bernstein argues that antidiscrimination laws may restrict speech. That claim supports the reciprocal inference that speech may create or perpetuate inequality. If and to the extent inequality counts as harm, the conflict between the protection of free speech and at least a strict version of the harm principle is fairly joined.

Professor Bernstein has chosen not to write a study of this conflict, however. His book tells a polemical story. In this story, which Professor Bernstein tells with great skill, hypersensitive plaintiffs, prudish social conservatives, and liberals who value equality over liberty are using laws against discrimination to suppress constitutionally protected speech. The threat is growing, and defenders of liberty, who in this story play both victim and hero, have got to repel the egalitarian assault.[10]

The moral of Professor Bernstein's story is that persons who take offense at speech simply have too thin a skin. They should buck up and learn to cope with the real world. Commands like that sound tough and tough-minded. Some might find this simulacrum of toughness pleasing. Commands are not reasons, how-

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5. Cohen v. California, 403 U.S. 15 (1971).

6. *See* City of Cincinnati v. Contemporary Arts Center, 566 N.E.2d 214 (Ohio 1990).

7. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

8. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realists Approaches to The First Amendment*, 1990 DUKE L.J. 375, 420-21.

9. As Professor Richard Epstein puts it, "[t]he libertarian thinkers were surely wrong when they argued that offense was not a category of harm, when it so clearly is. But they were right when they concluded that this was a form of harm that for good social reasons should not be subject to redress." RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 416 (1992).

10. *See* STANLEY FISH, THE TROUBLE WITH PRINCIPLE 20-21 (1999) (Fish, *Trouble*).

ever. They do not provide an autonomy-based account of what should and should not count as expressive harm.

To distinguish expressive harms the law should recognize from expressive harms the law should ignore requires reasons, not commands. To the extent welfare is relevant to this distinction, we need utilitarian reasons as well as libertarian ones. Either way, "get over it" will not do. So, although one may admire Professor Bernstein's devotion to liberty, particularly the often underrated freedom to arrange one's own economic affairs, and while I suspect we would agree on the results of many cases, his embrace of narrative is troubling.

The main lesson of this book is that no plausible free speech principle can justify all forms of liberty. A secondary lesson is that libertarian storytelling is subject to the same limitations that apply to storytelling from any other political perspective. The libertarian case is better made through logical arguments, based on clearly stated principles, which state and confront opposing views in their strongest form.

I

Professor Bernstein's large story is told through many smaller ones. The small stories cover a lot of ground—from the Miller Brewing Company and the *New York Times* to libraries, the Boy Scouts, the Nation of Islam, Princeton eating clubs, rental properties, university campuses, university classrooms, restaurants, a ballet company, newspaper want ads, parades, and the television program *Melrose Place*. The number and variety of these small stories creates two problems. The first has to do with what the stories actually show. I discuss this point in this Part. The second has to do with the need for a theory of speech adequate to hold the stories together. I discuss that problem in Part II.

A. NARRATIVE AND CONTEXT

The first problem is one of completeness. The strategy of telling one big story through many little ones forces Professor Bernstein to provide only brief summaries of the cases he describes. Adding facts to the book's description of some cases reduces the degree to which these cases depict egregious incursions on liberty.

Mackenzie v. Miller Brewing Co.[11] is a good example. It leads off Professor Bernstein's criticism of laws forbidding discrimination in the workplace, most particularly discrimination allegedly caused by a hostile work environment. Professor Bernstein says *Mackenzie* is about a 19-year Miller employee who "made the career-ending mistake of recounting the previous night's episode of the sitcom *Seinfeld* to his coworker Patricia Best" (p. 23). That episode had Jerry Seinfeld dating a woman whose name he could not remember. He did remember that her name rhymed with a female sexual organ, producing half an hour of euphemistic names leading up to the punch line: "Delores."

According to Professor Bernstein, Best, who he is careful to note "was apparently known to use salty language at work herself," complained that Mackenzie had harassed her (p. 23). Miller fired Mackenzie, who sued Miller, his supervisor, and Best for what Professor Bernstein describes as "wrongful termination and other wrongs" (p. 23). Professor Bernstein writes that at trial Miller "acknowledged that the direct cause of Mackenzie's termination was the *Seinfeld* incident and the ensuing fear of a sexual harassment lawsuit" (p. 23). Mackenzie won a $26.6 million verdict, including $1.5 million personally against Best for interference with his employment contract (p. 23).

There is more to the story than that. Mackenzie's main claim was that Miller deceived him when it said a corporate reorganization would not harm him, and again when it failed to disclose it had reclassified his job at a lower level.[12] $24.5 million of the damages were awarded on this theory, the elements of which—misstatements, omissions, and reliance—were largely unrelated to the *Seinfeld* incident.[13]

In addition, Best was not the first woman to complain about Mackenzie's conduct. Mackenzie's secretary previously had sued Miller, alleging that Mackenzie sexually harassed her. Miller settled that case for $16,000.[14] As for Best, media reports of the trial

11. 608 N.W.2d 331 (Wis. 2000).

12. *Id.* at 335-36. The theories are summarized at *id.* at 337.

13. Most of the rest of the award came from theories of interference with Mackenzie's employment contract, including a curious award of $0 in compensatory damages and $1.5 million in punitive damages against Best for complaining about the *Seinfeld* reference. *Id.* at 336-37. This award was reversed. *Id.* at 337.

14. At trial against Miller, Mackenzie denied harassing the secretary and claimed he always had denied it. *Id.* at 336. His supervisor testified that Mackenzie had "admitted that his behavior had been inappropriate" and that he (the supervisor) had warned Mackenzie that Mackenzie would be fired if he engaged in such conduct again. *Id.*

said that after the *Seinfeld* incident she asked Mackenzie's superior what she should do; he advised her to work it out with Mackenzie. When she complained to Mackenzie, however, he questioned why Best was complaining, given that she used bad language herself.[15]

In light of these facts, Professor Bernstein is too skeptical of Miller's claim that it fired Mackenzie for exercising "poor management judgment." Mackenzie was a supervisor who had already been sued for sexual harassment and who nevertheless bantered about women's sexual organs with a female subordinate and then reacted petulantly when the subordinate complained. It would have been perfectly reasonable for Miller to conclude that Mackenzie's judgment was poor.[16]

More significantly, though Professor Bernstein claims Miller "acknowledged" firing Mackenzie because it feared Best would sue (p. 23), the opinions do not say that. Quite the opposite. The court of appeals opinion states that Best did not threaten to sue Miller and, in fact, tried to dissuade Miller's management from punishing Mackenzie.[17] Perhaps Miller management feared Best would change her mind before the limitations period ran, but that is just speculation. With ample reason to accept Miller's explanation of the firing, there is reason to question Professor Bernstein's interpretation of the case.[18]

Mackenzie denied receiving this warning. *Id.* $16,000 is not a large sum, so it does not suggest Mackenzie's actions were egregious. Neither does it suggest he had good judgment.

15. *McKenzie v. Miller Brewing Co.*, Court TV Library, *at* http://www.courttv.com/archive/casefiles/verdicts/mackenzie.html (last visited Feb. 5, 2004). This account states that Mackenzie apologized to Best but then went on to question why she complained. An alternative media account makes Mackenzie look even worse. On this account, when Best complained to him, Mackenzie "was not contrite and told her it was "more of a personal problem for her than something he was responsible for." Jim Stingl, Peekaboo Website, *at* http://www.peekaboo.net/archives/cat18/27.html (July 4, 1997). Either way, it was only after Mackenzie had bungled the chance to defuse the situation that his supervisor took the issue to legal and personnel officials at Miller. I am grateful to Professor Bernstein for this reference.

16. One half expects Mackenzie to scream "you started it!" before the drama is over, so it is no surprise that after losing in the Supreme Court he sued his lawyers for malpractice. Corey Spivak & Dan Bice, *Seinfeld Suit Punchline: $625,000*, Milwaukee Journal Sentinel Online, *at* http://www.truthinjustice.org/GBBS.htm (June 7, 2003).

17. *Mackenzie*, 608 N.W.2d at 359.

18. At the end of the day, Mackenzie lost because Wisconsin does not recognize a tort of deceit for representations or omissions in an at-will employment context, and because employees may only sue for wrongful termination (Wisconsin law on this point actually does exist) if they were fired for engaging in socially desirable conduct, such as whistle-blowing. *Id.* at 360-61. Mackenzie's claim was based on Best's conduct, not his own. *Id.* Mackenzie did not appeal this ruling to the Supreme Court. Mackenzie v. Miller Brewing Co., 623 N.W.2d 739, 740 n.1 (2001).

There is also more than Professor Bernstein mentions to the story of a suit brought by Hunter Tylo, an actress hired to play a seductress on the television show *Melrose Place* (pp. 42-43). The show fired her when she got pregnant (p. 43). She sued for breach of contract and discrimination.[19] The show defended on the seemingly sensible ground that her contract required that there be no "material change" in her appearance. Professor Bernstein notes that she gained 47 pounds while pregnant, and invites the reader to imagine her pregnant in a bikini (pp. 42-43). Ms. Tylo won at trial. The jury awarded her $4 million in damages for emotional distress and $894,601 for economic losses.[20]

That result does seem wrong—the contract said what it said, and her appearance was a material part of the agreement—but the case seems less outrageous when one learns that the jury heard evidence that the same show previously had accommodated the pregnancy of its main star, Heather Locklear, by rearranging the shooting schedule and using a body double while continuing to photograph her face.[21] A juror might conclude that if a body double would do for Ms. Locklear, it would do for Ms. Tylo.[22] The woman hired to replace Ms. Tylo also got pregnant, and the show did not fire her, though it is not clear from the media reports whether this fact was in evidence.[23] Ms. Tylo testified that she is a Christian and that, when the show's producers learned she was pregnant, they suggested she abort the pregnancy.[24] None of these facts justify the result, but they make it easier to understand how ordinary persons could have produced such a verdict.

A third example involves a reprint of Goya's *Naked Maja* hanging in a classroom at Penn State (pp. 39-40). According to Professor Bernstein, Penn State "took down" the print after Professor Nancy Stumhofer complained about it (p. 39). He believes

19. *Would Be 'Melrose' Actress Wins Nearly $5 Million Award*, CNN Interactive, *at* http://edition.cnn.com/SHOWBIZ/9712/22/melrose.lawsuit/ (Dec. 22, 1997).

20. *Id.*

21. *Id.*

22. This point cuts both ways. The producers might have bothered in Ms. Locklear's case only because she was the star, and reasoned that seductresses are common enough in Hollywood that they would not trouble themselves for Ms. Tylo. The accommodation of a star should not create a duty to accommodate lesser actors, but one can understand how a jury might see things differently.

23. *Would Be 'Melrose' Actress Wins Nearly $5 Million Award*, *supra* note 19, at http://edition.cnn.com/SHOWBIZ/9712/22/melrose.lawsuit/.

24. *Id.* According to one website posting a Reuters news report, it was the abortion statement that prompted her to sue. *See Hunter Tylo vs. Aaron Spelling*, *at* http://www.geocities.com/Hollywood/5639/Archive/tylo.html (last visited Feb. 5, 2004).

this incident shows that "litigation or fear of litigation" under antidiscrimination laws may lead to the censorship of art (p. 39). Professor Bernstein acknowledges that Penn State had no duty to display the print in the first place, and might have reason not to display potentially offensive art in a "public space" (p. 40). He objects to the action, however, on the ground that Professor Stumhofer turned an issue of taste into one of "alleged illegal sexual harassment" and that Penn State took the print down "in response to threats of legal action" (p. 40).

Professor Stumhofer has written her own account of the case, entitled *Goya's* Naked Maja *and the Classroom Climate.*[25] Her account differs from Professor Bernstein's.[26] First, according to Professor Stumhofer, the *Maja* was not simply taken down; it was moved from a classroom to a public space in the student center.[27] Second, Professor Stumhofer never filed a formal complaint with the university, much less threatened to sue it.[28] On her account, the only mention of liability risk was a hearsay report from the university affirmative action officer of something a university lawyer supposedly said.[29]

Third, Professor Stumhofer claims the incident was never about sexual harassment.[30] Instead, it was about keeping her class and other classes focused on what was being taught, rather than on the art hanging on the walls.[31] The facts she recounts are consistent with this interpretation.[32] Professor Stumhofer was assigned to teach developmental English (this may be a euphemism for remedial English).[33] Because rooms were scarce, some class sessions were held in a long, narrow music room.[34] Unlike ordinary classrooms, in which no pictures were hung, Goya's nude hung behind the most logical place for an instructor to stand in order to make eye contact with the students.[35] Students

25. Nancy C. Stumhofer, *Goya's* Naked Maja *and the Classroom Climate*, DEMOCRATIC CULTURE, Spring 1994, at 18.

26. For this description, Professor Bernstein cites an editorial by Nat Hentoff in the *Washington Post* (p. 172, n.6). Professor Eugene Volokh has used the *Maja* incident in several articles as well, using the same source. *E.g.*, Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 642 (1997).

27. Stumhofer, *supra* note 25, at 20.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 18.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

who watched the professor could not help but see the *Maja*, too.[36]

As the first class got started, Professor Stumhofer noticed that male students pointed at the picture, laughed, and made comments to each other.[37] Female students blushed and seemed embarrassed.[38] Professor Stumhofer silenced the male students and proceeded with class. Later, she spoke with other students and faculty, some of whom reported similar incidents.[39] She proposed that either a male nude be hung next to the *Maja*, to level the playing field for female students, or that the *Maja* be moved.[40] The university eventually chose the latter course.[41]

On this account, the important thing is not Professor Stumhofer's concern that the picture prompted male students to comment on women's bodies (p. 39), but that these comments were made *in class*. As noted earlier, Professor Bernstein acknowledges that Penn State had the discretion to display or not display art on its walls (though he is mistaken to imply that the school shied away from displaying the *Maja* in a "public space"—the painting was actually moved to a more public space than the classroom it had been in). Because Professor Stumhofer did not threaten to sue, that exercise of discretion is all that is at issue in the case. Her basic point was that a classroom is not a public forum for the unregulated expression of views.[42] That point is perfectly sound.[43]

Even seemingly simple disputes can be socially complex, and it is hard to do justice to even a few disputes in a book of this length. It is impossible to do justice to the number of disputes recounted in this book.[44] One of the strengths of the sort of libertarian principles Professor Bernstein brings to bear in this book is that they demand that the law respect equally the rights of all persons—employers as well as employees, issuers of securities as well as investors, authors as well as readers or listeners,

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 18-19.
40. *Id.* at 19.
41. *Id.* at 20.
42. As she puts it, "[p]eople looked at the issue as one of censorship or sexual harassment. No one could understand the question of classroom climate which was at the heart of the problem." *Id.*, at 18.
43. For a more general discussion of this point, see Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997).
44. I have presented three examples here and could add others, but I have not researched them all.

manufacturers as well as consumers, and so on. Coercion or other use of one for the benefit of another is wrong.

On these principles, it is hard to justify this book's implication that Patricia Best and Nancy Stumhofer acted as censorious, litigation-happy busybodies. They are human beings and deserve to be treated with whatever respect the facts warrant. The staccato storytelling narrative of this book makes that impossible, and thus leads the form of the book to contradict the principles it is trying to advance.

B. RISK AVERSION AS SUBSTANTIVE LAW

Many and perhaps most of Professor Bernstein's stories concern claims that are threatened, or filed and then settled, rather than claims that produce a plaintiff's judgment. Some stories are thorough victories for free speech. Chapter Four, entitled *Political Speech as Illegal Discrimination*, discusses attempts to use laws against housing discrimination to penalize persons who opposed the creation of low-income housing. The Department of Housing and Urban Development investigated some such claims, but then adopted a policy of not investigating reports complaining of public advocacy (p. 49). Judges presented with such cases have sided with speakers (p. 51). In one case in Berkeley, California, the subjects of the investigation sued HUD and won (p. 51).

Including these cases muddles Professor Bernstein's claim that liberty is losing ground to equality. There are many reasons why persons give in to demands or settle suits. No doubt they sometimes give in because they are afraid they will lose at trial. As *Mackenzie* and the *Maja* case demonstrate, however, it is not always safe to assume that employers act only because of litigation risk. And, though Professor Bernstein perceives a growing threat to liberty,[45] he acknowledges, with admirable candor, that "clearly meritless claims rarely survive federal appellate review" (p. 25). Why should these cases count to show the "growing threat" antidiscrimination laws pose to free speech? Don't they show the opposite?

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45. Professor Bernstein's approach is anecdotal, not statistical, so it is not clear why he thinks the threat is growing. EEOC statistics on sexual harassment claims show a jump from 11,908 claims in 1993 to 14,420 claims in 1994, and 15,549 claims in 1995, but the numbers hold fairly steady after that. (1996: 15,342; 1997: 15,889; 1998: 15,618; 1999: 15,222; 2000: 15,836; 2001: 15,475; 2002: 14,396). The U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992-FY 2002*, *at* www.eeoc.gov/stats/harass.html (last visited Feb. 5, 2004).

Professor Bernstein's answer is that laws against discrimination are vague, and legal conflict is costly, so to avoid conflict firms will adopt zero-tolerance policies that squelch protected speech (pp. 29-34). If frivolous cases rarely survive appeal, however, courts rejecting such cases will establish principles employers can use to establish effective workplace policies. Lawyers can sell such policies, if clients demand them. If excessively timid advice is costly to clients, lawyers willing to give advice that reflects the appellate decisions should take business from risk-averse advisers.[46] The result should be a sensible equilibrium of appellate decisions and employment policies.[47] Firms might still adopt strict anti-sexual conduct policies, but if one has faith in legal markets one cannot reject the idea that firms adopt such policies because they like them.[48]

Because risk aversion is important to Professor Bernstein's story, it is surprising that he does not refer to the actual malice rule of *New York Times v. Sullivan*.[49] That rule expresses the judgment that the cost of protecting some constitutionally valueless expression is justified by gains in the "uninhibited, robust, and wide-open" debate on public issues.[50] The rule is explicitly based on the presumed risk aversion of speakers.[51]

Sullivan and *Hustler Magazine v. Falwell*,[52] which extends the rule to emotional distress claims, show that when speech is concerned risk aversion can affect substantive law. To this extent the cases support Professor Bernstein's story, but they also call it into question. The doctrine applies only to claims brought by public figures or officials; most of Professor Bernstein's stories involve private persons. If the Court does not alter the elements

46. *See* Vicki Schultz, *The Sanitized Workplace,* 112 YALE L.J. 2061, 2094-2103 (2003) (describing zero-tolerance advice of several human resources consulting firms).

47. It might be hard for clients to judge the quality of advice, though again competitors would invite them to do so and offer to help, and agents at firms like Miller Brewing probably can judge the quality of their legal inputs.

48. Professor Bernstein does not discuss such arguments directly, but he does discount the weeding-out of frivolous claims on appeal by saying "no sensible attorney would advise his clients to depend on appellate courts . . . to save them from unjustified claims'" (p. 25). I suppose few lawyers actually tell clients to trust in the kindness of appellate judges—saying that you will lose the trial but win the appeal might prompt a client to look for a better trial lawyer—but there is an obvious connection between appellate rulings and the expected value or expected cost of a case. Professor Bernstein obviously knows this, so it is hard to say what he means here.

49. 376 U.S. 254, 279-80 (1964).

50. *Id.* at 270.

51. *Id.* at 278.

52. 485 U.S. 46, 56 (1988).

of dignitary torts in such cases, it is not clear why risk aversion could count for Professor Bernstein, either.

In addition, these cases involve widely disseminated expression on matters of general concern—for which the public figure requirement serves as a proxy. Risk aversion in this context is justified on the ground that some unprotected expression must be protected to safeguard "speech that matters,"[53] by which the Court seems to have meant public debate on public issues. That logic may translate to small-scale speech within the confines of the workplace, but the analogy is not self-evident. It would need to be argued rather than asserted. I return to this point in Part II.

C. SELF-COMPULSION

The doctrine of compelled speech illustrates a related problem. Professor Bernstein discusses cases in which a party settled and, as part of the settlement, agreed to engage in some sort of expression or receive some sort of instruction. One example involves a racist man who harassed and intimidated a local fair-housing specialist (p. 73). He settled claims initiated by HUD by agreeing to stay away from the housing specialist, to attend sensitivity training, and to apologize to the specialist on his "White Forum" television show (p. 74).

Professor Bernstein's idea of compelled speech is not the Court's. Compelled speech cases deal with state actions that force persons to express something.[54] Settlements, by contrast, are contracts. First Amendment rights may be contracted away.[55] Unless a case involves coercion sufficient to give a promisor a defense to enforcement, a party who chooses to speak or fund expression as part of a settlement has simply made a choice they have a right to make. Professor Bernstein uses "compelled" in a way that calls to mind nothing so much as Robert Hale.[56] That is a surprising element to find in a libertarian book.

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53. Gertz v. Robert Welch, 418 U.S. 323, 341 (1974).

54. *E.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995); Wooley v. Maynard, 430 U.S. 705 (1977).

55. Cohen v. Cowles Media, 501 U.S. 663 (1991) (holding that a promissory estoppel claim was not preempted by First Amendment).

56. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). For an excellent critique of Hale's argument, see Richard A. Epstein, *The Assault that Failed: The Progressive Critique of Laissez Faire*, 97 MICH. L. REV. 1697 (1999). For an application of such an argument in the present context, see Balkin, *supra* note 8.

Professor Bernstein does not explain why we should tell plaintiffs to get thicker skins while wringing our hands over defendants who would rather quit than fight. Perhaps he means that antidiscrimination laws are so bad they are unjust, so that persons who settle claims brought under those laws do so under duress, but he makes no such argument explicitly. He does not attempt to show that laws against discrimination, or any particular interpretation of such laws, produce net social losses, nor does he discuss sanctions as a way of improving the cost-benefit ratio of these laws. As we will see in Part III, he is unwilling to condemn antidiscrimination laws altogether, so it is not clear why we should consider unjust whatever risk aversion those laws generate.

D. CAUSATION OR COVER?

Finally, there is a problem best described as causation. Professor Bernstein's stories state or imply that it is harassment law which drives employers to suppress speech. Absent laws against harassment, employers would be free to allow employees to engage in conduct such as sending lurid e-mails or downloading, sharing, or displaying pornography (p. 138).

Perhaps a large number of employers view work as a place for swapping porn, but I doubt it. Professor Vicki Schultz has argued recently that firms often rely on harassment policies to justify firing workers who violate a managerial norm of "asexuality," which holds that work is for work, not sex.[57] "In many of the cases," she writes, "it is difficult to sort out PC-like purposes from more conventional managerial motives."[58] In light of competition among lawyers, and cases such as *Mackenzie*, this claim is persuasive, as is her related claim that employees may use the language of sexual harassment to express opposition to (and perhaps even to understand) treatment they find objectionable, even if that treatment involves little sexual content.[59]

Professor Bernstein does not actually claim all employers would repeal anti-offense policies. Instead, he is for workplace pluralism, in which firms compete in labor markets partly on whether they have an offense-free or an offense-friendly workplace environment. Fair enough, but to the degree firms retain anti-offense policies to maximize productivity, nothing Professor

57. Schultz, *supra* note 46, at 2107.
58. *Id.*
59. *Id.* at 2152-58.

Bernstein advocates will actually increase the degree to which free speech flourishes at work.

The Court was concerned with risk aversion in *New York Times* and *Falwell* because it thought the defendants in those cases, and publishers generally, would want to publish right up to the line of legal liability. Move the line, and you produce marginal gains in speech. Professor Schultz's thesis calls that logic into question with regard to workplace expression, which means the *Times-Falwell* logic does not automatically apply in this context. One is left with a straightforward argument for private ordering, which I support, cast as an argument about free speech, which strikes me as too specific a principle to sustain Professor Bernstein's general argument for private ordering.

E. MEETING THE ENEMY

Professor Bernstein occasionally presents his story as a populist rejoinder to the assault of the pointy-headed intellectuals. In this subplot, free speech is "in dire need of a powerful, consistent, defense" from "radical scholars" and "'critical race' theorists" who "attack[] the First Amendment as a barrier to the government's ability to pursue sexual and racial equality" and whose attack is echoed by "influential liberal law professors" lodged in "their ivory towers at Harvard, Yale, Chicago, and other elite universities" (p. 14).

This is a bit much. Free speech is an elite idea. Professor Bernstein is not siding with the people and common sense as against intellectual foolery. He is simply takings sides in a quintessential spat among intellectuals—a spat in which the side he has chosen causes him to treat as anodyne abstractions comments an ordinary person would flatten you for making. Much of the book is taken up with stories of ordinary people who are chastised for caring less about free speech than Professor Bernstein does. That does not mean he is wrong, of course, but his populism is out of place.

II

Analytically, Professor Bernstein's stories advance an invariance thesis. This thesis holds that legal protection of speech is invariant to contextual facts, such as the purposes of places in which speech occurs and the social relationship between speakers and listeners. He states this thesis most clearly in Chapter

Two, asserting that "posting a nonobscene pinup or expressing a politically incorrect opinion is protected outside of the workplace, *and a mere change in venue from the sidewalk to the office cannot convert such protected speech into unprotected discriminatory action*" (p. 31, emphasis added).

Professor Bernstein's invariance thesis abstracts too much from the contextual facts courts rely on to relate expressive conduct to First Amendment values.[60] *United States v. Barnett*[61] nicely illustrates this point. Barnett was indicted for aiding and abetting others who cooked PCP.[62] He did so by selling drug-cooking recipes, which he would mail to buyers who sent him $10.[63] (The buyers found him through ads placed in *High Times* magazine.)[64] When the police arrested some of Barnett's customers, they found one of his mailings and traced it back to him.[65] Barnett moved to dismiss the indictment against him on First Amendment grounds.[66] The Ninth Circuit rejected this claim as a matter of law.[67]

Barnett tried to ground First Amendment protection in expression itself. That is not possible.[68] It is a trivial matter to show that not all expression is constitutionally protected speech, which means facts in addition to expression are relevant to constitutional protection.[69] The court thought Barnett's mail-order recipes had little to do with free speech.[70] If Barnett he had made a movie or published a novel in which the characters discussed the recipe and process for making PCP, however, one knows instinctively that the government could not enjoin distribution of the film on the ground that it might teach people how to make drugs.[71]

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60. For more on this point, see David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515 (2003).

61. 667 F.2d 835 (9th Cir. 1982).

62. *Id.* at 837.

63. *Id.* at 838.

64. *Id.*

65. *Id.* at 839.

66. *Id.* at 842.

67. *Id.*

68. *See* Robert Post, *Sexual Harassment and the First Amendment*, Working Papers 2000-13, p5, *at* http://www.igs.berkeley.edu/publications/workingpapers/WP2000-13.pdf (last visited Feb. 5, 2004).

69. *Barnett*, 667 F.2d at 842; *see also* Kent Greenawalt, SPEECH, CRIME, AND THE USES OF LANGUAGE 42 (1989) ("any assumption that all communications are covered by a principle of free speech would be ludicrous").

70. *Barnett*, 667 F.2d at 838.

71. *See* DeFillipo v. National Broadcasting Co., 446 A.2d 1036, 1041 (R.I. 1982)

What distinguishes these cases from each other? The text of the recipe cannot distinguish them, for it could be the same in each case. Distinctions therefore must rest on contextual facts that affect the social significance, costs, and benefits of expressive activity.[72] These facts must be related to the purposes the First Amendment serves and the ways different uses of expression in different contexts relate to those purposes.[73] Such analysis requires an adequate account of what a free speech principle is good for. Any such account will also define the limits of the principle, and thus of constitutional protection.

Professor Bernstein argues that protecting speech produces a "robust marketplace of ideas," which in turn "helps ensure the triumph of reason over prejudice, of enlightened public opinion over entrenched political and economic power" (p. 14). He advances three particular propositions. First, in America, "political and cultural innovations arise from the grass roots, not from the government;" "[f]reedom of expression is therefore necessary for economic and cultural progress" (p. 18).[74] Second, government cannot be trusted with the power to say what is right or wrong, true or false, fair or unfair (pp. 16-17). Third, "allowing politicians to decide the scope of freedom of speech is simply more dangerous than any damage the speech itself may cause" (p. 18).

In the context of the book as a whole, these propositions can be related to two claims. The first is that, within the core of a free speech principle, there should be no special rules penalizing speech that offends persons, or which they claim tends to perpetuate inequality. With regard to that claim, Professor Bernstein's account is persuasive. There is no Archimedean point outside social debates from which a judge or other official could

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(holding that, as a matter of law, a stunt performed on the Johnny Carson show did not incite imitation by plaintiff's son, in which he hanged himself); *cf.* Byers v. Edmonson, 712 So. 2d 681, 690 (La. 1998) (allowing plaintiffs to proceed on a claim alleging that the producers of the movie *Natural Born Killers* intended it to incite mass murder).

72. *Cf.* Virginia v. Black, 123 S. Ct. 1536 (2003) (distinguishing the burning of a cross on the property of a friend with no uninvited guests present from the burning of a cross in a neighbor's yard following a dispute).

73. *E.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995) (discussing need for clearer connection between First Amendment decisions and values).

74. This proposition is overstated. For example, the Court in Miller v. California, 413 U.S. 15, 35 (1973), pointed out that progress in arts and science did not grind to a halt during the Nineteenth century's stringent prohibition on the distribution of sexually explicit material. *Id.* That does not justify continuing the prohibition, but it is hard to argue with this historical point.

evaluate the substance of those debates, but allowing debate to run its course without government suppressing one side to help another is a surer way to advance the values of enlightenment, self-governance, and the reconciliation of competing interests than is any alternative approach.[75]

Because Professor Bernstein's story draws upon such varied contexts, however, he must also be read as asserting that there is a cogent free speech principle that extends to each context from which his vignettes are taken. Because the Constitution does not protect all expressive acts, however, this claim is not self-evident. Once one acknowledges that there are limits to a free speech principle, the government—meaning elected officials and judges—has no choice but to "decide the scope of freedom of speech." That means Professor Bernstein's second and third propositions are at best partly true—judges rule on the truth of expression every day in fraud and malpractice cases—and they are true only in the sense that judges *make* them true by declaring certain expressive conduct beyond the power of the government to regulate.

The real questions are when and why judges and other officials should decide when to treat Professor Bernstein's propositions as if they are true and when they should set those propositions aside in favor of other values. Unless there is a single principle coterminous with the constitutional protection of speech, which no one has ever found, then reasons limiting the domain of a free speech principle cannot come solely from within that domain. There must be some additional argument that allows the boundary to be drawn. It is on this point that Professor Bernstein's book has the most trouble, for he offers no such argument.

Professor Bernstein comes closest to confronting such theoretical concerns in his discussion of the work of Dean Stanley Fish. In connection with his argument that free speech doctrine has to have a purpose to be even minimally coherent, Dean Fish has argued that the First Amendment "is not a self-declaring statement and will assume the form given to it by powerful and authoritative interpreters."[76] Thus, like concepts such as "fairness" and "merit," the idea of "free speech" does not sit "above

75. *Cf.* Charles Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 732-35 (1998).

76. Stanley Fish, THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING, TOO 16 (1994).

the fray, monitoring its progress and keeping the combatants honest."[77] Instead, any principle of free speech "is right there in the middle of the fray, an object of contest that will enable those who capture it to parade their virtue at the easy expense of their opponents: . . . we're for free speech and you are for censorship and ideological tyranny."[78]

Professor Bernstein responds to this line of argument in two ways. First, he characterizes it as a claim that judges are not "Platonic guardians immune from political motivation" (p. 20). That reading is partly right, because judges are the principal authorities who give the First Amendment its authoritative meaning. That is not the important part of the argument, however, nor is it one that can be dealt with, as Professor Bernstein tries to do, by pointing out that judges are socialized to "fairly enforce constitutional rights" so that "their self-image [is] bound up in their ability to eschew personal prejudices and act fairly" (p. 20). Judges no doubt try to see things impartially but, as Justice Cardozo said, "[they] can never see them with any eyes except [their own]."[79]

More importantly, no matter how hard judges try to be neutral in enforcing free speech rights, they will not act in a politically neutral manner because (and this is Dean Fish's point) free speech is itself simply one of many political positions. It has no greater claim to priority or neutrality than any competing view. If the text or original meaning of the First Amendment were clear and self-executing then neutrality might conceivably be possible, but neither the text nor the history of the clause tell judges very much about how to resolve current disputes

To this broader point Professor Bernstein has an unusual reply. He says "if we accept Fish's view that . . . everything comes down to politics, then surely there can be no such thing as 'dignity' or 'equality' either" (p. 21). That is true, but it repeats the point rather than rebutting it. Dean Fish said just that himself. At this point—just as he comes toe to toe with his ideological opponents—Professor Bernstein ducks. Rather than a knockout punch, he lets fly a burden-shifting argument: "Those who argue that purportedly illusory notions of freedom of speech should be sacrificed to equalitarian commitments that are based on notions at least as delusive cannot possibly explain why" (p. 21).

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77. *Id.*
78. *Id.*
79. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).

This response is not persuasive. There are plenty of such explanations, some of which deserve thoughtful responses.[80] At worst, because Professor Bernstein treats the domain of protected speech as self-evident, without discussing the choices necessary to support a principle and define its limits, his opponents could justly respond: "and vice versa." This gap in his argument is not much of a problem within the doctrinal domain of the free speech principle. In dealing with cases in which doctrine is not currently on his side, however, such as in hostile workplace environment claims, the gap means that the book asserts conclusions rather than makes arguments.

Professor Bernstein's treatment of Dean Fish's arguments shows that even within the domain of protected speech one cannot establish conclusively that it is better to favor marginal gains in liberty over marginal gains in equality. Though within the set of expressive conduct we denominate the "marketplace of ideas" I agree with Professor Bernstein, candor compels the conclusion that this preference does not reflect some well-defined relation between speech and progress.[81] No one on either side has comprehensive data on the marginal costs and benefits of different rules. I think the libertarian side has much the better of the anecdotal evidence, but that is not conclusive proof.

The autonomy-based, nonconsequentialist aspect of the argument for liberty as against equality has a very hard time specifying what should count as legal harm.[82] This aspect of the argument cannot draw the practical distinctions that are important to the working of the real world. With respect to its consequentialist side, this preference is a bet.[83]

This bet seems safe within the doctrinal marketplace of ideas, because it is a characteristic of that social space that courts claim to eschew cost-benefit analysis. Within the marketplace, "one man's vulgarity is another's lyric,"[84] "there is no such thing as a false idea,"[85] falsehood must be tolerated to avoid "chill,"[86] and the cost of maintaining order is irrelevant to the obligation

80. *E.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

81. *See supra* note 74.

82. *See supra* note 3.

83. *Id.* at 838. Or, as Justice Holmes would say, an experiment, as all life is an experiment. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

84. Cohen v. California, 403 U.S. 15, 25 (1971).

85. Gertz v. Robert Welch, 418 U.S. 323, 339 (1974).

86. *Id.* at 341.

to protect speech.[87] Occasionally, however, one gets a peek behind the curtain. These rules obtain because speech within the marketplace "matters,"[88] an assertion that makes sense only if there is expression that does not "matter" and if courts can distinguish between the two.

The refusal to weigh costs and benefits within the marketplace of ideas is an illusion, however. Courts eschew such analysis for two reasons. First, as a general matter, they have already weighed the costs of benefits of protecting different types of expressive behavior in defining the parameters of the marketplace.[89] It is easy to see this point if one looks at the doctrinal descriptions of exceptions to the free speech principle. *Chaplinksy* defines "fighting words" as expressive acts "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[90] Obscene speech is that patently offensive speech which appeals mostly to prurient interest in sex (cost) without adequate offsetting social value (gain).[91] By looking to the immediacy of harm the *Brandenburg* incitement test adopts a part of expected cost analysis.[92]

Second, as a particular matter, simply by understanding the social context in which a case occurs, in order to decide whether to treat the case as within a free speech principle or outside of it, courts engage in a sort of unspoken, quick-look cost-benefit analysis. *Barnett* illustrates the point. Had the recipe been in a novel, the court probably would have trotted out various stock phrases about free speech. Cost-benefit analysis would not be absent from such an opinion, however, it would simply have been done categorically, by treating the case as one involving a novel rather than just a recipe. The point is made more explicit in cases that limit the free speech principle by deciding when a

87. Forsythe County v. Nationalist Movement, 505 U.S. 123 (1992) (invalidating a rule allowing government to take the content of expression into account in setting the fee for parade permit based on the expected cost of maintaining order).

88. *Gertz*, 418 U.S. at 341.

89. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 9-11, 34 (1986).

90. Chaplinksy v. New Hampshire, 315 U.S. 568, 572 (1942).

91. Miller v. California, 413 U.S. 15 (1973).

92. Brandenburg v. Ohio, 395 U.S. 444 (1969). Though it deviates from that analysis by not taking into account the magnitude of the harm, I suspect that in actual practice magnitude will count when courts consider potential harm from expression. *Cf.* United States v. Progressive, Inc., 467 F. Supp. 990, 995-96 (D. Wis. 1979) (noting the magnitude of potential harm from the publication of an article describing the workings of a hydrogen bomb as a reason to enjoin publication).

defendant indicted for aiding and abetting tax evasion is entitled to a First Amendment jury instruction.[93]

For this reason, any argument over the domain of a speech principle has to take the costs and benefits of protection into account. Those costs and benefits vary with context, so context matters and the invariance thesis is therefore not a reliable basis for making decisions. Professor Bernstein is worried about speech restrictions in the workplace, so workplace expression is a good example of this point. Should workplace expression be treated as part of the marketplace of ideas, and therefore subject to the judicial choice not to evaluate the costs and benefits of regulating that expression?

This is a hard question, to which there are multiple answers. Sometimes, as in a gallery or other space devoted to deliberating about expression, the answer should be "yes." I doubt any employee could prevail on a complaint regarding the hanging of the *Naked Maja* in a public space in the Student Center which, it will be recalled, is where Penn State moved it. Why should we consider galleries part of the marketplace of ideas? Because extending the reach of antidiscrimination laws to galleries would impair too much their ability to facilitate the kind of critical expressive interaction the First Amendment values. The cost, in other words, would be too high.[94] In such workplaces, Professor Bernstein is quite right: offended employees need either a thicker skin or a new job. The same point would extend to hiring for the theatrical aspects of a theme restaurant (p. 45).

Apart from spaces devoted to the sort of expressive interaction the First Amendment values, however, the marginal costs and benefits of protecting expression in the workplace probably differ from the marginal costs and benefits of protecting expression in the marketplace of ideas. Part of the difference is that the benefits to protecting speech in nonexpressive workplaces may be lower than the benefits to protecting speech in the marketplace.[95] As noted earlier, employers who do not produce speech for a living may like restrictive policies. At a minimum, we

93. United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983); United States v. Freeman, 761 F.2d 549 (9th Cir. 1982); United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978).

94. For a thorough discussion of this point in the context of the relation between antiharassment laws and free speech, see Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment is Wrong*, 19 CONST. COMMENT. 391 (2002).

95. *See id.*

should presume that profit-maximizing employers will not let expression interfere too much with work. In such cases, the marginal gain from *New York Times*-like rules will be lower than it presumably is within the marketplace.[96]

In addition, workplaces involve hierarchies the marketplace of ideas (at least notionally) does not. In the marketplace, people act for their own account and on a nominally equal footing. Others in the market will be richer or smarter than you, but in the marketplace of ideas no one can order you around. You can be mocked or disregarded, but not fired or demoted. That is not true at work. Ever laugh at a prospective employer's bad joke?

In light of these facts, on average employees probably do not engage expression in the workplace in the same way they engage expression in the marketplace.[97] Teeth-grinding frustration and reduced productivity are relatively more likely responses to expression at work than they are to expression seen at home or on the street. So even if courts extend First Amendment protection to all workplace expression, it does not follow that the presumed benefits of a free speech principle will be the same at work as in the marketplace. Employer profit motives and workplace hierarchies give reason to doubt that expression will be the subject of the kind of critical interaction that produces the benefits Professor Bernstein associates with free speech. If and to the extent this point is correct, one cannot simply extend the principle into the workplace on the ground that the marketplace justifications hold in the workplace, too.

What about the cost side of the ratio? Take another of Professor Bernstein's cases, *Aguilar v. Avis Rent A Car Systems, Inc.*[98] That case involved an Avis supervisor who addressed all Hispanic employees, but no white employees, as "motherfucker."[99] Such a personal insult would not be protected speech outside the workplace,[100] so even under the invariance thesis it should not be protected within the workplace. (Though the book is not explicit on this point, I do not read Professor Bernstein as disagreeing with this conclusion.)

Why doesn't the freedom of speech extend to "motherfucker" as a form of addressing a particular person? Following

96. *See supra* Part I(D).
97. For more on this point *see* Post, *supra* note 68.
98. Aguilar v. Avis Rent A Car Sys., Inc., 21 Cal. 4th 121 (1999).
99. *Id.* at 126.
100. Bern v. Board of Comm'rs of Jackson County, 330 F.3d 1275, 1285 (10th Cir. 2003).

the logic of *Chaplinsky,* presumably it is because (i) as a social matter the phrase is likely to be understood as an insult, (ii) it therefore does little to advance the values the First Amendment upholds,[101] and (iii) there is therefore no reason to protect it (little if any gain) and a good reason not to protect it (genuine, if not large costs). Professor Eugene Volokh, whose work on these topics blazed much of the trail Professor Bernstein pursues, offers analysis consistent with this argument.[102]

In the workplace context, the gain remains the same—little or nothing—but the cost may be higher. Professor Bernstein treats employee reactions to offensive speech as mental phenomena (p. 155), but one could plausibly cast employee offense in economic terms. Genuine rage, distress, and offense are emotionally costly. An employee who experiences them at work incurs a higher cost of working than an employee who does not. At the same nominal wage, such an employee earns a lower *effective* wage than an employee who does not experience these costs. If a supervisor refers to all Hispanic employees as "motherfucker" and all white employees by their names then, all else being equal, the Hispanic employees earn a lower effective wage than the white employees. That is a more direct cost than one finds in cases involving offense from marketplace speech. If one cared to make it, a general argument for freedom to discriminate in employment policies is a better match for the *Aguilar* case than is a free speech claim.

Professor Bernstein does not argue that the supervisor's actual language was protected speech, but he offers no reasons why it should *not* be protected, so one wonders how his theory can justify his concession. If we assume he would adopt the sort of cost/benefit reasoning exemplified by *Chaplinsky* and adopted by Professor Volokh, then we must ask why this concession should be limited to face-to-face cases. Should it really matter if the supervisor called all the Hispanic employees together and addressed them *all* as motherfuckers?[103]

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101. There *is* a truth condition for "motherfucker" as a form of address, and it is the kind of fact a court could actually find, but that is not what the case is about.

102. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992), *available at* http://www1.law.ucla.edu/~volokh/harass/permissi.htm (last visited Feb. 5, 2004).

103. Professor Bernstein does argue that the trial court and courts of appeal erred by enjoining Avis employees from using racial slurs "directed at" or to "descriptive of" Hispanic employees (p. 33). He worries the injunction is unconstitutional because it might chill speech that would turn out to be constitutionally protected. If one views prior restraint doctrine as basically an error-cost analysis in which a mistake in restraining pro-

To take a different example, what if a supervisor decides to mimic a wrestler on television and so walks around the office grabbing his crotch and yelling "suck it!"[104] In a one-on-one encounter this might be a case of quid-pro-quo harassment, though if the supervisor were merely mimicking the wrestler there would be no demand. If others were in the room, the cost would be lower because a reasonable employee would be less likely to perceive a demand if others were present. The employee might not be sure, however, especially if she was the only woman in the room, or if the supervisor eyeballed her when he grabbed his crotch, etc., so there is still some uncertainty, which is an emotional cost to the uncertain employee.

Does the value of the grab-and-yell performance increase with the size of the audience? That would depend on several factors. What sort of workplace is it? How far does the performance deviate from baseline, efficiency-based restrictions on expression in that workplace? Do additional members share in the wrestling fantasy? Are they annoyed at being distracted from work? Are they repulsed by the image of the speaker in wrestling tights, or engaging in oral sex?

I do not suggest the answers to these questions are obvious. My point is rather that they are difficult and socially complex questions, which the invariance thesis does not address adequately.[105] If a court were to treat the grab-and-yell case differently depending on whether there were one or more than one person in the room, it would have to be on the ground that the marginal audience member altered the equation enough to justify the choice to invoke the rule that courts will not engage, nor allow legislators to engage, in cost-benefit analysis involving speech. If the probability of critical interaction with expression is already lower than in the marketplace, however, and the ex-

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tected speech is weighted more heavily than a mistake in allowing unprotected speech into the market, then the different ratio of costs and benefits to workplace expression calls into question whether the ordinary marketplace rules should be applied in the workplace. Again, the point is not that they necessarily should or should not, but that the point has to be argued, not asserted. Argument is particularly important in *Avis*, where the injunction was based on a liability finding based on unprotected expressive activity. Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994), is at least relevant here, but it is not discussed in this book.

104. *See* Suders v. Easton, 325 F.3d 432, 437 (3d Cir. 2003).

105. *Cf.* Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 8-9 (1994) (noting the need for contextual judgments distinguishing protected expression from threats).

pected cost higher, this choice is harder to justify in the workplace context than it would be in the marketplace.[106]

Against these claims, one might argue that employees spend so much time at work they have to pursue truth there or they will never have the time to do it. Note, however, that this is a version of what equality advocates call the captive audience rationale—civility has to be enforced because those offended by speech have no choice but to go to work. Pick your conclusion; the premise is the same. People have to work and spend a lot of time there, ergo: (a) they must be free to offend or (b) they must be free from offense. Professor Bernstein disparages the "captive audience" argument (p. 32), but his attack relies on the invariance thesis which, as we have seen, is not a reliable basis for deciding cases. For the reasons stated in this Part, more explicit analysis is needed.

One could also reply that if courts increase constitutional protection for workplace expression then at least any restrictions will be imposed by a private employer rather than the government (p. 19). Except where the employer's business is to market expression, however, speech gains from such a move would probably be secondary to and derivative of general liberty gains. In many cases, the employer's general freedom to run its own business will bear an attenuated and perhaps no relation to the purpose of the First Amendment. I address this point in the next Part.

III

I have been writing about the freedom of speech so far, which seems fair given that this is the nominal topic of Professor Bernstein's book. The book is not really about speech as such, however. It is about freedom from governmental regulation.

This point can be seen in one of Professor Bernstein's alternative statements of what the First Amendment is for. "[T]he underlying rationale for the First Amendment," he says "is to protect the private sector from government regulation of speech" (p. 19). The "private sector" language suggests the book aims to use free speech ideology to advance a general libertarian

106. Employees may adapt to legal rules, so if the law treats workplaces as public forums employees might come to see them that way, but one still faces efficiency-based employer restrictions on expression, so it is not clear how much the law could influence the manner in which employees relate to workplace expression.

agenda. Because most social institutions are constituted and operated in significant part through expression, free speech rhetoric can provide a useful wedge to expand the domain of private ordering and reduce governmental regulation.

On this reading, the real point of Professor Bernstein's story is that the rhetoric of free speech is a potentially effective way of co-opting support for libertarian ideas too quickly rejected on their economic merits. By employing the marketplace metaphor speech defenders endorse, Professor Bernstein hopes to use speech as a wedge to revive notions of economic liberties, freedom of contract, and private ordering. It is easiest to see this move in the expressive association context. If all associations are expressive in some sense, then those that speak get protection for their speech, and those that don't speak get protection from compelled speech, so the First Amendment forbids state regulation of any social practice that brings people together.

Among other things, this argument suggests Title VII is unconstitutional and should be struck down.[107] Professor Bernstein does not go that far, however. Apart from advising Americans that "if civil liberties are to be preserved" they "will need to develop thicker skin" (p. 165), he asks only for "a presumption of freedom of association," that public accommodation laws be revised so they apply to only "truly public commercial entities," that states do some statutory tinkering to accommodate religious belief, and that courts not favor antidiscrimination laws when those laws conflict with free speech (pp. 162-64).

Indeed, and to his credit, Professor Bernstein seems to know the Civil Rights Movement is a weak spot for the libertarian case (p. 6). There is good if not indisputable evidence that Title VII produced significant gains for blacks relative to an alternative approach that only would have eliminated Southern employment laws that made it hard to hire blacks.[108] Once one concedes that government regulation can disrupt illiberal and socially undesirable employment practices, however, then any purely libertarian critique of such laws is likely to be incomplete. To the extent one cares about welfare, whether state incursions on private ordering are desirable becomes a measurement problem to be considered, rather than an article of faith to be proclaimed.

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107. *See* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000).

108. The evidence is surveyed in Donohue, *supra* note 3.

Basing such a general libertarian argument solely or even largely on a principle of free speech makes this incompleteness problem worse and actually weakens the libertarian case. Expression is present in virtually all social activity, but the Constitution protects only a fraction of expressive activity. The wedge strategy states excessively broad premises and then deals with counter-examples simply by conceding without analysis that such cases are not protected speech. When one cannot say why unprotected expression is not protected, however, one cannot fully explain protection, either. The result is to make the case for free speech seem shakier than it is without gaining much if any ground on economic liberties.

Professor Bernstein's devotion to liberty is admirable. The New Deal settlement is no more sacrosanct than anything else, and it should not be treated as if it is. Many who would salute the skeptical relativism behind the proposition that "one man's vulgarity is another's lyric"[109] would scream bloody murder at the notion that "one man's maximum hours law is another's anti-immigrant protectionism," or "one man's minimum wage is another's unprincipled exaction." There is no obvious *logical* difference among these statements, however, and the philosophical and economic case for freedom from government control in economic matters is much stronger than is commonly acknowledged. In other work, Professor Bernstein has been a powerful advocate for these views.[110]

Nevertheless, as I hope this discussion shows, though our current legal culture undervalues economic freedoms, those freedoms have to be defended on their own terms. Even if one believes that well-intentioned antidiscrimination laws have served their useful purpose of shattering government-reinforced discrimination practices and are now merely spoils systems that should be pared back or repealed, that argument has to be made on its own merits. No free speech principle can prove such a general point. It is therefore a mistake to try to use a free-speech principle as a wedge to gain acceptance of economic freedom. The cost in reason is simply too high.

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109. Cohen v. California, 403 U.S. 15, 25 (1971).

110. *See, e.g.*, David Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

CONCLUSION

If I were Professor Bernstein, I would reply to this review by saying the author objects more to the polemical form than to this particular book. There is some truth to the point, though I believe works written to persuade a general audience require even greater care in some respects than works written for specialists.

Regardless what one thinks of academic polemics in general, however, in my view Professor Bernstein's rhetorical approach contradicts the principle of individual autonomy the book seeks to vindicate. Professor Bernstein's narrative seems designed to persuade more by appealing to the reader's preexisting sentiments than to reason. That is an oddly communal strategy, which ultimately conveys the impression that the libertarian position on the issues Professor Bernstein discusses is weaker than it actually is.

I will return to *Mackenzie* one last time to illustrate this point. The plaintiff in *Mackenzie*—the victim in Professor Bernstein's story—was actually trying to extend the tort of deceit to employers who make representations that allegedly persuade at-will employees to keep working. Had he succeeded, his theory would have limited the scope of the at-will doctrine and possibly given rise to the sort of "fraud by hindsight" claims one sometimes sees in securities markets.[111]

Relying in part on Professor Richard Epstein's *In Defense of The Contract At Will*,[112] the Wisconsin Supreme Court rejected this new theory. The Court emphasized that employment at-will creates flexibility that benefits both employers and employees, and it stressed that "contract law is based upon the principles of free will and consent, whereas tort law is based upon the principles of risk-sharing and social duties."[113] In other words, *Mackenzie* is a success story for Professor Bernstein's cause. I cannot see what is gained by casting it as a PC travesty to better fit the narrative.

More generally, though narrative may contribute to analysis, it cannot substitute for it.[114] If and to the extent the libertar-

111. The phrase is Judge Friendly's. Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978).

112. 51 U. CHI. L. REV. 947 (1984).

113. Mackenzie v. Miller Brewing Co., 623 N.W.2d 739, 749 (Wis. 2001).

114. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

ian-utilitarian position enjoys a comparative advantage over opposing views, that advantage is more likely to be realized through candid and closely reasoned argument than through storytelling.[115] I like to think the position does enjoy such an advantage. Even if it doesn't, however—even if Dean Fish is right and it is all just a rhetorical struggle to grab power one can then lord over others—I still oppose the move toward libertarian storytelling. If nothing else, it seems a bad tactic. It is hard to criticize fact-blurring narratives that stress pathos over logos when dealing in such stories yourself.

115. I think of it as the "Libutarian" position, but that is an awfully ugly usage.