
YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES

FROM ANTIDISCRIMINATION LAWS BY DAVID BERNSTEIN

REVIEWED BY THOR HALVORSEN*

A judge in Pennsylvania ruled that by printing Christian-themed verses on company paychecks, a trucking company had “harassed” a Jewish employee. In Ohio, a Dairy Mart manager was fired for removing from store shelves *Playboy* and other periodicals that had offended her Christian sensibilities. With the support of a religious conservative foundation, she sued for religious and sex discrimination, claiming that the magazines subjected her to a “hostile workplace environment.” The plaintiff received hundreds of thousands of dollars in an out-of-court settlement. In California, Krissy Keefer, a self-described “radical feminist,” filed a complaint against the San Francisco Ballet for “height and weight discrimination” when her daughter Fredrika was not admitted to ballet school. The school requires successful candidates to be healthy children with a “well-proportioned body,” “supple spine,” “slender legs and torso”; Fredrika was judged not to meet these requirements. The matter of Fredrika’s corpulence versus the ballet company’s First Amendment rights is still pending and may cost the Ballet the grant it receives from the city.

In contemporary America, an increasing number of citizens, judges, and government officials seem to believe that people—especially women, minorities, and other “historically disadvantaged” groups—have a right not to be offended and that this right supercedes the freedom of speech and association rights of others. As this belief gains wider acceptance, it threatens to have tragic consequences for the First Amendment to the U.S. Constitution. David Bernstein’s magnificent book, *You Can’t Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (CATO Institute, 2003), addresses this urgent problem by analyzing its historical, social, and legal roots and by stressing the exceptional importance of resolving this conflict to the advantage of liberty.

As a matter of full disclosure, I should mention that in his book David Bernstein calls the Foundation for Individual Rights in Education (FIRE)—where I was CEO—an effective force countering the assault on civil liberties. I have never met or spoken to Mr. Bernstein; regardless of his praise for FIRE, he has produced a wonderfully written, profoundly significant, and timely work.

Bernstein, a George Mason University law professor, accurately defines the problem as the trend toward redefining civil liberties to include protection from any conceivably discriminatory behavior and offensive speech. According to Bernstein, this redefinition creates an arena where new “civil liberties” conflict with traditional constitutional freedoms: freedom of speech, freedom of association, and freedom of religion. The clash

between old and new “liberties” has produced laws, regulations, and government actions that impinge on the freedom of expression protected by the First Amendment, jeopardizing, for example, a club’s right to choose its own members or an artist’s right to display provocative and controversial images.

Although the author is not a trained historian, he begins the book with a concise and comprehensive history of how the concept of discrimination developed as a threat to civil liberties. Bernstein opens by discussing the insight and consistency of the civil rights champions who, in 1945, opposed laws forcing the private sector to engage in fair employment practices. *The Nation* publisher and NAACP cofounder Oswald Garrison Villard insisted that it was best to “rely on the force of slow but steadily growing public opinion,” instead of government coercion, to end racial discrimination in the private sector. In 1959, Hannah Arendt, no friend of bigotry and racial intolerance, observed that “discrimination is as indispensable a social right as equality is a political right.” Civil rights organizations at the time understood the shortsightedness of eviscerating civil liberties in the name of civil rights; this explains why the American Jewish Congress and NAACP fiercely opposed hate speech laws.

Bernstein explains that the 1964 Civil Rights Act compromised freedom of association by making it illegal for certain businesses to engage in racial discrimination. Bernstein argues that the Act did not end discrimination and that *The Nation*’s publisher was right in his conviction that public opinion is an infinitely better alternative to force; he nevertheless acknowledges that “within a few years of the passage of the 1964 Civil Rights Act, racial exclusion and segregation by hotels, restaurants, theatres, and other commercial spaces virtually disappeared,” and that by 1974 employers were aggressively recruiting minority job applicants. With the dismantling of the racial caste system, new groups (among them senior citizens, gays, and the disabled) began to use civil rights terminology to further their own agendas; in the process, discrimination in all of its forms came to be considered a moral evil.

From the 1970s onward, antidiscrimination laws began to seep into every nook and cranny of local, state, and federal government; a zealous bureaucracy of self-appointed “human rights” practitioners began to root out the perceived evil of discrimination without regard for the consequences. In their fervor, they tried to weaken the freedoms that would protect an individual accused of discrimination—freedom of speech, association, and conscience. The dogmatic demonization of discrimination was so effective that even the first President Bush character-

ized discrimination as a “fundamental evil” in a 1990 address.

Bernstein’s book catalogues the myriad ways anti-discrimination law conflicts with constitutionally-protected freedoms, offering cases ranging from religious primary schools to public colleges, from political speech to artistic expression, and from workplace harassment law to privacy rights. Bernstein provides dozens of carefully footnoted examples, at every level of government, where the kindly inquisitors have struck against civil liberties.

The extent to which artistic freedom has been limited by discrimination laws becomes clear when we note that Francisco Goya’s *Naked Maja* was found to create a hostile environment for a Penn State English professor. Meanwhile, pictures of interracial kissing shown in an art class so offended a University of Southern Florida college freshman that she later accused the “African-American male” in the photograph of “sexual harassment.” In this day and age, a plaintiff can win a \$125,000 judgement for alleging that “misogynistic” rap lyrics and sexually charged music videos create a “hostile environment” in the workplace.

We can see the extent to which political speech and freedom of the press are threatened by antidiscrimination law in cases such as the one in which the director of the St. Paul, Minnesota Human Rights Office sought to punish the St. Paul *Pioneer Press* for publishing a cartoon, charging that it created a “hostile public environment” that “discriminated” against black athletes. It made no difference that the newspaper’s cartoon actually protested the perceived exploitation of black athletes by the University of Minnesota.

“Hostile work environment” regulations threaten free expression in the workplace, but rarely with any identifiable consistency. Bernstein holds forth on various contradictory and bewildering cases, noting in particular how *Playboy* was found to create a hostile environment in Alaskan firehouses while it enjoys First Amendment protection at Los Angeles firehouses and prisons.

Bernstein’s book contains a first-rate chapter on the phenomenon of campus speech codes, analyzing their genesis and charting their proliferation at hundreds of universities. College and university administrators’ attempts to create an inoffensive campus climate free from “discriminatory language” have led to “hostile environment”-motivated restrictions on academic freedom and freedom of speech. Worse still, the selective enforcement of speech codes entails the patronizing notion that some individuals, because of their color or gender, are simply too weak to study in an environment where an honest disagreement may offend them. We are teaching the next generation that the proper response to speech one doesn’t like is repression and censorship, not vociferous debate and moral witness.

Bernstein’s discussion rightly recognizes that private and sectarian colleges and universities have a right to limit the free speech and association rights of their students. However, Bernstein mistakenly analogizes religious universities with elite private universities when he suggests that the latter, when “controlled by politically correct administrators,” can enforce speech codes at will. In fact, while private universities may not have to honour the constitutional protections of freedom of speech, they may not violate common law.

While religious institutions announce to incoming students what they can expect in the matter of their free speech rights, elite private institutions overwhelmingly advertise themselves in glowing terms as centers of vigorous debate, unfettered discussion, and academic freedom. Cal Tech, Harvard, and Northwestern, for example, do not advertise themselves as politically biased institutions whose partisan speech codes deprive students of their free speech rights—an omission that may well constitute actionable false advertising and breach of contract. Speech codes at elite secular institutions should only get a free pass when these schools make it clear to their current and prospective students that they enjoy fewer free speech rights on campus than students at the local community college.

Although verbal behavior that offends or hurts people’s feelings is an inevitable (if undesirable) by-product of a free society, it would be disastrous to allow government to try to police offensive expression. One undeniable fact of American history is that the civil rights movement could not have happened without the right to free speech. Bernstein stresses that advocates for the governmental policing of citizens’ thoughts and attitudes should remember Albert Jay Nock’s admonition that whatever power you give the State to do things *for* you carries with it the equivalent power to do things *to* you.

During the past ten years, the First Amendment has been battered by the civil rights establishment. Sadly, the censors on the authoritarian left have sometimes joined with religious conservatives in a vision of a world where only their ideological enemies are silenced. Ironically, as Bernstein notes, it is Christians, particularly in school and university settings, who are increasingly the targets of anti-discrimination zealots.

The First Amendment needs philosophically and strategically consistent advocates. The same law that protects a Dairy Mart’s right to dismiss an employee for refusing to sell *Playboy* magazine will also protect the Dayton Christian School’s right to fire a teacher who flouts church doctrine and violates the “Biblical Chain of Command.” The First Amendment will also protect a religious landlord who refuses to rent to tenants whose behavior could, in the landlord’s opinion, place her eternal soul at risk.

Despite having good reason for pessimism, Bernstein is immensely cheered by the *Boy Scouts v. Dale* (2000) decision, in which the Supreme Court granted an expressive organization the right to be selective in its membership. While this decision will protect the Ku Klux Klan's right to maintain its racist, sexist, anti-Semitic profile, it will also protect forward-thinking organizations' associational rights. Bernstein sees the *Dale* decision as a new bulwark for pluralism and the safeguarding of diverse viewpoints.

Bernstein's chapter "The ACLU and the Abandonment of Civil Liberties" gives credit to that organization for years of defense of civil liberties. It also singles out the ACLU for failing to protect civil liberties and too often spearheading the assault on them. He lists internal schisms that have weakened the organization, noting in particular that state chapters and the national office cannot agree on issues of discrimination. According to Bernstein, the ACLU has become fissured and ideologically incoherent, some chapters protecting the Bill of Rights, others privileging a dubious civil rights agenda over civil liberties. It is worth noting that ACLU President Nadine Strossen, whom the book celebrates, contests some of Bernstein's claims. For example, Bernstein states that the ACLU gave an "honorary position" to censorship advocate Mari Matsuda, a Georgetown University law professor. Strossen denies the accuracy of that description.

Bernstein concludes by passionately reminding the reader that civil liberties must remain inviolate. He asks us to look at the frightening experiences of other English-speaking democracies where the thought police have taken control of public policy, and calls on American citizens to defend their precious civil liberties from similar erosion.

This is a persuasive, well-researched, thoughtful, and cutting-edge study. It deserves serious consideration by all friends of liberty, regardless of their political, ideological, or religious persuasions.

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