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# THE SECOND AMENDMENT’S SAFE SPACE, OR THE CONSTITUTIONALIZATION OF FRAGILITY

MARY ANNE FRANKS\*

## I

### INTRODUCTION

Contempt for vulnerability is the defining characteristic of contemporary American conservatism. Conservatives ridicule diversity initiatives, government assistance, antidiscrimination policies, the #MeToo movement, worker protections, universal health care, family leave, forgiveness of student debt, and other progressive concepts as obsessions of the fragile and the dependent. The contempt for vulnerability has been on vivid display in the campus free speech crisis narrative, which bemoans the rise of “snowflake” students demanding safe spaces from conflict and discomfort.<sup>1</sup> According to proponents of this narrative, snowflakes are dangerous as well as ridiculous, and their pernicious influence extends beyond college campuses. Conservative critics warn that “Antifa” and other extreme elements of the left seek to silence and disarm dissent everywhere, by force if necessary.<sup>2</sup>

There is truth in the dangerous snowflake narrative, but not the truth that its promoters think. It is true that impressionable individuals who are taught to fear ideas that they do not understand or people who disagree with them pose a threat to society. The danger is particularly acute when these individuals come together and develop a group identity based on their fears. When such a group decides that it is imperative to protect its identity at all costs, it becomes, in effect, a cult.

But college students protesting controversial speakers or requesting content warnings are not that cult. Neither are progressives demanding accountability for sexual abuse, racist policies, or economic injustice. If there is a group truly determined to make the entire world into their personal safe space, no matter the cost, it is the self-identified Second Amendment activists too frightened to

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This Article is also available online at <http://lcp.law.duke.edu/>.

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1. E.g., Chris Quintana, *Colleges Are Creating ‘a Generation of Sanctimonious, Sensitive, Supercilious Snowflakes,’ Sessions Says*, CHRON. HIGHER EDUC. (July 24, 2018), <https://www.chronicle.com/article/Colleges-Are-Creating-a/243997> [<https://perma.cc/FD2N-ND6U>].

2. E.g., Nicholas Bogel-Burroughs & Sandra E. Garcia, *What is Antifa? Explaining the Movement to Confront the Far Right*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/article/what-antifa-trump.html> [<https://perma.cc/WTR6-E7YW>].

venture into a home, school, grocery store, movie theater, church, or public area without being armed for battle. The group that demands more people to have more guns in more places is ruled by a wide array of fears—of mass shooters, terrorism, home invasions, natural disasters, same-sex marriage, feminism, abortion, changing racial demographics, political disagreement, democracy itself. The threat to civil liberties and public safety posed by even the most intolerant college student pales in comparison to the extremists advocating for armed demonstrations, guns in schools, expanded open carry permissions, and Second Amendment “sanctuary cities,” all in the name of the Constitution. The “dangerous snowflake” narrative not only baselessly maligns college students and progressive activists, but diverts attention from the genuinely repressive and deadly excesses of Second Amendment activists.

This Article counters the myth of liberal fragility promoted by critics of snowflakes and safe spaces. Close analysis of these tropes reveals that while intolerant fragility is a real threat to American society, it is conservative extremists using the threat of violence to express their fear of differing viewpoints who most clearly embody this threat. Conservatives’ fearful fragility is most dramatically illustrated in their increasing attempts to use the Second Amendment to suppress the First.

## II

### THE MYTH OF THE SNOWFLAKE STUDENT

The condemnation of “safe spaces” played a key role in the national handwringing that began in 2015 over the supposed fragility of college students. The dangerous snowflake narrative is reminiscent of previous controversies that have shaken up higher education, including the student protest movement that swept American campuses in the 1970s and the political correctness debates of the 1990s. As with those clashes, the responsibility for the allegedly infantilized and repressive state of campus discourse is laid squarely at the feet of “the left”: feminists, critics of racial injustice, advocates for same-sex rights, and opponents of war and police brutality. In an echo of the anti-PC narrative, the scale of the actual conflict is often obscured by imprecise terminology<sup>3</sup> and reliance on sensationalized anecdotes. Yet another similarity is how the criticism of liberal fragility is often disguised as concern for the resilience of young minds, even as it often devolves into mockery.<sup>4</sup> Like prior educational controversies, the flash points of the current safe space discourse cross political lines and extend beyond college campuses.

To the extent that the backlash against the student protest movement of the 60s and 70s diverges from the political correctness debates of the 90s, the current dangerous snowflake narrative more closely resembles the former. The

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3. Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 1992–93 (2017).

4. See, e.g., Jonathan Chait, *Not a Very P.C. Thing to Say*, N.Y. MAG. (Jan. 27, 2015), <https://nymag.com/intelligencer/2015/01/not-a-very-pc-thing-to-say.html> [<https://perma.cc/ZZ3Y-XJBS>].

contemporary “snowflake,” in contrast to the more one-dimensional sensitive PC wimp, is simultaneously ridiculed as weak and vilified as dangerous: critics are as likely to characterize leftists as puppy-hugging snowflakes as black-shirted “Antifa.” Similarly dramatic rhetoric about dangerous leftists helped justify the use of force against student protesters in the Vietnam era, including the fatal shootings of students on the Kent State and Jackson State campuses in 1971. Indeed, one Republican lawmaker in Michigan invoked the Kent State shootings in response to the 2017 protests at University of California-Berkley over the invitation of rightwing provocateur Milo Yiannopoulos to speak on campus.<sup>5</sup> Dan Adamini, who serves as secretary of the Marquette County Republican Party, wrote in a Facebook post, “I’m thinking that another Kent State might be the only solution. . . . They do it because they know there are no consequences yet,” and tweeted, “Violent protesters who shut down free speech? Time for another Kent State perhaps. One bullet stops a lot of thuggery.”<sup>6</sup> Now, as then, students who dissent from institutional and political authority are portrayed as threats to public order who must be brought in line, with force if necessary.

#### A. Mockery and Vilification

Though the term “safe space” has been in circulation since the 1960s to refer to places where feminists could engage in consciousness-raising, or where gays and lesbians could congregate without being subjected to immediate harassment,<sup>7</sup> it took on a new and politically charged meaning beginning around 2015.<sup>8</sup> New York Times journalist Judith Shulevitz used the term in a March 2015 op-ed to mock students who were, as the title of her piece described them, “in college and hiding from scary ideas.”<sup>9</sup> To support her claim, Shulevitz described a “safe space” set up at Brown University for students who might be troubled by a campus debate about rape culture: “The room was equipped with cookies, coloring books, bubbles, Play-Doh, calming music, pillows, blankets and a video of frolicking puppies, as well as students and staff members trained to deal with trauma.”<sup>10</sup>

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5. Niraj Warikoo, *GOP Leader Apologizes for Tweeting: ‘Time for Another Kent State’*, USA TODAY (Feb. 5, 2017, 8:15 PM), <https://www.usatoday.com/story/news/nation-now/2017/02/05/gop-leader-apologizes-kent-state/97533372/?fbclid=IwAR2QViZovmHCmsswvz2soWax5Y-uzgYwYATwIBhXW2cILhmoB38GjODB-g> [<https://perma.cc/Q445-KPVK>].

6. *Id.*

7. See Malcolm Harris, *What’s a ‘Safe Space’? A look at the Phrase’s 50-Year History*, SPLINTER NEWS (Nov. 11, 2015, 3:16 PM), <https://splinternews.com/what-s-a-safe-space-a-look-at-the-phrases-50-year-hi-1793852786> [<https://perma.cc/WG7M-MMSB>].

8. Though as Heidi Kitrosser writes, this meaning is not particularly precise: “[‘Safe space’] has been used to denote everything from locations where people voluntarily agree to speak openly and without judgment to one another, to places populated by persons who share similar views on social justice issues and are hostile to opposing views, to areas formally or informally designated as meeting spaces for persons from marginalized groups.” Kitrosser, *supra* note 3, at 2018.

9. Judith Shulevitz, *Opinion, In College and Hiding from Scary Ideas*, N.Y. TIMES (Mar. 21, 2015), <https://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html> [<https://perma.cc/KDM5-QV85>] (capitalization adjusted).

10. *Id.*

The example vividly underscored Shulevitz's view that safe spaces are intellectually and emotionally infantilizing, a point taken up a few months later in Greg Lukianoff and Jonathan Haidt's now-famous Atlantic piece, *The Coddling of the American Mind*.<sup>11</sup> The two deplored the "vindictive protectiveness" of the contemporary college campus, which, in their view, "presumes an extraordinary fragility of the collegiate psyche, and therefore elevates the goal of protecting students from psychological harm. The ultimate aim, it seems, is to turn campuses into 'safe spaces' where young adults are shielded from words and ideas that make some uncomfortable."<sup>12</sup> In 2016, the Dean of Students at the University of Chicago advanced the narrative in a widely-shared open letter to incoming students informing them that the university does "not condone the creation of intellectual safe spaces where individuals can retreat from ideas and perspectives at odds with their own."<sup>13</sup>

Many modern-day critics of safe spaces are at pains to emphasize, as critics of the 1970s student protesters were, that though the fragile subject is weak, she is not harmless.<sup>14</sup> While demanding safe spaces is a sign of emotional and intellectual fragility—a defense mechanism deployed by people who cannot bear to have their ideas or identities challenged—the intolerance signified by such demands inevitably leads, in the arguments of these critics, not only to McCarthyesque constraints on public discourse, but also physical violence. In such an environment, these critics warn, dissenters and nonconformists must remain silent or face negative social or other repercussions.

In 1971, the year he was appointed to the Supreme Court, Lewis Powell lamented that "[i]t is common practice, especially on the campus, for leftists to shout down with obscenities any moderate or conservative speaker or physically to deny such speaker the rostrum."<sup>15</sup> Similarly, modern-day promoters of the campus speech crisis narrative, which include many prominent liberal and libertarian thinkers, point to instances of disruptions and disinvitations of controversial speakers as proof of this violent epidemic. For example, in 2016, Floyd Abrams, author of the book *The Soul of the First Amendment* and one of the most influential figures in First Amendment law, asserted that:

[T]he greatest threat to American free speech presently comes not from government's mega-sophisticated electronic surveillance techniques, but from within academia—principally from "a minority of students who strenuously and, I think it is fair to say,

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11. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [<https://perma.cc/Ry6U-BN9U>]. The authors later expanded the piece into a book of the same name, published in 2018.

12. *Id.*

13. Letter from John Ellison, PhD, Dean of Students, to the University of Chicago Class of 2020 (2016), [https://news.uchicago.edu/sites/default/files/attachments/Dear\\_Class\\_of\\_2020\\_Students.pdf](https://news.uchicago.edu/sites/default/files/attachments/Dear_Class_of_2020_Students.pdf) [<https://perma.cc/C8E2-K33G>].

14. See, e.g., Gil Troy, *Why the 'Alt-Left' Is a Problem*, TIME (Aug. 28, 2017, 2:28 PM), <https://time.com/4919011/donald-trump-alt-left-antifa/> [<https://perma.cc/9BND-WGA4>].

15. Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218, 219–20 (2019).

contemptuously, disapprove of the views of speakers whose view of the world is different from theirs, and who seek to prevent those views from being heard.”<sup>16</sup>

Conservative commentators have gone further, drawing a direct connection between safe spaces and terrorist violence. Donald Trump Jr., in his 2019 anti-liberal screed *Triggered: How the Left Thrives on Hate and Wants to Silence Us*, wrote:

So-called activists on the extreme left have moved from their safe spaces and the basements of their parents' houses out into the streets, usually clad in black hockey pads and carrying weapons. Sometimes they call themselves antifascists, or Antifa, but most of the time, they don't know why they're there or what they even believe. All they know is hate and anger. Time and time again, these people try to shut down speakers with whom they don't agree. They attack journalists in the streets and threaten anyone who doesn't go along with their twisted sense of social justice and equality.<sup>17</sup>

In 2015, conservative author William Hennessey wrote that safe spaces are not only “bubbles of ignorance[]” in which “no one may say or do anything that might offend anyone else[]” but are also “breeding grounds for terror and murder.”<sup>18</sup> Hennessey claimed that the ideology of safe spaces was partly responsible for the San Bernardino mass shooting carried out by Syed Rizwan Farook and Tashfeen Malik,<sup>19</sup> citing a widely reported but never verified secondhand account from one of the couple's neighbors that claimed his friend had seen suspicious activity at the home but “did not report it out of fear of racial profiling.”<sup>20</sup> According to Hennessey, “the political-correctness police who applaud ‘safe spaces’ must accept the consequences of their actions: 14 people dead, 21 injured in San Bernardino in part because the PC Police prevailed over common sense and responsibility.”<sup>21</sup> Safe spaces, according to the contemporary conventional wisdom among these conservatives, are anything but: they are censorious, intolerant, and inherently violent.

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16. Jeff Robbins, *Floyd Abrams Speaks Freely to Political Correctness on America's Campuses*, OBSERVER (May 9, 2016, 9:00 AM), <https://observer.com/2016/05/floyd-abrams-speaks-freely-to-political-correctness-on-americas-campuses/> [https://perma.cc/626H-ENCX].

17. DONALD TRUMP JR., *TRIGGERED: HOW THE LEFT THRIVES ON HATE AND WANTS TO SILENCE US* 15–16 (2019). In a textbook example of simultaneous mockery/vilification (and a heavy dose of cynical historical misrepresentation), Trump Jr. elaborates: “They're not exactly the most physically imposing people in the world (that's what happens when you live on nothing but soy lattes and veggie burgers) but the sheer force of their numbers is shocking. They have allowed hate to spread at a rate since the era of civil rights, when Democrats—the party that founded the KKK, in case you've forgotten—would organize lynch mobs and counterprotests all across the South, most of which ended in horrific violence.” *Id.* at 16.

18. William Hennessey, *Up from Political Correctness*, HENNESSY'S VIEW (Dec. 5, 2015), <https://www.hennesseyview.com/2015/12/05/up-from-political-correctness/> [https://perma.cc/UK33-8GVX].

19. *Id.*

20. Matt Hamilton, *Donald Trump Repeats False Claim that Neighbors Saw ‘Bombs All Over’ Before San Bernardino Attack*, L.A. TIMES (Oct. 9, 2016, 10:10 PM), <https://www.latimes.com/politics/la-na-pol-trump-debate-san-bernardino-20161009-snap-story.html> [https://perma.cc/M2H3-XZHJ].

21. Hennessey, *supra* note 18.

## B. Debunking the Myth

But as I have detailed in prior work,<sup>22</sup> the proof that college campuses are incubators of deadly intolerance is thin on the ground. The contemporary liberals-as-censors narrative is largely the product of well-funded efforts by conservative groups to strategically highlight a tiny number of cherry-picked, sensationalist campus controversies, aided by uncritical civil libertarians and a gullible public.<sup>23</sup> There are over 4,500 institutions of higher education in the United States, and only a tiny fraction of these have experienced substantial disruption over controversial ideas—much of which has been directed at liberal, rather than conservative, ideology. Despite the outsized attention given to incidents of physical violence that erupted over controversial conservative speakers, such as Charles Murray at Middlebury College and Ann Coulter at Berkeley<sup>24</sup>—attention not afforded to the numerous instances of threats and harassment of speakers and faculty members perceived as “liberal,” including a literal “Professor Watchlist” that urges the reporting and punishment of academics who demonstrate leftist commitments<sup>25</sup>—the vast majority of college speaking events take place without any controversy at all, physical or otherwise. College campuses remain some of the most intellectually open and physically safe environments in the country: they experience far lower crime rates than the country at large,<sup>26</sup> and studies have shown that college students tend to be more open-minded and supportive of free speech than the general population.<sup>27</sup>

In addition to being unjustified, this contemptuous attitude towards students is also ungenerous. Responding to signs of student intolerance with contempt and mockery is neither effective nor laudable. One great responsibility of teachers and administrators is to guide students through the process of critical thinking, to model and encourage habits of careful reflection and intellectual analysis. Society at large also bears responsibility for promoting and reinforcing these habits, and those who value critical thinking would do well to support the educational institutions that have the best chance of instilling them. To the extent that the

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22. See generally MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* (2019); Franks, *supra* note 15.

23. See FRANKS, *supra* note 22, at 140–43; Franks, *supra* note 15, at 222–24.

24. It is important to note that even in these incidents, the identity and ideology of the violent actors remains uncertain.

25. Franks, *supra* note 15, at 229.

26. *School and Campus Crime Fact Sheet*, OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, [https://ovc.ncjrs.gov/ncvrvw2017/images/en\\_artwork/Fact\\_Sheets/2017NCVRW\\_SchoolCrime\\_508.pdf](https://ovc.ncjrs.gov/ncvrvw2017/images/en_artwork/Fact_Sheets/2017NCVRW_SchoolCrime_508.pdf) [<https://perma.cc/7RXP-T96S>].

27. See Franks, *supra* note 15, at 239–40 (“A 2018 Gallup-Knight Foundation survey found that 70 percent of students ‘preferred their campus to be an “open learning environment” where they might be exposed to offensive speech,’ a higher rate than U.S. adults generally, and ‘older people and Republicans actually exhibit *less* tolerance for free expression’ than younger, more liberal individuals. Recent studies have also indicated ‘that college attendance may actually bolster a student’s support for free speech rather than undermine it.’”) (citing Jeffrey Adam Sachs, *The ‘Campus Free Speech Crisis’ Is a Myth. Here Are the Facts.*, WASH. POST (Mar. 16, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/16/the-campus-free-speech-crisis-is-a-myth-here-are-the-facts/> [<https://perma.cc/8ZAN-STHF>]).

younger generation fails to demonstrate optimal levels of open-mindedness and critical thinking skills, that failure is a collective one.

The college experience is the first opportunity for many individuals to seriously grapple with views that differ from their own. Students are often intemperate, impulsive, and full of righteous certainty—but these are not characteristics unique to any generation. What is unique to younger generations is the omnipresence of social media and the 24-hour news cycle. While previous generations of students may have been able to escape scrutiny of their moments of poor judgment or emotional vulnerability, today such moments can be turned into viral phenomena which may come to define students' lives.

What is more, the caricature of the privileged, out of touch, coddled college student ignores the vast numbers of students who struggle with poverty, homelessness, food insecurity, debt, domestic violence, sexual assault and harassment, and other forms of hardship and discrimination that can be created or exacerbated by the college environment. It ignores, too, the dramatic rise in racist incidents in schools since Donald Trump's election<sup>28</sup> and the concerted efforts of white supremacists to recruit on college campuses.<sup>29</sup> It also fails to acknowledge how many of today's college students have grown up in the era of mass school shootings<sup>30</sup>—an era in which, in the first half of 2018, more schoolchildren were killed on campuses than individuals who were deployed in military service<sup>31</sup>—and are also contending with the trauma inflicted by increasingly commonplace active shooter drills.<sup>32</sup> Far from being fragile snowflakes, many students demonstrate remarkable resilience in hostile educational environments.<sup>33</sup>

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28. Dan Bauman, *After 2016 Election, Campus Hate Crimes Seemed to Jump. Here's What the Data Tell Us.*, CHRON. OF HIGHER EDUC. (Feb. 16, 2018), <https://www.chronicle.com/article/After-2016-Election-Campus/242577> [<https://perma.cc/6WGL-ZMFR>].

29. See Natasha Lennard, *While the Media Panicked About Campus Leftists, the Far Right Surged*, INTERCEPT (Feb. 14, 2018, 7:30 AM), <https://theintercept.com/2018/02/14/alt-right-campus-free-speech-adl-splc/> [<https://perma.cc/P5B4-A4Y6>] (“The ‘alt-right’ is a movement of mostly young white males . . . . They realize that for any movement to truly grow, they must reach young minds, and [the alt-right] segment of the white supremacist movement has been focused on doing that.”).

30. Lukianoff and Haidt disparagingly describe measures taken to mitigate known harms to schoolchildren, from playground accidents to deadly allergies to school shootings, as “the flight to safety”: “Dangerous play structures were removed from playgrounds; peanut butter was banned from student lunches. After the 1999 Columbine massacre in Colorado, many schools cracked down on bullying, implementing “zero tolerance” policies. Lukianoff & Haidt, *supra* note 11.

31. Philip Bump, *2018 Has Been Deadlier for Schoolchildren than Deployed Service Members*, WASH. POST (May 18, 2018, 4:22 PM), <https://www.washingtonpost.com/news/politics/wp/2018/05/18/2018-has-been-deadlier-for-schoolchildren-than-service-members/> [<https://perma.cc/M4EQ-CZ5X>].

32. See Peter Nickeas & Elyssa Cherney, *Critics Warn School Shooter Drills May be Doing More Harm than Good: ‘They’re Becoming More Perverse and Obscene’*, CHI. TRIB. (Feb 12, 2020, 6:35 AM), <https://www.chicagotribune.com/news/ct-active-shooter-drills-schools-lockdowns-20200212-dzfevmvj6zfy1a6eyj52d42uq4-story.html> [<https://perma.cc/Y7F6-RX84>].

33. Lukianoff and Haidt demonstrate an alarming lack of acknowledgment or understanding of these issues in their 2015 *Atlantic* essay. In one particularly tone-deaf passage, they write:

Students with PTSD should of course get treatment, but they should not try to avoid normal life, with its many opportunities for habituation. Classroom discussions are safe places to be



### III CONSERVATIVE CENSORS

Though they identify the wrong target, safe space critics are on to something. There is in fact an epidemic of fragility in this country, and it poses a grave threat to intellectual inquiry and freedom of speech. The dangers of accommodating this fragility do not stop there; they also include the undermining of public welfare and even democracy itself. But what the safe space critics get wrong is *whose* fragility is being forced upon us. It is not liberal college students, or women, people of color, LGBTQ individuals, or other marginalized groups who wield the greatest power to constrain public discourse or impose conformity. None of these groups controls any branch of the government, dominates any educational institution, or sets the standards for any industry. Anyone genuinely concerned for the protection of free speech and the prevention of violence should focus on the largely white, male, and wealthy conservative establishment's sustained attacks on the First Amendment, especially through its insurrectionist interpretation of the Second.

#### A. Direct Attacks on Dissent

Conservative lawmakers have used the manufactured campus free speech crisis as an excuse to impose draconian anti-protest policies on colleges and universities.<sup>34</sup> At least seventeen states have enacted school anti-protest laws since 2015, including eight in 2019 alone.<sup>35</sup> These bills are based on model legislation drafted by the conservative-funded Ethics and Public Policy Center and the Goldwater Institute and bear the Orwellian title of the “Campus Free Speech Act.”<sup>36</sup> The model bill prohibits “protests and demonstrations that infringe upon the rights of others to engage in or listen to expressive activity”; dictates that a “student who has twice been found responsible for infringing the expressive rights of others will be suspended for a minimum of one year, or expelled”; and requires academic institutions to “remain neutral” on “the public policy controversies of the day.”<sup>37</sup> The broad prohibition on “infringing the expressive rights of others” and the forced institutional neutrality on “public policy controversies” fly in the face of academic freedom and the Supreme Court’s longstanding recognition of nonviolent protest as protected free speech.

The crackdown on protests is not limited to college campuses or to administrative penalties. In the wake of the #BlackLivesMatter protest movement against police brutality and several high-profile environmental protests, conservative legislators in nearly two dozen states proposed bills that

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exposed to incidental reminders of trauma (such as the word *violate*). A discussion of violence is unlikely to be followed by actual violence, so it is a good way to help students change the associations that are causing them discomfort.

Lukianoff & Haidt, *supra* note 11.

34. Franks, *supra* note 15, at 234–36.

35. *Id.* at 234.

36. *Id.* at 233–34.

37. *Id.*

would curb the ability of individuals to engage in protest. These included bills that provide legal protection for motorists who hit protesters with their vehicles—legitimizing, if not encouraging, the use of physical violence in response to unpopular speech.<sup>38</sup> As Jamelle Bouie wrote, the intent of these laws, even when they do not pass, is “to suppress unpopular speech with the threat of state-sanctioned harm.”<sup>39</sup> In his words, “focusing on campus protesters in the face of this danger is like worrying about the crumbs on your floor when your kitchen is on fire.”<sup>40</sup>

President Donald Trump has repeatedly demonstrated his personal hostility to free speech, including by calling for National Football League players who kneel during the National Anthem to be fired;<sup>41</sup> asserting that people who burn the American flag should be imprisoned or lose their citizenship;<sup>42</sup> expressing his disbelief that people are allowed to protest even when “you don’t know what side [they’re] on”;<sup>43</sup> revoking the press privileges of journalists who challenge him;<sup>44</sup> calling upon audience members to rough up and expel protesters at his rallies;<sup>45</sup> and filing multiple defamation lawsuits against news outlets for opinion pieces that criticize him.<sup>46</sup>

Conservative antipathy for free speech has also been on display in recent Republican efforts to punish online intermediaries such as Facebook for their “bias” against conservative viewpoints.<sup>47</sup> While no such bias has ever been

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38. *Anti-Protest Bills Around the Country*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/free-speech/rights-protesters/anti-protest-bills-around-country> [https://perma.cc/FJG8-TZ6D] (last updated June 23, 2017).

39. Jamelle Bouie, *Minor Threat*, SLATE (Mar. 8, 2018, 4:59 PM), <https://slate.com/news-and-politics/2018/03/the-real-threats-to-free-speech-arent-campus-protests.html> [https://perma.cc/EA4U-3RJL].

40. *Id.*

41. See Adam Edelman, *Trump Says NFL Players Who Kneel During National Anthem ‘Maybe Shouldn’t Be in the Country’*, NBCNEWS.COM (Mar. 24, 2018), <https://www.nbcnews.com/politics/donald-trump/trump-says-nfl-players-who-kneel-during-national-anthem-maybe-n876996> [https://perma.cc/NKQ5-XCJ8].

42. See David Wright, *Trump: Burn the Flag, Go to Jail*, CNN (Nov. 29, 2016), <https://www.cnn.com/2016/11/29/politics/donald-trump-flag-burning-penalty-proposal/index.html> [https://perma.cc/U5AM-99EC].

43. See Chris Cillizza, *Donald Trump Just Wondered Why Protests Are Allowed. Yes, Really.*, CNN (Sept. 5, 2018) <https://www.cnn.com/2018/09/05/politics/donald-trump-protest/index.html> [https://perma.cc/4QZT-T68P].

44. See Mathew Ingram, *White House Revokes Press Passes for Dozens of Journalists*, COLUM. JOURNALISM REV. (May 9, 2019), [https://www.cjr.org/the\\_media\\_today/white-house-press-passes.php](https://www.cjr.org/the_media_today/white-house-press-passes.php) [https://perma.cc/8ZFE-QJC8].

45. See Sam Reisman, *Trump Tells Crowd to ‘Knock the Crap Out’ of Protesters, Offers to Pay Legal Fees*, MEDIAITE (Feb. 1, 2016), <https://www.mediaite.com/online/trump-tells-crowd-to-knock-the-crap-out-of-protesters-offers-to-pay-legal-fees/> [https://perma.cc/FN5Y-FPPW].

46. See Joshua A. Geltzer, *The True Danger of the Trump Campaign’s Defamation Lawsuits*, ATLANTIC (Mar. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/true-danger-trump-campaigns-libel-lawsuits/607753/> [https://perma.cc/XNL2-PNVS].

47. See Kerry Flynn, *Facebook Commissioned a Study of Alleged Anti-Conservative Bias. Here’s What It Found*, CNN (Aug. 20, 2019), <https://www.cnn.com/2019/08/20/media/facebook-anti-conservative-bias-report/index.html> [https://perma.cc/J5QK-MUM6].

empirically demonstrated, the larger point is that online intermediaries, as private actors, have a First Amendment right to make whatever choices they wish about the kinds of speech they will carry. Attempts to force private companies to promote speech against their will, whether through legislative changes to the immunity provisions of Section 230 of the Communications Decency Act or through lawsuits, violate the long-recognized First Amendment right against compelled speech.

## B. Silencing Through Guns

Conservatives have also attempted to undermine the First Amendment through extremist interpretations of the Second. As Greg Magarian has noted, the increasing tendency among judges, legal scholars, and litigants to analogize the Second Amendment to the First is complicated by the highly divergent purposes that the two rights serve.<sup>48</sup> One of the most compelling arguments for robust free speech protections is that speech is not violence—that discourse and debate is always the preferable means by which society should address conflict. Bearing arms, especially bearing arms in a way that signals the present ability to engage in violence, works at cross purposes to free speech. A loaded weapon is a threat to anyone in its vicinity; while its presence may make the owner feel more free to speak, the effect on others is almost inevitably the opposite. Violence, including the threat of violence, tends to have a chilling effect on speech.

Despite this, in 2009 the National Rifle Association (NRA) began encouraging states to adopt “campus carry” laws, which would allow students and faculty to carry loaded weapons onto college campuses.<sup>49</sup> Ten states have passed such laws and many more are considering them.<sup>50</sup> Faculty members have objected that the possibility of armed students would severely curtail their ability to foster robust class discussions, especially of controversial subjects.<sup>51</sup> Others noted that such a policy would make them hesitate before giving students low grades or negative feedback and undermine professor-student and peer-to-peer dynamics generally.<sup>52</sup>

The chilling effect of guns has been vividly illustrated in open-carry demonstrations. On the morning of January 20, 2020, around 22,000 gun rights activists flooded into Richmond, Virginia to protest gun control policies passed

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48. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 52 (2012).

49. See, e.g., *Attention Texas NRA Members: House Committee Approves NRA-Backed “Campus Personal Protection Act”*, NAT’L RIFLE ASS’N INST. FOR LEGISLATIVE ACTION (Apr. 10, 2009), <https://www.nraila.org/articles/20090410/attention-texas-nra-members-house-comm> [<https://perma.cc/5UZW-YVQ9>].

50. *Guns on Campus: Overview*, NAT’L CONFERENCE OF STATE LEGISLATURES (Nov. 1, 2019), <https://www.ncsl.org/research/education/guns-on-campus-overview.aspx> [<https://perma.cc/VHN4-Q5M6>].

51. See *Glass v. Paxton*, 900 F.3d 233, 236 (5th Cir. 2018).

52. See, e.g., Coleen Flaherty, *Not in My Classroom*, INSIDE HIGHER ED (Apr. 28, 2017), <https://www.insidehighered.com/news/2017/04/28/study-professors-widely-oppose-campus-carry-inimical-academic-freedom-fewer-would> [<https://perma.cc/VHN4-Q5M6>].

by the newly Democratic legislature.<sup>53</sup> Governor Ralph Northam, concerned about a repeat of the violence and unrest that erupted during the 2017 rightwing demonstration in Charlottesville, declared a state of emergency and announced a prohibition against firearms on the grounds of the Capitol. The 6,000 or so protesters that entered the grounds complied, but many of the thousands of protesters outside of grounds came dressed for war, holding sniper rifles and AR-15s. There were Confederate flags, a battle tank, and a homemade guillotine inscribed with the words “The penalty for treason is death.” Attendees included the Proud Boys and other white supremacist groups, as well as rightwing conspiracy theorist Alex Jones.

Conservative commentators and media outlets described the event as “peaceful” because no violent confrontations broke out and only a single arrest was made.<sup>54</sup> “But that ‘peace,’” wrote Bouie, “can’t be separated from intimidation.”<sup>55</sup> Journalist Talia Levin described how normal activity in the city ground to a halt, lawmakers stayed away from the Capitol, and planned counter-protests as well as Martin Luther King Day celebrations were cancelled out of fear of violence.<sup>56</sup>

What Levin and multiple others describe was no peaceful protest, but a show of force against democracy itself. The modest gun regulation measures that unleashed this mob intimidation were adopted through a lawful democratic process and were supported by the majority of Virginians.<sup>57</sup> Protesters nonetheless described state legislators who voted for the measures as “tyrants”; one legislator who had been wrongly identified as the sponsor of a gun control measure and became the subject of multiple gun-related conspiracy theories was forced to go into hiding due to death threats.<sup>58</sup> As Lavin concluded, “to oppose the monopoly of gun owners over the American commons is to risk death.”<sup>59</sup> The demonstration in Richmond, far from being an exercise in democratic deliberation, was an exercise in censorship. One commentator observed: “There were no counter-protests or rival demonstrations. The Second Amendment had effectively limited the First.”<sup>60</sup>

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53. Talia Lavin, *That Pro-Gun Rally in Virginia Wasn't Exactly "Peaceful"*, GQ MAG. (Jan. 22, 2020), <https://www.gq.com/story/pro-gun-rally-threat> [<https://perma.cc/WV36-5YKP>]. The contents in this paragraph draw from Lavin's account.

54. See, e.g., Alana Wise et al., *A Packed, Peaceful Protest: Activists Descend on Virginia's Capitol for Pro-Gun Rally*, WAMU 88.5 AM. U. RADIO (Jan. 20, 2020), <https://wamu.org/story/20/01/20/the-view-from-richmond-pro-gun-rally/> [<https://perma.cc/A9AV-V73T>].

55. Jamelle Bouie, Opinion, *The Iconic Man with a Gun Is a White Man*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/opinion/richmond-gun-rights-rally.html> [<https://perma.cc/2S5Y-SV4B>].

56. Lavin, *supra* note 53.

57. See Lavin, *supra* note 53 (“Virginia voters strongly support requiring background checks on all gun sales, 86% to 13%, and passing a “red flag” law to remove guns from someone who may harm someone, 73% to 23%. A majority, 54% to 44%, support banning assault-style weapons.”).

58. *Id.*

59. *Id.*

60. Bouie, *supra* note 55.

## IV

## THE CODDLING OF THE AMERICAN CONSERVATIVE

As noted above, in *The Coddling of the American Mind* Lukianoff and Haidt describe the attempt to “turn campuses into ‘safe spaces’ where young adults are shielded from words and ideas that make some uncomfortable” as “vindictive protectiveness”: “It is creating a culture in which everyone must think twice before speaking up lest they face charges of insensitivity, aggression, or worse.”<sup>61</sup>

Lukianoff and Haidt enumerate several features of this vindictive protectiveness by drawing from the work of Robert L. Leahy, Stephen J. F. Holland, and Lata K. McGinn on cognitive distortions. These features include “emotional reasoning” and “catastrophizing.” Emotional reasoning involves the belief “that your negative emotions necessarily reflect the way things really are: ‘I feel it, therefore it must be true.’”<sup>62</sup> Individuals in thrall to emotional reasoning discount facts in favor of feelings, especially feelings of fear. According to Lukianoff and Haidt, “[i]f our universities are teaching students that their emotions can be used effectively as weapons . . . then they are teaching students to nurture a kind of hypersensitivity that will lead them into countless drawn-out conflicts in college and beyond.”<sup>63</sup> “Catastrophizing,” which is closely related to emotional reasoning, is “a kind of magnification that turns ‘commonplace negative events into nightmarish monsters.’”<sup>64</sup>

“Vindictive protectiveness” is an apt term for a hypersensitive mentality that ironically increases the chances of harm both to its adherents and others. But it is not a compelling description of the current state of college campuses. As described above, the vast majority of institutions of higher education have experienced no major disruptions over controversial speakers or ideas. Importantly, the objections and protests that have taken place, however unwise or intemperate, have largely been peaceful. One of the longstanding tenets of the First Amendment is that even foolish speech is protected. The true cause for concern, and justification for the label “vindictive protectiveness,” should be threats or acts of violence—precisely because they abandon expression for intimidation and create actual physical risks to others. Such threats and acts of violence cannot be said to be characteristic of liberal college students, but they are characteristic of self-styled Second Amendment activists. These activists, far more than any other group, consistently demonstrate how they are ruled by emotional reasoning and catastrophic thinking, to the detriment of themselves and those around them.

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61. Lukianoff & Haidt, *supra* note 11.

62. *Id.*

63. *Id.*

64. *Id.*

### A. Weaponized Emotions

Gun rights activists justify their call for increasing the availability and visibility of weapons on the grounds of self-defense. At the outset, it is important to note that an obsessive focus on self-defense is indicative of a fearful mindset. There is a strong correlation between political conservatism and gun ownership,<sup>65</sup> and extensive research has indicated that “conservatives are more easily threatened, more likely to perceive the world as dangerous, and less trusting in comparison with liberals.”<sup>66</sup> Gun owners in particular exhibit strong feelings of fear: “most research comparing gun owners to non-gun owners suggests that ownership is rooted in fear . . . the decision to obtain a firearm is largely motivated by past victimization and/or fears of future victimization.”<sup>67</sup> Of course, such fear might be considered rational, not emotional, if gun owners were at greater risk of violent victimization than others. But “gun ownership tends to be lower in urban settings and in low-income families where there might be higher rates of violence and crime . . . [whereas] the largest demographic of gun owners in the US are white men living in rural communities who are earning more than \$100K/year.”<sup>68</sup>

Gun rights rhetoric is brimming with demonstrably false beliefs that reveal the influence of emotional reasoning.<sup>69</sup> These include the belief that crime is on the rise, despite the fact that the violent crime rate fell between 51 percent and 71 percent and the property crime rate fell between 54 percent and 69 percent between 1993 and 2018 in the United States.<sup>70</sup> Another false claim is that “gun-free zones” are targets for violence, when in reality the vast majority of firearm violence occurs in private homes. Of the mass shootings (which make up a small percentage of firearm fatalities) that took place between 2009 and 2016, almost two-thirds took place in private residences, and of the fraction of mass shootings that did occur in what could be characterized as a “gun-free zone” over that time period, there is no evidence to suggest that the location was chosen for that reason.<sup>71</sup>

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65. See Kim Parker et al., *The Demographics of Gun Ownership*, PEW RESEARCH CTR. (June 22, 2017), <https://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/> [<https://perma.cc/7M6Z-BDKB>].

66. Tom Jacobs, *A New Take on Political Ideology*, PAC. STANDARD, <https://psmag.com/social-justice/a-new-take-on-political-ideology-24683> [<https://perma.cc/3826-YHQU>] (last updated June 14, 2017).

67. Joseph M. Pierre, Comment, *The Psychology of Guns: Risk, Fear, and Motivated Reasoning*, 5 PALGRAVE COMM. 1, 2–3 (2019).

68. *Id.* at 3.

69. A significant portion of the following discussion is territory covered in my book, *THE CULT OF THE CONSTITUTION*, *supra* note 22.

70. Depending on whether one uses FBI statistics or Bureau of Justice statistics. John Gramlich, 5 *Facts About Crime in the U.S.*, PEW RESEARCH CTR. (Oct. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/> [<https://perma.cc/W6Y5-5LKN>].

71. See EVERYTOWN FOR GUN SAFETY, *MASS SHOOTINGS IN THE UNITED STATES: 2009–2016*, at 2 (2017) (stating that 63 percent of all mass shooting incidents between 2009 and 2016 “took place entirely in public homes” and that “[o]nly ten percent of incidents took place in ‘gun-free’ zones”).

Another popular gun rights belief is that “the only thing that stops a bad guy with a gun is a good guy with a gun.”<sup>72</sup> But extensive research has demonstrated that defensive gun uses are rare, especially compared to unlawful and socially undesirable uses. The Violence Policy Center reports that, for 2016, “for every justifiable homicide in the United States involving a gun, guns were used in 37 criminal homicides.”<sup>73</sup> Guns “are used to threaten and intimidate far more often than they are used in self defense[.]”<sup>74</sup> including by domestic abusers and by foreign terrorist groups who deliberately take advantage of America’s lax gun laws to arm their members. A 2014 study of 160 mass-casualty shootings between 2000 and 2013 found that armed civilians (including off-duty policemen), stopped shooters in only seven cases.<sup>75</sup> Successful civilian intervention in gun crimes is unsurprisingly rare given that even highly-trained professionals, such as soldiers and law enforcement officers, exhibit low firearm accuracy rates. The average hit rate of New York Police Department officers during gunfights between 1998 and 2006, for example, was eighteen percent.<sup>76</sup>

The foundational belief of gun rights activists—that guns are an effective tool for self-defense—is based almost entirely on erroneous, emotional belief. Researchers have found no evidence that guns are more effective than other forms of self-defense, and plentiful evidence that guns make people objectively less safe. Multiple studies have shown a correlation between permissive gun laws and increases in crime, injuries, and suicides, as well as injuries and death caused by accidental discharges. A 2011 study showed that firearm deaths “are significantly lower in states with stricter gun control legislation.”<sup>77</sup> People carrying guns are more than four times more likely to be shot than those not,<sup>78</sup> and the presence of guns increases the likelihood of accidental death across all age groups.<sup>79</sup> Access to a firearm makes a person almost twice as likely to become

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72. For example, Wayne LaPierre explicitly invokes this narrative in his article, *Stand and Fight*: “It has always been sensible for good citizens to own and carry firearms for lawful protection against violent criminals who prey on decent people.” Wayne LaPierre, *Stand and Fight*, DAILY CALLER (Feb. 13, 2013, 4:32 PM), <https://dailycaller.com/2013/02/13/stand-and-fight/> [https://perma.cc/3J5D-NEPF].

73. VIOLENCE POL’Y CTR., FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE 1 (2019).

74. D. Hemenway, D. Azrael & M. Miller, *Gun Use in the United States: Results from Two National Surveys*, 6 INJURY PREVENTION 263, 263 (2000).

75. U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013, at 11 (2013).

76. LAWRENCE M. HANSER ET AL., RAND CORP., EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM-DISCHARGE REVIEW PROCESS 14 (2008).

77. Richard Florida, *The Geography of Gun Deaths*, ATLANTIC (Jan. 13, 2011), <https://www.theatlantic.com/national/archive/2011/01/the-geography-of-gun-deaths/69354/> [https://perma.cc/DU5Y-MT35].

78. Ewen Callaway, *Carrying a gun increases risk of getting shot and killed*, NEW SCIENTIST (Oct. 6, 2009), <https://www.newscientist.com/article/dn17922-carrying-a-gun-increases-risk-of-getting-shot-and-killed/> [https://perma.cc/26SN-BLTD].

79. Douglas J. Wiebe, *Firearms in US Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 ACCIDENT ANALYSIS & PREVENTION 711 (Sept. 2003), [https://doi.org/10.1016/S0001-4575\(02\)00049-0](https://doi.org/10.1016/S0001-4575(02)00049-0) [https://perma.cc/MG2R-CDQP].

a homicide victim and three times more likely to commit suicide.<sup>80</sup> The statistics for domestic violence victims are particularly dire: the presence of a gun in a domestic violence situation increases a woman's chance of homicide by 500 percent.<sup>81</sup>

The campus-carry movement starkly illustrates the dangers of false beliefs about guns. Colleges and universities have long been gun-free zones with rates of violence far lower than the country's average. "The overwhelming majority of the 4,400 colleges and universities in the United States prohibit the carrying of firearms on their campuses. These gun-free policies have helped to make our postsecondary education institutions some of the safest places in the country."<sup>82</sup> While the criminal homicide rate in the United States is around 5 per 100,000 persons overall, and 14 per 100,000 for those aged 17 to 29, "the overall homicide rate at post-secondary education institutions was 0.07 per 100,000 students."<sup>83</sup> Students are also 1.2 times less likely than nonstudents to be victims of sexual assault.<sup>84</sup> Not only is there no evidence that the passage of campus carry laws has reduced crime rates, sexual assault rates have actually risen in states that have passed campus-carry laws.<sup>85</sup>

Gun rights activists resolutely ignore this wealth of factual information that conflicts with their emotional attachments. What matters to them is not what *is*, but how they *feel*. Guns make gun owners feel safe, even though guns objectively make them—and everyone around them—less safe.

## B. Catastrophic Justifications

The NRA's tremendous influence in the United States is due in large part to its ability to convince its members that they are always one step away from catastrophe and from losing their Second Amendment rights. In 2013, NRA Vice President Wayne LaPierre urged Americans to "Stand and Fight" in an op-ed for the rightwing outlet *The Daily Caller*: "Hurricanes. Tornadoes. Riots. Terrorists. Gangs. Lone criminals. These are perils we are sure to face—not just maybe. It's

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80. Laura Kurtzmann, *Access to Guns Increases Risk of Suicide, Homicide*, UNIV. CAL. S.F. (Jan. 24, 2014), <https://www.ucsf.edu/news/2014/01/111286/access-guns-increases-risk-suicide-homicide> [<https://perma.cc/USE8-ZVFJ>].

81. EVERYTOWN FOR GUN SAFETY, *GUN AND VIOLENCE AGAINST WOMEN: AMERICA'S UNIQUELY LETHAL INTIMATE PARTNER VIOLENCE PROBLEM* 10 (2019), <https://everytownresearch.org/wp-content/uploads/2019/10/IPV-for-WEB-112519B.pdf> [<https://perma.cc/A9AR-XYCW>].

82. *Guns on Campus' Laws for Public Colleges and Universities – by The Campaign to Keep Guns off Campus*, ARMED CAMPUSES, <https://www.armedcampuses.org/> [<https://perma.cc/NGS8-HUA5>].

83. *Id.*

84. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013*, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/7SAR-S7DB>].

85. See FRANKS, *supra* note 22, at 85 (stating that "[s]ince all public colleges in Colorado have been forced to allow campus carry (2012–2013), the rate of rape has increased 25% in 2012 and 36% in 2013," while the "national average over the past ten years has been slowly decreasing at a rate of approximately 3% per year").



not paranoia to buy a gun. It's survival."<sup>86</sup> As Adam Winkler has observed, the NRA has "thrived over the years thanks to crisis-driven fund-raising appeals warning members that the government was coming to take their guns. Every time a new gun control law was proposed, the NRA sent out mass mailings telling members that they needed to send money right away to stop the law" or risk the stripping of their right to bear arms altogether.<sup>87</sup> Of course, no administration has ever made an attempt to seize citizens' weapons en masse (at least, not from the NRA's base of white men<sup>88</sup>), and for decades there has been near-total inaction by the federal government, and most state governments, to pass even modest firearms regulation. When the Supreme Court ruled in *District of Columbia v. Heller*, against the weight of history and text, that the Second Amendment protected an individual right to self-defense, it established a constitutional foundation for gun rights that was already formidably protected.

Nonetheless, the NRA has continued to insist that gun rights are under attack. On July 19, 2016, Chris W. Cox, the executive director of the NRA's Institute for Legislative Action, delivered an address at the Republican National Convention that trotted out all of the gun lobby's favorite catastrophic clichés: "we live in dangerous times;" "government has failed to keep us safe;" we all need a "good guy with a gun."<sup>89</sup> In Cox's view, the 2016 election was nothing less than a referendum on the Second Amendment, which in turn was nothing less than "your right to protect your life."<sup>90</sup> Cox closed his address by warning the audience that "[t]he only way we save [this freedom] is by electing Donald Trump the next president of the United States."<sup>91</sup>

And elect him they did. The NRA devoted more than \$30 million dollars to helping Donald Trump in his presidential bid.<sup>92</sup> And when they succeeded, Trump made sure to express his gratitude. Speaking at the NRA's annual convention in 2017, the first president to do so since Ronald Reagan, Trump promised, "You came through big for me, and I am going to come through for you . . . . The eight-year assault on your Second Amendment freedoms has come

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86. LaPierre, *supra* note 72.

87. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 58 (2013).

88. Cf. Nicholas Johnson, *The Arming and Disarming of Black America*, SLATE (Feb. 10, 2018), <https://slate.com/human-interest/2018/02/what-reconstruction-and-its-end-meant-for-black-americans-who-had-fought-for-the-right-to-keep-and-bear-arms.html> [<https://perma.cc/J6V5-ZYED>].

89. Chris W. Cox, Executive Dir., Nat'l Rifle Ass'n Inst. for Legislative Action, Address at the Republican National Convention (July 19, 2016), <https://www.youtube.com/watch?v=RuTcoYKjj1M> [<https://perma.cc/KV6U-NVTT>].

90. *Id.*

91. *Id.*

92. Luke Johnson, *NRA's 2016 Donation to Trump's Campaign Pays Off*, FORTUNE (Aug. 21, 2019), <https://fortune.com/2019/08/21/how-much-did-nra-contribute-trump-campaign/> [<https://perma.cc/5EDG-TXWH>].

to a crashing end.”<sup>93</sup> But somehow, even with a grateful and compliant president installed in the White House, and gun-supporting Republicans controlling all branches of the federal government and the majority of state governments, the gun lobby continued to insist that citizens were mere steps away from being forcibly disarmed.

President Trump himself invoked the supposed threat to the Second Amendment in his State of the Union address in February 2020. “Just as we believe in the First Amendment, we also believe in another constitutional right that is under siege all across our country . . . . So long as I am president, I will always protect your Second Amendment right to keep and bear arms.”<sup>94</sup> Later that month, his son, Donald Trump, Jr., echoed the catastrophic refrain in an interview with the NRA, warning about Democratic presidential candidates’ plans for gun control: “I can assure you we are up against a big juggernaut here. They will do whatever it takes to take away your rights, your ability to protect yourself. We must preserve our Second Amendment rights at all costs.”<sup>95</sup>

In their critique of coddled college students, Lukianoff and Haidt claimed that millennials “got a consistent message from adults: life is dangerous, but adults will do everything in their power to protect you from harm, not just from strangers but from one another as well.”<sup>96</sup> It is notable that the gun lobby, particularly the NRA and the politicians in its debt, has been giving exactly this message to gullible and frightened gun owners.

### C. Victim Claiming

In my book, *The Cult of the Constitution: Our Deadly Devotion to Guns and Free Speech*, I draw parallels between religious and constitutional fundamentalism—in particular, a tactic I refer to as “victim-claiming.”<sup>97</sup> The conservative movement in general, and gun rights activists in particular, have made great use of this tactic. A common corollary of victim-blaming, which attempts to deprive victims of sympathy, victim-claiming attempts to garner sympathy for non-victims, to allow powerful groups to occupy the space of the vulnerable. It is a reversal technique beloved by domestic abusers, which casts the abuser in the role of the abused. The fundamentalist reading of the Constitution, especially of the First and Second Amendments, produces much the same effect. In the name of the Constitution, the most powerful and

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93. Bill Hutchinson, *Trumps Election Partly Responsible for Legendary Gunmaker's Demise: Experts*, ABCNEWS.COM (Feb. 13, 2018), <https://abcnews.go.com/US/trumps-election-partly-responsible-legendary-gunmakers-demise-experts/story?id=53056490> [<https://perma.cc/8VT9-YEKW>].

94. German Lopez, *Fred Guttenberg, Parkland Shooting Victim's Father, Was Escorted out of State of the Union*, VOX (Feb. 4, 2020, 11:05 PM), <https://www.vox.com/2020/2/4/21123617/state-of-the-union-2020-fred-guttenberg-parkland-shooting> [<https://perma.cc/7X3H-H327>].

95. AWR Hawkins, *Donald Trump Jr.: Hold to Your Second Amendment Rights 'At All Costs'*, BREITBART (Feb. 29, 2020), <https://www.breitbart.com/politics/2020/02/29/donald-trump-jr-hold-to-your-second-amendment-rights-at-all-costs/> [<https://perma.cc/LS75-KW6A>].

96. Lukianoff & Haidt, *supra* note 11.

97. FRANKS, *supra* note 22, at xii–xiii.

privileged group in America—white men—demands that any change in the status quo of free speech or gun rights be evaluated in terms of the potential impact on them, not in terms of the actual and present harms currently inflicted on women and minorities.

The NRA began exploiting the fear of crime and social change in the 1970s, but its direct appeal to the victim complex of white Christian men crystallized in the late 1990s. Actor Charlton Heston, who served as the organization’s president from 1998 to 2003, provided a compelling mouthpiece for this message:

Heaven help the God-fearing, law-abiding, Caucasian, middle class, Protestant, or—even worse—Evangelical Christian, Midwest, or Southern, or—even worse—rural, apparently straight, or—even worse—admittedly heterosexual, gun-owning or—even worse—NRA-card-carrying, average working stiff, or—even worse—male working stiff, because not only don’t you count, you’re a downright obstacle to social progress.<sup>98</sup>

As Scott Melzer has written, the NRA unified diverse conservative groups by appealing to “their sense of victimization at the hands of a liberal culture run amok. In their eyes, immigrants, gays, women, the poor, and other groups are (undeservedly) granted special rights and privileges.”<sup>99</sup>

Gun owners’ false sense of victimization is increasingly being expressed through the claims that gun owners are a minority group subjected to discrimination and that the Second Amendment has been relegated to “second class status.” This has led to a new phenomenon of so-called “Second Amendment sanctuary cities,” a truly breathtaking appropriation of the rhetoric of victimhood. The original idea of a “sanctuary city” is associated with local resistance to enforcement of federal immigration laws, a concept that has been heavily mocked and criticized by the right.<sup>100</sup> Like immigration sanctuary cities, the definition and legal status of Second Amendment sanctuaries are somewhat unclear. The term generally refers to jurisdictions who take the position that various gun regulation measures violate citizens’ constitutional rights, and most involve resolutions that “claim an absolute right to protect local citizens from any statewide gun control law by refusing to enforce those laws in their jurisdiction.”<sup>101</sup> The laws triggering this kind of resistance commonly include universal background checks, “assault weapon” bans, and extreme risk protection orders.

Second Amendment sanctuaries did not exist until 2019, when Democratic lawmakers enjoying newfound majorities began to enact statewide gun regulations. But once the movement began, it accelerated quickly: “In 2019 alone, [Second Amendment sanctuary] resolutions were adopted in 38 of 64 Colorado counties, 70 of 102 Illinois counties, 10 of 16 Nevada counties, and 30

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98. FRANKS, *supra* note 22, at 65.

99. SCOTT MELZER, *GUN CRUSADERS: THE NRA’S CULTURE WAR* 59 (2009).

100. See, e.g., Steven Greenhut, *Federal Immigration Raids in ‘Sanctuary Cities’ Have Conservatives Abandoning Federalism*, REASON (Feb. 28, 2020), <https://reason.com/2020/02/28/federal-immigration-raids-in-sanctuary-cities-have-conservatives-abandoning-federalism/> [<https://perma.cc/AY9M-E3QU>].

101. Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. (forthcoming 2021) (manuscript at 3).

of 33 New Mexico counties.”<sup>102</sup> By January 2020, 441 localities in twenty-one states identified themselves as Second Amendment sanctuary cities.<sup>103</sup> In Virginia, “the state rapidly becoming ground zero for the Second Amendment Sanctuary battle,” over a hundred localities had passed sanctuary regulations in less than two months at the end of 2019.<sup>104</sup>

As Shawn Fields has written, gun rights activists’ claim to legal victimhood is not supported by legal doctrine:

[W]hile gun rights activists regularly claim discrimination from “anti-gun” politicians and decry the Second Amendment’s “second class status,” “firearm owners” is not a constitutionally protected class triggering heightened scrutiny of gun regulations. Nor do any of the disfavored gun regulations stem from the kind of explicit, outright bare animus against gun owners necessary to invalidate them under rational basis review.<sup>105</sup>

Because of this, the wave of Second Amendment sanctuary resolutions may ultimately have no real legal effect. But even if it does not prevail in the courts, the attempt to establish literal safe spaces for the Second Amendment—places where nothing, not even democratically enacted, popularly supported gun safety legislation, is allowed to contradict the fear-driven world view of gun rights activists—is pernicious.

[E]ven if many of these resolutions are intended to be symbolic, such political expression is richly communicative and predictive of potential future litigation, particularly given the unsettled state of Second Amendment doctrine. Moreover, some resolutions articulate not just a passive dissatisfaction with gun regulation, but an active intention to resist state enforcement through financial defunding, law enforcement and prosecutorial nullification, and regulatory militia-raising.<sup>106</sup>

The demand for Second Amendment safe spaces poses a far graver threat to society than even the most intemperate demands of overly sensitive college students. Intolerant liberalism, to the extent that it exists, neither constitutionalizes the fragility of its adherents nor inherently imposes physical risk on others. As Justice Breyer wrote in his dissent in *McDonald v. City of Chicago*, “[u]nlike other forms of substantive liberty, the carrying of arms . . . often puts others’ lives at risk.”<sup>107</sup> Speaker disinvitations and content warnings pale in comparison to open threats of violence against anyone who rejects an ahistorical, absolutist, extremist interpretation of the right to bear arms. The dangerous fragility of Second Amendment fundamentalists chills free speech and endangers public welfare.

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102. *Id.* (manuscript at 8).

103. *Id.* (manuscript at 16).

104. *Id.* (manuscript at 8–9).

105. *Id.* (manuscript at 31).

106. *Id.*

107. 561 U.S. 742, 912 (2010) (Breyer, J. dissenting).

## IV

## CONCLUSION: TRIGGERED

President Trump's son, Donald Trump Jr., has championed his support of the Second Amendment through op-eds and praise for his father's policies on guns. Shortly after his father became the third president in U.S. history to be impeached, Trump Jr. posted a photo of himself on social media posing with an assault rifle.<sup>108</sup> The rifle featured an image of a cross associated with the Crusades and the magazine was decorated with a drawing of Hillary Clinton.<sup>109</sup> In the January 4, 2020 Instagram photo, Trump Jr.'s finger is on the trigger, the safety of the weapon is off, and the selector switch is set to fire.<sup>110</sup> It was exactly the kind of image calculated to "trigger" fragile liberals, the putative subject of Trump Jr.'s 2019 book, *Triggered: How the Left Thrives on Hate and Wants to Silence Us*.<sup>111</sup> The book's thesis, as the title indicates, is that liberals are cowards who constantly seek to stifle opposing views. While liberals-as-cowards has long been a cherished conservative cultural trope, Trump Jr.'s book also capitalizes on the dangerous snowflake narrative sparked by college protests in 2015. *Triggered* accordingly portrays liberal college students both as immature and intolerant individuals seeking to eliminate all sources of discomfort from their environments as well as aggressive insurrectionists eager to engage in violent tactics.

Perhaps hoping to inspire a demonstration of student intolerance, Trump Jr. chose a college campus for his book launch on November 10, 2019.<sup>112</sup> The event, held at UCLA, certainly delivered a display of censorial intolerance, but not one Trump Jr.'s narrative would lead one to expect. According to news reports, the largely supportive student audience began chanting "Q&A" after being told that the speakers, Trump Jr. and his girlfriend, former Fox News host Kimberly Guilfoyle, would not take questions during the scheduled two-hour event due to "time constraints."<sup>113</sup>

"I'm willing to listen..." Trump began. "Q and A! Q and A!" the audience yelled back. "We'll go into the lion's den and talk ..." Trump tried again. "Then open the Q and A!" came the immediate response. Guilfoyle, forced to shout to make herself heard, told students in the crowd: "You're not making your parents proud by being rude and

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108. Sarah Pulliam Bailey, *Donald Trump Jr. Poses with Rifle Decorated with a Cross Used During the Crusades*, WASH. POST (Jan. 6 2020, 3:23 PM), <https://www.washingtonpost.com/religion/2020/01/06/donald-trump-jr-poses-with-rifle-decorated-with-cross-used-during-crusades/> [https://perma.cc/K473-44R3].

109. *Id.*

110. Donald Trump Jr. (@donaldtrumpjr), INSTAGRAM (Jan. 04, 2020), [https://www.instagram.com/p/B67J4TtInDn/?utm\\_source=ig\\_embed](https://www.instagram.com/p/B67J4TtInDn/?utm_source=ig_embed) [https://perma.cc/manage/create?folder=14471].

111. *See generally* TRUMP JR., *supra* note 17.

112. Andrew Gumbel, *Donald Trump Jr Walks out of Triggered Book Launch After Heckling—from Supporters*, GUARDIAN (Nov. 10, 2019, 10:29 PM), <https://www.theguardian.com/us-news/2019/nov/11/donald-trump-jr-walks-out-of-triggered-book-launch-after-heckling-from-supporters> [https://perma.cc/J8M7-ZAZF].

113. *Id.*

disruptive.” She and Trump Jr left the stage moments later.<sup>114</sup>

One student who attended the event told the school newspaper that it seemed Trump Jr. was “scared of being triggered by the questions people ask.”<sup>115</sup>

A self-identified defender of the Second Amendment, author of a book ridiculing leftist college students for intellectual cowardice, and son of the most powerful man in the United States, fleeing his own book launch rather than answer questions from even a supportive crowd of students—it is an almost too-perfect illustration of how the proponents of the safe space narrative have identified the right diagnosis, but the wrong patient. Truly dangerous fragility that threatens free speech and public welfare does indeed exist, but the call is coming from inside the house.

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114. *Id.*

115. Alexandra Ma, *Donald Trump Jr. Stormed out of an Event for His Book—Which Accuses the Left of Stifling Open Debate—After Getting Heckled for Refusing To Do a Q&A*, BUS. INSIDER (Nov. 11, 2019, 3:11 PM), <https://www.businessinsider.com/donald-trump-jr-triggered-book-launch-refuse-questions-storms-out-2019-11> [<https://perma.cc/U6PQ-HSUF>].

