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Shadowboxing with Free Speech Principles

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BOOK REVIEW

SHADOWBOXING WITH FREE SPEECH PRINCIPLES

AGAINST FREE SPEECH. By Anthony Leaker. Lanham, M.D.: Rowman & Littlefield Publishers. 2020. Pp. 128. Paperback. \$19.95.

Reviewed by Noah C. Chauvin*

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I. INTRODUCTION

In his book *Against Free Speech*, Anthony Leaker makes the case that progressives have too long fought battles over free speech constrained by rules that do not limit their right-wing opponents.¹ Leaker’s thesis is that defenses of free speech based on abstract principle should be rejected because they legitimate the harmful ways speech is used by the right and hide the ways it is ineffective as a tool for the left.² Free speech principles, Leaker says, are not reflected in the way free speech works in practice.³ Leaker’s solution is the liberal⁴ use of censorship to combat what he views as reactionary ideas.⁵

Leaker is wrong about free speech, and *Against Free Speech* is a bad book. To be clear, these are two separate criticisms of widely differing consequence, and I take up my pen (er, keyboard) with the primary intent of addressing the latter. Leaker is perfectly at liberty to believe in and advocate for the usefulness of censorship. In my view he is wrong to do so, but it is certainly possible to make a thoughtful, reasoned, and nuanced argument for the modification or abandonment of the classical liberal notions of free

* Attorney Advisor, U.S. Department of Homeland Security. I am grateful to the members of the *South Carolina Law Review*, whose careful editing greatly improved this paper. All views—like all errors—are strictly my own.

1. ANTHONY LEAKER, *AGAINST FREE SPEECH* 2–3 (2020).
2. *Id.* at 3.
3. *Id.*
4. Pun(s) intended.
5. LEAKER, *supra* note 1, at 108–10.

speech.⁶ Leaker's book is not bad because he is wrong. It is bad because it is thoughtless, poorly reasoned, and unnuanced. Because it was written by an academic and was published by an academic press, *Against Free Speech* has the veneer of serious scholarship. As I hope to show in this review, there is nothing serious about it.

The review proceeds in three parts. In Part II, I briefly describe Leaker's central thesis and arguments. In Part III, I explain the defects in Leaker's presentation of his argument and explain what makes *Against Free Speech* an unacademic book. Finally, in Part IV, I explain why such a book is worthy of review at all.

II. THE BOOK

Against Free Speech is an expansion of Leaker's earlier work on the same theme. In a 2018 essay in *Cato Unbound*, Leaker argued that the world had been made "less free, secure, and prosperous . . . because of the policies, ideologies, and values endorsed and promoted by the very people who insist on fostering the idea that there is a free speech crisis or who use 'free speech' as a Trojan horse."⁷ The trouble, Leaker asserted in this essay, was that free speech had been co-opted in theory and in practice by "white, male centrists seeking to preserve a dominant worldview that normalizes and universalizes the values of their gender, race, and class."⁸ Freedom of speech, Leaker concluded, should not be defended as an "abstract principle[]," but rather should be used only as necessary to achieve "concrete political change."⁹ In other words, speech is only as useful as it is effective as a tool for achieving progressive political outcomes.

These same theses animate *Against Free Speech*. Leaker makes clear from the beginning of the book that he is skeptical not only of free speech as it is practiced, but also of free speech in the abstract. As he puts it, "arguments of principle . . . deflect attention away from issues of power, context and the specifics of each case."¹⁰ As such, Leaker devotes relatively little of his book to abstract free speech principles. Rather, the bulk of *Against Free Speech* is dedicated to discussions of free speech in practice.

6. See, e.g., Brian Leiter, *The Case Against Free Speech*, 38 SYDNEY L. REV. 407 (2016).

7. Anthony Leaker, *Against "Free Speech,"* CATO UNBOUND (June 13, 2018), <https://www.cato-unbound.org/2018/06/13/anthony-leaker/against-free-speech> [<https://perma.cc/G76G-DLDU>].

8. *Id.*

9. *Id.*

10. LEAKER, *supra* note 1, at 3. In an effort to support Leaker's fight against repressive elites, I retain his omission of the Oxford comma when I quote him.

Prior to making these specific critiques, however, Leaker first explains why he views the principles of free speech as rotten to their core. Leaker is explicit in his rejection of Enlightenment liberalism, including the Enlightenment's embrace of free speech, because liberalism "has been one of the most powerful tools for perpetuating and legitimising not only historical acts of barbarism—from slavery to colonial subjugation—but ongoing forms of inequality, exclusion and injustice."¹¹ Therefore, Leaker rejects the notion that the atrocities of the colonial era—colonization, slavery, and genocide—were anything but full instantiations of liberal values.¹² Rather, he views the atrocities and the values (including free speech) as part and parcel of the same project: the projection of Western hegemony and white dominance.¹³ Moreover, Leaker argues that not only have non-whites borne a disproportionate volume of the *costs* of the liberal regime, but they also have failed to share equally in its benefits, which have accrued disproportionately to white Europeans.¹⁴ Given these conditions, Leaker says that it is little wonder that people such as himself "have become disillusioned with the false promises of liberal democracy"—free speech chief among them.¹⁵

Having established why he views free speech as faulty in principle, Leaker then turns to his problems with free speech in practice. In successive chapters, he discusses free speech controversies involving students, non-whites, and Muslims. In each chapter, Leaker argues that free speech is used as a sword to target these groups and as a shield to protect against their speech.

In the chapter on students, for instance, Leaker argues that free speech is used both to attack students for wanting safe spaces (which, Leaker says, are necessary to the intellectual life of the university, lest students be forced to spend their time rebutting racist or sexist views),¹⁶ and to shut down student attempts to achieve equity on campus.¹⁷ The irony, Leaker maintains, is that

11. *Id.* at 25. *See also id.* at 26 ("What [advocates of Enlightenment liberalism] seem unable to consider is the possibility that these cherished principles might be part of the problem, that the principles themselves have served as ideological tools, used to legitimise a range of exclusionary, exploitative, extractive and oppressive policies and practices.").

12. *Id.* at 26–28.

13. *Id.* at 26–29. For a rejection of this view, see JONATHAN RAUCH, *KINDLY INQUISITORS* 113 (2d ed. 2013) ("It is quite true that for most of history (and not just in the West) women, blacks, and others were denied equal access to the intellectual and scientific establishment, as they were denied equal access to so much else. But that represents not the failure of liberalism, but the failure to embrace it. To renounce liberal science [Rauch's term for freedom of speech and freedom of inquiry] because the society in which it was embedded tended to shut out women is as silly as it would have been to renounce democracy in 1910 because women were not allowed to vote.").

14. LEAKER, *supra* note 1, at 27. One presumes that Leaker means that liberalism's benefits have fallen disproportionately on white men. *See id.*

15. LEAKER, *supra* note 1, at 15.

16. *Id.* at 47.

17. *Id.* at 40.

students' demands to improve their campuses are "necessarily the result of discussion and consensus as they involve a plurality of voices."¹⁸ Thus, it is not student activists who threaten free speech on campus; rather such threats are a result of the commodification of education, the neo-liberalism of faculty and administrators, and the actions of right-wing activists.¹⁹

The *Against Free Speech* chapters discussing free speech in relation to non-whites and Muslims make largely similar arguments. In Leaker's view, non-whites and Muslims both share the same problems: their views are rarely given the attention they merit, and in the rare circumstances when they do receive some notice, they are warped almost beyond recognition and then ridiculed.²⁰ Meantime, racists and Islamophobes are allowed to spew their hateful beliefs without interference or serious challenge.²¹ When racial justice activists and Muslims try to confront this hate, they are criticized for attempting to censor speech.²² Free speech therefore serves to legitimize hateful views while further marginalizing non-whites and Muslims.²³ Ignored when they try to speak in their own right and vilified when they try to confront hateful speech, some racial justice activists and Muslims come to the natural conclusion that their only available recourse is to resort to violence.²⁴ Yet, violent action—while, Leaker says, understandable—only draws stronger condemnation, furthering the cycle of the legitimization of hate and the marginalization of its victims.²⁵ For these reasons, Leaker argues that free speech as it is practiced serves the ends of the powerful (generally speaking, straight white men) and represses everyone else.²⁶

Leaker spends the majority of the book focusing on the problems he associates with the current free speech regime in liberal democracies, but he does turn to a proposed solution in his final chapter. In this chapter, he makes clear that "[t]o be against free speech is not merely to be against the misuse of free speech as an ideological tool, it is also to be in favour of some forms of silencing."²⁷ In point of fact, Leaker argues, censorship abounds already in the West.²⁸ People are prohibited from violating another's copyright rights,

18. *Id.* at 52.

19. *Id.* at 53.

20. *Id.* at 71, 98–100.

21. *Id.* at 75, 94.

22. *Id.* at 72, 87–88.

23. *Id.* at 72–73, 99–100.

24. *Id.* at 71, 99.

25. *Id.* at 71, 100.

26. *Id.* at 73, 98.

27. *Id.* at 107.

28. *Id.* at 109.

slandering others, or disclosing state secrets.²⁹ And this is to say nothing of social norms and customs, which further restrict what a person may say.³⁰

Against this backdrop of pervasive silencing that “not only makes our lives easier, better and more practical [and that] can even save lives,” Leaker believes that the only moral choice is to censor, among other views, “misinformed hate speech . . . against the (structurally) weak.”³¹ Leaker does recognize the importance of free speech to people living under repressive regimes, but argues that in liberal democracies there is “little evidence” that censorship will be used to target the marginalized, or that “free speech is a particularly effective tool against those with power.”³² As such, Leaker maintains, the only thing that stands between us and the brighter future censorship could bring us are the “self-declared liberals” whose commitment to white privilege and their own freedom is stronger than their belief in racial equality and the freedom of others.³³

Against Free Speech builds on (and often draws explicitly from) the work of scholars such as Brian Leiter, Catharine MacKinnon, and Leslie Kendrick, who have argued for various reasons that free speech principles ought to be reconsidered or reformed.³⁴ In his call for censorship of certain viewpoints and speakers, Leaker goes further than most people who question certain of free speech’s theoretical underpinnings, who tend to recognize the difficulty of appointing and legitimizing a censorship authority, no matter how desirable such an authority might be in the abstract.³⁵ Similarly, while scholars such as Stanley Fish and Robert Post approve of censorship in certain circumstances for utilitarian reasons (both support censorship on campus because campuses are places of instruction and as such, in their view, ought not be content neutral), they do not join Leaker in calling for censorship of certain viewpoints in *all* circumstances.³⁶ Leaker also goes beyond certain progressive scholars who are skeptical of free speech’s usefulness in the fight to achieve

29. *Id.*

30. *Id.* at 108–09.

31. *Id.* at 109–11.

32. *Id.* at 111–12.

33. *Id.* at 114.

34. See, e.g., Leiter, *supra* note 6, at 433–36; Catharine A. MacKinnon, *The First Amendment: An Equality Reading*, in *THE FREE SPEECH CENTURY* 140, 148–52 (Lee C. Bollinger & Geoffrey R. Stone eds., 2018) [hereinafter *The First Amendment*]; Leslie Kendrick, *Another First Amendment*, 118 *COLUM. L. REV.* 2095, 2112–15 (2018).

35. See, e.g., Leiter, *supra* note 6, at 437–39.

36. See STANLEY FISH, *THE FIRST* 100–08 (2019); Robert C. Post, *The Classic First Amendment Tradition under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY*, *supra* note 34, at 106, 113–17.

progressive political aims, but do not advocate for its wholesale abandonment.³⁷

Against Free Speech hews most closely to the work of scholars such as Catharine MacKinnon, who argue that free speech should be subject to a “substantive equality standard” that “confin[es] prohibited abuse and harassment by expressive means to specific hierarchical grounds of historic inequality, with the potential intersectional addition of socioeconomic class as an aggravating factor.”³⁸ Leaker shares MacKinnon’s essentially utilitarian view of free speech, which holds that speech is only useful to the extent it contributes to the betterment of society.³⁹ But, as I discuss in Part III, whereas scholars such as MacKinnon make careful, evidence-backed arguments,⁴⁰ Leaker does anything but in *Against Free Speech*.

III. THE CRITIQUE

As I wrote in the introduction, my objection to *Against Free Speech* is not so much that I think Leaker is wrong about free speech principles—though I do and he is—but that the arguments he makes against free speech are specious and poorly developed. In this section, I expand upon those criticisms. This is not meant to be a point-by-point rebuttal of Leaker’s arguments in *Against Free Speech*. Rather, it is meant to discuss the *kinds* of arguments Leaker makes and to explain why they are unpersuasive.

In arguing against free speech principles, Leaker frequently provides the least generous possible framing of his opponents’ ideas and then treats his refutation of that framing as authoritatively rebutting those ideas. This is the classic “straw man” argument: when your opponents argue for Proposition A, act as if they have asserted the easily falsifiable Proposition B and are therefore clearly wrong.⁴¹ *Against Free Speech* is riddled with such arguments.

37. See Kendrick, *supra* note 34, at 2112–15; see also Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2248 (2018).

38. Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1275 (2020) [hereinafter *Weaponizing the First Amendment*]; see also *The First Amendment*, *supra* note 34, at 148–52.

39. See *Weaponizing the First Amendment*, *supra* note 38, at 1275–78; *The First Amendment*, *supra* note 34, at 159–61. Incidentally, this is where I part ways with MacKinnon and one of the major reasons why I am ultimately unconvinced by her careful and thoughtful scholarship. I do not value free speech in proportion to the usefulness of what is said. Rather, I place inherent value in freedom of speech, which I view as a natural right of autonomous people. (My other major point of departure is the question of authority: who is to have the power to decide which speech is useful, and why should we trust them with that power?)

40. See, e.g., *Weaponizing the First Amendment*, *supra* note 38, at 1253–63.

41. See *Fallacies*, STAN. ENCYC. PHIL. (Apr. 2, 2020), <https://plato.stanford.edu/entries/fallacies/> [<https://perma.cc/VK7P-M6C8>].

Take, for example, Leaker's treatment of former British Minister of State for Universities, Science, Research and Innovation Jo Johnson's statement that "young people and students need to accept the legitimacy of healthy vigorous debate in which people can disagree with one another."⁴² Leaker dismisses this as a "highly gendered[,] . . . hyper-competitive, even militaristic" view of free speech that evinces "a highly infantile conception of communication, but one that benefits people with structural power."⁴³ Leaker manages the jump from Johnson's anodyne defense of the values of free speech on campus to his own extraordinary categorization of that defense by relying on a definition of vigor that focuses on physical strength and power.⁴⁴ In fairness to Leaker, if one reads Johnson as advocating a mode of debate that privileges strength and power, then one *possible* reading is that one is trafficking in ideas that are gendered, hyper-competitive, and militaristic.⁴⁵

But it is clear from context that Johnson is *not* advocating for a form of debate in which the strong impose their views on the weak. Rather, he is calling for an energetic and spirited discussion of ideas. Contra Leaker, such a conception of debate is antithetical to preserving structural power; the incentive of those in power is to suppress the spirited discussion of ideas, not encourage it.⁴⁶ Thus, Leaker's contention that Johnson advocates for vigorous debate because he thinks (perhaps knowingly, perhaps not) that the strong ought to impose their views on the weak is quite different from what Johnson actually says. It is easy for Leaker to "refute" the scarecrow version of Johnson's argument; it has no brain. But such refutations are not compelling, and they do Leaker's arguments a disservice. Reading them, one finds oneself spending more time trying to understand what the terms of Leaker's disagreements with free speech advocates actually are, rather than considering the merits of his position.

42. See LEAKER, *supra* note 1, at 42–46. Johnson was speaking about new regulations that would require universities to protect freedom of speech or be subject to sanctions including fines; his full quote was: "Our young people and students need to accept the legitimacy of healthy vigorous debate in which people can disagree with one another. That's how ideas get tested, prejudices exposed and society advances. Universities mustn't be places in which free speech is stifled." Josh Lowe, *Free Speech: Colleges Could Be Fined if They Stifle Debate on Campus*, U.K. SAYS, NEWSWEEK (Oct. 19, 2017, 7:07 AM), <https://www.newsweek.com/free-speech-campus-no-platforming-safe-spaces-uk-688274> [<https://perma.cc/5SGF-FREE>].

43. LEAKER, *supra* note 1, at 45.

44. See *id.* at 44–46.

45. Of course, Leaker never explains *why* strength and power are gendered (presumably male) characteristics, or why being gendered (again, presumably male), hyper-competitive, and militaristic is necessarily a bad thing. Instead, the reader must take Leaker at his word on both fronts.

46. See Noah C. Chauvin, *Governments "Erasing History" and the Importance of Free Speech*, 41 N. ILL. U. L. REV. 1, 12 (2020).

The trouble is that *Against Free Speech* is replete with such mischaracterizations. For instance, in discussing a lecture psychologist Jonathan Haidt gave lauding the American constitutional system as having “ma[d]e possible the development of stable political life” despite the human instinct towards tribalism,⁴⁷ Leaker says that Haidt celebrates the Constitution in a manner that disregards “a historical record riddled with ethnic, racial, and sexual exclusion.”⁴⁸ In fact, Haidt does no such thing. For example, he roundly criticizes America’s history of slavery and Jim Crow oppression, and he celebrates civil rights activist Martin Luther King Jr.’s vision of a nation in which all people are treated equally.⁴⁹ Far from whitewashing or ignoring American history, Haidt recognizes historical oppression for the moral abomination that it is, but maintains—as did Reverend King—that the liberal tradition enshrined in our founding documents provides the necessary tools for overcoming such oppression.⁵⁰ One would not know it from reading *Against Free Speech*, though.

One would also not know that commentator Brendan O’Neill really does take the threat of right-wing extremists seriously,⁵¹ that political scientist Yascha Mounk does not want politicians to be able to lie to us to get what they want,⁵² or that the Foundation for Individual Rights in Education is willing to protect the academic freedom rights of anyone, including supporters of antifa, Black Lives Matter, and Palestine.⁵³ More generally, a reader

47. See Jonathan Haidt, *The Age of Outrage*, CITY J. (Dec. 17, 2017), <https://www.city-journal.org/html/age-outrage-15608.html> [<https://perma.cc/RL7M-Q2WE>].

48. LEAKER, *supra* note 1, at 30.

49. Haidt, *supra* note 47.

50. See *id.*; see also Martin Luther King Jr., “I have a Dream” Speech, in THE GREATEST AMERICAN SPEECHES 132, 134 (2006) (“When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.”).

51. See LEAKER, *supra* note 1, at 18–20. But see Brendan O’Neill, *Don’t Exaggerate the Threat of the Capitol Rioters*, SPIKED (Jan. 7, 2021), <https://www.spiked-online.com/2021/01/07/dont-exaggerate-the-threat-of-the-capitol-rioters/> [<https://perma.cc/KK77-6C3A>].

52. See LEAKER, *supra* note 1, at 16–17. But see, e.g., YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY 240–42 (2018).

53. See LEAKER, *supra* note 1, at 41. But see, e.g., VICTORY: College Settles with ‘antifa’ Professor Fired for Criticizing President Trump on Facebook, Avoids First Amendment Lawsuit from FIRE, FIRE (Apr. 27, 2020), <https://www.thefire.org/victory-college-settles-with-antifa-professor-fired-for-criticizing-president-trump-on-facebook-avoids-first-amendment-lawsuit-from-fire/> [<https://perma.cc/5R7K-6H7W>]; FIRE Sues College for Ignoring Records Requests About Its Firing of Black Lives Matter Advocate, FIRE (Jan. 4, 2018), <https://www.thefire.org/fire-sues-college-for-ignoring-records-requests-about-its-firing-of-black-lives-matter-advocate/> [<https://perma.cc/5DGE-F9WL>]; FIRE, NCAC Call on Fordham to Recognize Students for Justice in Palestine, FIRE (Jan. 25, 2017),

coming to *Against Free Speech* without a basic understanding of Western history would not know that free speech is anything but a tool for the advancement of the interests of conservative white men.⁵⁴ The reader would not know that over the last century, the lives of the poor, middle class, rich, women, men, blacks, whites, Hispanics, Asians, Arabs, Africans, Europeans, indigenous peoples, Catholics, Jews, Muslims, Hindus, Buddhists, the disabled, gays, lesbians, bisexuals, and transgender persons—the lives of *humanity writ large*—have improved by orders of magnitude, and that speech was often the primary tool through which these improvements were achieved.

A closely related point is that Leaker frequently fails to consider, and sometimes outright ignores, evidence that runs contrary to his position.⁵⁵ While this happens many times in *Against Free Speech*, I will address only the two most egregious instances here. These are Leaker's claims that there is little evidence of censorship being used to target the politically weak, or that speech is an effective tool for the marginalized to use against those in power. Both claims are absurd; evidence abounds.

Leaker dismisses out of hand concerns that vulnerable people would bear the brunt of any censorship regime, writing that “there is little evidence” to support these fears.⁵⁶ In fact, this phenomenon has been well documented by scholars such as Nadine Strossen, who has noted that prominent civil rights groups, after experiencing “hostile government officials who employed a wide array of speech regulations in efforts to suppress” their work “came to recognize that any speech regulations that did not conform to the viewpoint neutrality and emergency principles, including ‘hate speech’ laws, could be . . . turned against them.”⁵⁷ As Ira Glasser, the former executive director of the American Civil Liberties Union, succinctly put it, “There is no social justice movement in America that has ever not needed the First Amendment to initiate its movement for justice, to sustain its movement to justice, to help its movement survive.”⁵⁸ It is one thing to argue that conditions have changed

<https://www.thefire.org/fire-ncac-call-on-fordham-to-recognize-students-for-justice-in-palestine/> [<https://perma.cc/9KNH-TTMK>].

54. See LEAKER, *supra* note 1, at 26–30, 50, 68.

55. This is a somewhat odd criticism to have to make of Leaker, as he himself recognizes the importance of supporting one's claims with evidence. See LEAKER, *supra* note 1, at 76–77.

56. LEAKER, *supra* note 1, at 111.

57. NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 41–42 (2018); see also *id.* at 86–88 (discussing how hate speech laws have been used abroad to suppress speech by disempowered minority groups); cf. Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2065–68 (2018) (discussing the ways censorship was used to target the labor movement in the United States).

58. Nick Gillespie, *Ira Glasser: Would Today's ACLU Defend the Speech Rights of Nazis?*, REASON (Oct. 14, 2020, 5:39 P.M.), <https://reason.com/podcast/2020/10/14/ira-glasser->

and that the politically weak no longer need to fear censorship, or that the rewards to be gained from censorship are so great that they merit the risk it poses. But to suggest that there is little evidence that censorship is used by the politically strong to target the politically weak is to willfully blind oneself to the whole of human history.

So too with Leaker's claim that "it cannot be said that in today's liberal democracies free speech is a particularly effective tool against those with power."⁵⁹ This is blatantly false. For example, in the United States, the civil rights movement mobilized massive and wide-spread protests against segregation, leading to such victories as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.⁶⁰ Protracted feminist advocacy led Congress to pass Title IX in 1972, banning sex-based discrimination in education.⁶¹ Massive shifts in public opinion, brought on by decades of careful advocacy from gays and lesbians, led the Supreme Court to strike down laws criminalizing homosexuality and subsequently to legalize same-sex marriage.⁶²

And, lest it seem that I am cherry-picking examples from a bygone era when speech could still achieve meaningful change, let me point out that within the last year and a half, the United States has been rocked by protests against perceived racial injustices. In response to those protests, governments have taken down statues, universities have changed the names of buildings and schools, and the state of Mississippi has changed its flag, all in the name of advancing racial justice.⁶³ This is to say nothing of the city of Louisville

would-todays-aclu-defend-the-speech-rights-of-nazis/ [https://perma.cc/ABT2-2JC3]. For those interested in freedom of speech, this entire podcast episode is worth a listen.

59. LEAKER, *supra* note 1, at 112.

60. See, e.g., Sheryll D. Cashin, *The Civil Rights Act of 1964 and Coalition Politics*, 49 ST. LOUIS U. L.J. 1029, 1037–39, 1039 n.54 (2005); John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 115–16 (2007); Charles R. DiSalvo, *Necessity's Child: The Judiciary, Disobedience, and the Bomb*, 41 U. MIAMI L. REV. 911, 919 (1987).

61. 20 U.S.C. §§ 1681 et seq.; see Cashin, *supra* note 60, at 1039 n.55; Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 137 (2005) (noting that lawsuits challenging sex discrimination contributed in large part to the passage of Title IX in 1972).

62. See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 38, 47–48, 85–88, 100 (2019).

63. See, e.g., *2020 Confederate Symbol Removals*, S. POVERTY L. CTR., <https://www.splcenter.org/data-projects/2020-confederate-symbol-removals> [https://perma.cc/84RU-QPCA]; Rachel Triesman, *Nearly 100 Confederate Monuments Removed In 2020, Report Says; More Than 700 Remain*, NPR (Feb. 23, 2021, 5:48 PM) <https://www.npr.org/2021/02/23/970610428/nearly-100-confederate-monuments-removed-in-2020-report-says-more-than-700-remain> [https://perma.cc/NH93-C3B4]; Stephen L. Carter, *How to Decide Which Statues to Pull Down*, BLOOMBERG (June 22, 2020, 1:00 PM), <https://www.bloomberglaw.com/product/blaw/document/QCC78EDWRGGZ> [https://perma.cc/HP8U-VW5F]; Zachary

banned no-knock warrants, the city of Minneapolis banned chokeholds after these practices led to highly publicized citizen deaths at the hands of the police,⁶⁴ and Congress considered a bill to end qualified immunity for police officers (and all other government officials).⁶⁵ These are progressive victories realized through the power of free speech.

Even worse than Leaker's mischaracterizations of his opponents' positions and his ignorance of contrary evidence is his seemingly willful misunderstanding of the right he is attacking. In discussing the so-called "right to offend," Leaker writes:

The first thing to note . . . is that, even though it is invoked all the time, there is actually no such thing; it is a fictitious right. It is not only that it comes into conflict with other rights and values such as the right to dignity and to live safe from harm, but it does not exist.⁶⁶

Well, true. Reading through the Magna Carta or the Declaration of Independence, one will not find a right to offend listed. No matter, because the *very nature* of the free speech right is the right to offend. Unoffensive speech does not need protection; nobody wants to be rid of it. It is only speech that is offensive to those in power, to the majority (in liberal democracies), or to the mob that needs to be safeguarded.⁶⁷ This is why, as Justice Oliver Wendell Holmes stated, the free speech right provides "freedom for the thought that we hate."⁶⁸ No other speech needs protection.

Shevin, Evelyn Doskoch, & Sam Kagan, *U. Renames Woodrow Wilson School and Wilson College*, DAILY PRINCETONIAN (June 27, 2020, 1:12 P.M.), <https://www.dailyprincetonian.com/article/2020/06/woodrow-wilson-racism-school-and-college-renamed-black-justice-league> [<https://perma.cc/ZYJ5-AK9Q>]; Dan Avery, *Mississippi Voters Decide to Replace Confederate-Themed Flag*, NBC NEWS (Nov. 3, 2020, 11:52 P.M.), <https://www.nbcnews.com/news/nbcblk/mississippi-voters-decide-replace-confederate-themed-state-flag-n1246244> [<https://perma.cc/P2H8-CKP6>]. For a discussion of these phenomena and their relationship to free speech, see generally Chauvin, *supra* note 46.

64. Alisha Haridasani Gupta & Christine Hauser, *New Breonna Taylor Law Will Ban No-Knock Warrants in Louisville, Ky.*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/06/12/us/breonna-taylor-law-passed.html> [<https://perma.cc/4XPM-9UFG>]; Ben Poston, *Police Agencies Are Banning a Controversial Neck Hold After George Floyd's Death*, L.A. TIMES (June 5, 2020, 2:37 PM), <https://www.latimes.com/california/story/2020-06-05/george-floyd-carotid-neck-hold-police> [<https://perma.cc/ZXF4-ZN7D>].

65. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020).

66. LEAKER, *supra* note 1, at 93.

67. See, e.g., Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1110–11 (1997).

68. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

A related misunderstanding is Leaker's claim that free speech rights are in some way illusory because certain laws, institutions, and norms restrict the things that people can say.⁶⁹ In his view, "[m]ost people in liberal democracies are already against free speech, if by free speech is meant the unfettered absolute right to say what we want when we want to whom we want, in which all context, custom, taboo and civic sense is ignored."⁷⁰ Such a view goes beyond free speech fundamentalism into free speech anarchism—a position virtually no free speech advocates would take. It would of course be unreasonable for a person to say that his freedom is impinged because social custom discourages calling someone a "bitch" in polite conversation. As Tara Smith has written, "[f]reedom is not immunity from all standards of judgment (such as standards of logical strength, probative relevance, or pedagogical import). Rather, it is the absence of coercion; one's speech is free when it is not forcibly restricted by other people."⁷¹ The conventions of polite conversation are not censorship because people voluntarily accede to them out of deference for others' feelings. There is a meaningful difference between a person electing not to say something, and that person being prevented from or punished for saying it.

A natural byproduct of Leaker's seemingly willful misunderstanding of the "right to offend" is his defense of violent responses to speech. Leaker avoids the moral discomfort of equating speech with physical violence by arguing that students combatting racism on college campuses by assaulting faculty and committing arson or Muslim extremists who respond to religious offense by shooting the offenders to death "are met with a blanket refusal to engage, or stonewalling" whenever they try to use less extreme methods to

69. See LEAKER, *supra* note 1, at 108–09.

70. *Id.* at 108.

71. Tara Smith, *The Free Speech Vernacular: Conceptual Confusions in the Way We Speak About Speech*, 22 TEX. REV. L. & POL. 57, 71 (2017). I do want to note one point Leaker makes in *Against Free Speech* that is correct: the mere existence of laws that restrict the things a person can say, such as copyright protections, libel laws, and proscriptions on disseminating classified information, demonstrate that free speech rights are not absolute. See LEAKER, *supra* note 1, at 108. However, this is not because, as Leaker argues, it is appropriate for the government to restrict people's free speech rights. *Id.* at 109. Rather, it is because speech that infringes on another's rights falls outside of the scope of the free speech right to begin with (i.e., speech is not protected when it violates another's copyright, is defamatory, or reveals protected classified information). See Smith, *supra*, at 66 ("Recall Pinker's characterization of legal limits for fraud and libel as 'exceptions.' Ask yourself: what would these be exceptions *from*? From one's right to pillage and loot? To take from another what is his?"); see also Matthew Strauser & Noah C. Chauvin, *Student-Athlete Employee Speech*, 20 VA. SPORTS & ENT. L. REV. (forthcoming 2021) (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542468 ("Governments may punish incitements to violence, true threats, fighting words, child pornography, libel and slander, obscenity, and harassment because of their *impact*, not because of their content.").

make their point.⁷² Leaker never pauses to consider whether violent student activists and religious extremists are merely unpersuasive, rather than ignored. In his view, violence against speakers one disagrees with is acceptable when one's ideas otherwise fail to gain traction. (One wonders how he might respond to Christian extremists who, unable to stop abortions from taking place through legal means, resort to bombing clinics and murdering doctors.) The moral relativism of this claim is somewhat mind-boggling. As Charles C. W. Cooke has written, "Offense, taste, hatred—these all ultimately reside in the eye of the beholder, and there are many beholders' eyes. By contrast there is one rule to which we all must hew devotedly—namely, Don't Kill People for Speaking Peacefully—and it is not subjective at all. Indeed, it is clear as day."⁷³ Quite.

Given Leaker's willingness to excuse violent reactions to speech, it is unsurprising that he also supports censoring speech with which he disagrees.⁷⁴ (Indeed, it comes as something of a relief that he does not outright advocate for more extreme measures of combatting speech he does not like.) However, Leaker is careful to avoid a central question: If we are going to censor so-called reactionary speech, who is it that will do the censoring? Leaker clearly intends for censorship to be performed by his political allies.⁷⁵ However, one of his central contentions in *Against Free Speech* is that free speech is one of many tools employed by the powerful—in his view, largely straight, white, conservative men—to "maintain existing power relations."⁷⁶ In other words, people in power (the only ones with the capacity to censor) are the very people Leaker believes need to be censored. Why would anyone willingly hand a loaded gun to his purported oppressors?⁷⁷ Leaker never explains.

72. See LEAKER, *supra* note 1, at 71; see also *id.* at 99 ("It might be the case that if you are unable to communicate in normal channels, if your arguments are not heard, if you are not only silenced, but repeatedly denigrated, dehumanized and insulted, and if you understand that the consequences of this misrepresentation are all too real and material, that they result in the indiscriminate oppression or even mass murder of innocent people, then you might feel compelled to resort to desperate measures.").

73. Charles C. W. Cooke, *Free Speech Without Apologies*, NAT'L REV. (June 1, 2015, 5:00 AM), <https://www.nationalreview.com/magazine/2015/06/01/free-speech-without-apologies/> [<https://perma.cc/EP6D-8NBK>]; see also RAUCH, *supra* note 13, at 131 ("My own view is that words are words and bullets are bullets . . ."). Beyond the immorality of violent responses to speech, Leaker also never contends with the ways in which such responses are counterproductive: when advocates for a particular belief or set of beliefs are violent, they relieve their ideological enemies of the burden of actually contending with their ideas, which become dwarfed by their actions.

74. See LEAKER, *supra* note 1, at 107–10.

75. See *id.* at 107–14.

76. See *id.* at 30–31, 45, 54, 59–60, 73–74, 93–95, 110–14.

77. Cf. RAUCH, *supra* note 13, at 143 ("Obviously, an equal-speech regime inherently requires a strong regulative authority which can have no agreed-upon mission. So we are back,

As alluded to above, the problems with *Against Free Speech*—Leaker’s refusal to meet his opponents on fair terms, his disregard for countervailing evidence, and his seemingly willful misunderstanding of the very right he denigrates—make it difficult to take seriously his core arguments. More damning, they make it unnecessary. Leaker’s theses are built on such shaky foundations that all of his claims become suspect. This means that even valid criticisms of free speech—*e.g.*, that defenders of the free speech right rely too heavily on its enshrinement in the First Amendment, rather than on a meaningful defense of free speech as a principle⁷⁸—become lost in a haze of half-truths, mischaracterizations, and outright lies. *Against Free Speech* can join the ranks of the many poorly written and openly partisan polemics criticizing free speech principles.⁷⁹ But it is difficult to see what it adds to the academic conversation. Anthony Leaker is no Brian Leiter or Catharine MacKinnon.

IV. CONCLUSION

Since my contention is that *Against Free Speech* is not simply wrong, but *bad*, it might seem strange to review it. Indeed, in the past I have observed that book reviews of the sort that are published in law journals are typically reserved for “substantial work[s] of . . . scholarship.”⁸⁰ My central contention in this review is that Leaker’s book is insubstantial. Why, then, review it? There are two reasons.

The first is that *Against Free Speech* strikes me as dangerous—not because its ideas are bad (though they are), but because it is political propaganda posing as scholarship. This is an accusation that I am uncomfortable leveling. Academics should take positions on the issues they study, and when they study social science and social ordering, their positions will doubtless have a political bias. My own support of and scholarship about free speech is doubtlessly “political” in this sense. But even “political” work by scholars should meet certain standards. Scholars are supposed to engage in their research and writing with the understanding that their original hypotheses may be wrong. To fully test those predictions, they are supposed to consider all relevant evidence in good faith. To the extent that evidence weighs against their hypotheses and beliefs, they are supposed to explain why

again, to the political regulation of inquiry on the behalf of the most politically powerful.”). Of course, “loaded gun” may be the answer to this paradox. One way of gaining the ability to censor the powerful is to overthrow them. But for all the excuses he makes for political violence, *see supra* note 72 and accompanying text, Leaker never goes quite this far in his advocacy for a new and brighter future.

78. LEAKER, *supra* note 1, at 30, 48, 113.

79. *See, e.g.*, P.E. MOSKOWITZ, *THE CASE AGAINST FREE SPEECH* (2019).

80. Noah C. Chauvin, *Enough Is as Good as a Feast*, 44 SEATTLE U. L. REV. 1, 1 (2020).

that evidence is unpersuasive, or to change their arguments to fully account for it. It is because we expect that scholars do these things as a matter of course that they are influential. We trust that when they tell us something, they tell it to us with authority.

Academics have two primary roles: teaching and research.⁸¹ They can be influential in both roles. As teachers, they educate young people who go on to be civic, business, and governmental leaders. We allow them to teach because we expect them to have the knowledge necessary to be conversant in most aspects of their field. More relevant to this essay, they produce scholarship that is a result of thoughtful, prolonged engagement with an issue. Academic scholarship is influential because its producers are expected to be, if not infallible, then at least less fallible than those who lack the time and resources to dedicate to protracted study.⁸² Not so with Anthony Leaker and *Against Free Speech*. As I have discussed, the ideas expressed in the book are specious—bad, but not transparently so. To people unfamiliar with free speech theory and practice, they may even seem convincing. This is particularly the case because Leaker is an academic and his book, published by a scholarly press and employing lots of footnotes, looks academic, too.

This is the first reason to review Leaker's book. As I have discussed, his conclusions are based on misrepresentations of his ideological opponents, ignorance of evidence that weighs against his beliefs, and fundamental misunderstandings about the principles of free speech. It would be one thing if Leaker was simply unaware of the evidence and arguments against his position. Indeed, if that were the case, I would be somewhat sympathetic to him. There has been more written about free speech than one person could ever possibly hope to read, and a person can hardly be blamed for being unfamiliar with certain works or arguments. But Leaker's sin is worse than being mistakenly unnuanced; he is intentionally so. He cannot possibly be unaware of the arguments against him because he has already been confronted by them.⁸³ There is no choice but to conclude that Leaker *intentionally* packages propagandistic arguments as serious scholarship, knowing that, because they look scholarly, they will be convincing to a broader segment of the people who read *Against Free Speech*.

81. They also frequently engage in service and in management of the university; both of these functions are somewhat ancillary to the academic project.

82. The importance of the academy is a rare point on which Leaker and I agree. See LEAKER, *supra* note 1, at 36.

83. See Jacob Mchangama, *Imagining a World Without Free Speech*, CATO UNBOUND (June 20, 2018), (responding to Leaker, *supra* note 7); see also Nico Perrino, *So to Speak Podcast Transcript: Against 'Free Speech' with Anthony Leaker*, FIRE (Jan. 2, 2019), <https://www.thefire.org/so-to-speak-podcast-transcript-against-free-speech-with-anthony-leaker/> (discussing, among other things, Leaker, *supra* note 7).

The promise Leaker makes to the political left—the opportunity not just to level the playing field with their ideological enemies but to actually tilt it against them—is built on incredibly shaky foundations. And yet, it is superficially compelling. It is important to review works such as *Against Free Speech* to prevent cynical totalitarian politics from being allowed to masquerade as serious scholarship. However, this review is not just merited because *Against Free Speech* is a vessel for bad ideas. The second reason for writing the review is that *Against Free Speech* is of a type of scholarship—known as critical theory—that frequently suffers from many of these same defects.

Critical theory is a branch of scholarship that is marked by its focus on freeing groups of people from repression.⁸⁴ Critical theorists often focus their work on the ways in which a particular group—such as women, the poor, or racial, sexual, or religious minorities—are oppressed by the powerful or the majority.⁸⁵ One crucial aspect of this project is post-modernist in origin: the rejection of “the grand narrative of the modern masters”; the dismissal of claims of external authority.⁸⁶ For one large subset of critical theorists, a natural outgrowth of their rejection of authority is their willingness to abandon the classical liberal project of evidence-based inquiry in lieu of scholarship that “is characterized by frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of [social systems], and the unapologetic use of creativity.”⁸⁷ To these scholars, demands for objective evidence merely help perpetuate systems of oppression.⁸⁸ To them, what matters is the subjective: a claim that feels true—to either the author or her audience—must *be true*.

To be clear, I believe that critical theory can make valuable contributions to the scholarly discourse. Humans have an evolutionary instinct toward prejudice,⁸⁹ and no society can look back upon a history free of, for instance, racism, sexism, or homophobia. Given these conditions, it is a good thing that there are scholars who critically evaluate the ways in which identity shapes

84. See *Critical Theory*, STAN. ENCYC. PHIL. (Mar. 8, 2005), <https://plato.stanford.edu/entries/critical-theory/> [<https://perma.cc/PRJ6-8FG6>]; see also Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 901; Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 367, 377–78 (1984).

85. E.g., Bell, *supra* note 84, at 898, 902.

86. Seyla Benhabib, *Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory*, 11 CARDOZO L. REV. 1435, 1439, 1447–48 (1990); see Bell, *supra* note 84, at 901–02.

87. Bell, *supra* note 84, at 899; cf. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 103 (2019) (“What if we measured intelligence by how knowledgeable individuals are about their own environments? What if we measured intellect by an individual’s desire to know?”).

88. Bell, *supra* note 84, at 901.

89. See Francisco J. Gil-White, *Are Ethnic Groups Biological “Species” to the Human Brain?*, 42 CURRENT ANTHROPOLOGY 515, 532–34 (2001).

our experiences. Indeed, I have proudly helped publish such work in the past.⁹⁰ However, critical theory is only useful in proportion to its practitioners' willingness to make evidence-backed assertions and to listen in good faith to criticisms of their hypotheses and the data that purport to support those hypotheses. The trouble with critical theory is that when one views the world only through the lens of "power" dynamics among groups, and especially when one rejects objective evidence in favor of subjective evidence, interesting and nuanced questions ("What role, if any, does racism play in differential rates of incarceration across racial groups?") can, over time, come to be answered in predictable, un-nuanced ways ("Any difference among racial groups is a result of racism.")⁹¹ Rather than seeing them as complex, multi-determined beings—seen, in other words, as they *are*—this mode of scholarship too often reduces people to mere stereotypes based on their "identity."

The simplicity of such worldviews is powerfully tempting. If only we could resolve one issue (such as racism), then a whole host of real social problems (such as differential rates of incarceration, educational achievement, and wealth accumulation among racial groups) might be solved. Thus, we get the totalizing worldview of antiracists such as Ibram X. Kendi, Robin DiAngelo, and Leaker.⁹² Their flattening of complex, multifaceted problems is highly effective as a political tool but frequently lacks explanatory power. Instead of providing evidence for their assertions, critics of this type have crafted an ideology that is self-executing and unfalsifiable.

Examples abound, such as Kendi's assertion that "the heartbeat of racism is denial, the heartbeat of antiracism is confession,"⁹³ DiAngelo's claim that those who question claims of racism are, in "a fundamental way," helping "white people maintain unequal racial power,"⁹⁴ and Leaker's contention that any need to explain how "[t]he United States and the United Kingdom are structurally, institutionally, systemically racist" and that "racism pervades everyday life and language. . . . is itself testament to just how deep-rooted racism is."⁹⁵ There is a moral clarity to these claims that makes challenging

90. See Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809 (2019).

91. Cf. Haidt, *supra* note 47.

92. I focus on critical race theorists in this article because it is their work with which I am most familiar and because Leaker is one of them. However, my comments and criticisms apply equally to practitioners of any sort of critical theory, including, for example, those involved in women's studies, queer studies, and ecocriticism.

93. KENDI, *supra* note 88, at 235.

94. ROBIN DIANGELO, *WHITE FRAGILITY* 86 (2018).

95. LEAKER, *supra* note 1, at 59; see also *id.* at 87 ("[A] dominant form of racism is denial that it exists.").

them virtually impossible. The choice is clear: affirm claims of racism—no matter how oversimplified or absurd—or be labeled a racist.⁹⁶

People who subscribe to this sort of worldview must be willing to accept strange and seemingly contradictory results. Take, for example, Leaker's complaint that coverage of student speech controversies often does not identify protesting students by their gender, sex, or race.⁹⁷ To Leaker, this is a "kind of racist erasure" that helps explain and justify why students are protesting in the first place.⁹⁸ Yet, it is clear that someone of Leaker's worldview confronted with a news story that discussed, for example, a protest led by Muslim students, would find such coverage to be Islamophobic. We can intuit this with a high degree of confidence because a bare thirty-eight pages after complaining of the "racist erasure" of news coverage that *does not* racialize student protestors, Leaker bemoans the fact that "Muslims are overwhelmingly represented in a negative light, and not merely in news media, but also in cultural texts such as Hollywood films, TV series and novels."⁹⁹ The reader is chided to remember that "[t]hese representations matter."¹⁰⁰

So, coverage that *does not* identify people by one or more of their identity characteristics is racist. But, coverage that *does* identify people by one of their identity characteristics is . . . also racist?¹⁰¹ Clearly, both claims cannot be true—they directly contradict one another.¹⁰² Yet, Leaker expects his reader to accept both. This acceptance can only be achieved if the reader is willing to accept the unfalsifiability of Leaker's claims: both things are racist because Leaker says they are.

There is nothing inherently wrong with self-executing moral claims. Indeed, in the political sphere, such sloganeering is quite common. Statements such as "Black Lives Matter" or "All Lives Matter," or assertions that people should be "pro-life" or "pro-choice" are at the same time anodyne moral truths and deeply political slogans. This is what makes these and similar averments such powerful political tools. Anyone who denies their political content can be accused of denying the moral truth. ("Oh, you're not pro-life? So, you must think people should just be able to kill one another, right?") The

96. *See id.* at 64. None of this is to deny that racism exists or to suggest that any claim of racism ought to be dismissed out of hand. It is merely to argue that claims of racism—like *all* claims made by academics—need to be meaningfully substantiated.

97. *See id.* at 60–61.

98. *See id.* at 61.

99. *Id.* at 99.

100. *Id.*

101. We might quibble over the terminology here, as Muslims share a religion, not a "race." For the purposes of this paper, though, I use the same terminology as Leaker. *See id.* at 87, 100–01.

102. In fact, I would argue that neither is true. As in all things, context matters.

trouble is that these kinds of claims are mere labels; they do not have any explanatory power. This is allowable in the political sphere, in which it is merely deplorable.¹⁰³ In academia, it is unacceptable.

This is not to say that academics should not do research that might be deemed political—academics can and should take up political questions. But the academy is one of the few places in which people have the time and resources to think deeply and long about the world’s problems, to consider them from all angles, and to develop nuanced explanations and solutions for them. Academics therefore have a responsibility to conduct careful research and to make only evidence-backed assertions. Claims such as Leaker’s that the mere fact of being asked to justify a claim—*i.e.*, of being asked to *do what academics do*—serves as proof that the claim is true¹⁰⁴ are anathema to this project, which requires above all a large degree of epistemic humility and a willingness to show one’s work.¹⁰⁵

Academics have a responsibility to jealously safeguard the institutions for which they are responsible from people making unsupported, unfalsifiable claims. These claims are tempting because they are easy; once one makes them, one is absolved of any responsibility for showing one’s work. But academia is not Twitter, and academics who find simple, obvious answers are usually not asking particularly interesting questions. Worse still, they may be instilling their unacademic, and ultimately unliberal worldview in the young people who learn at their feet—young people who will take the beliefs that evidence does not matter and that what is important is only how something makes you feel with them as they begin to take on the task of managing our most precious institutions.¹⁰⁶ If people holding these kinds of ideas are finally able to wrest control of newsrooms, political movements, and the education of our children—as they are now attempting to do¹⁰⁷—we will all be the poorer for it.

103. Cf. RAUCH, *supra* note 13, at 129, 153–54.

104. LEAKER, *supra* note 1, at 59; *see also id.* at 87 (“[A] dominant form of racism is denial that it exists.”).

105. This is why I had to include so many footnotes in this essay. Some critical theorists are quite open about their rejection of evidence-based study. Derrick Bell, for instance, wrote in one essay that people who apply “standards of excellence and find [critical race theory] seriously inadequate” just do not get it. Bell, *supra* note 84, at 910. The appropriate response, Bell said, was to give “a sad smile of sympathy,” or to tell people that if they did not understand the critical race theory project, it simply is not for them. *Id.* Empty as I find those justifications, I cannot help but admire how brazen Bell was in advancing them.

106. *See* Andrew Sullivan, *We All Live on Campus Now*, N.Y. MAG.: INTELLIGENCER (Feb. 9, 2018), <https://nymag.com/intelligencer/2018/02/we-all-live-on-campus-now.html> [<https://perma.cc/ZU3S-8KCZ>].

107. *See, e.g.*, Bari Weiss, *Resignation Letter*, BARI WEISS, <https://www.bariweiss.com/resignation-letter> [<https://perma.cc/4ZHB-D9P3>]; Coleman Hughes, *Stories and Data*:

Against Free Speech not only does a poor job of supporting Leaker's core theses but is also a type of "scholarly" work that ought to be roundly criticized whenever it is found in the academy. As *Against Free Speech* demonstrates, the quality of such work is often poor, and the mode of developing it is dangerous. Free speech deserves better enemies than Anthony Leaker, and his ideas deserve a better champion.

Reflections on Race, Riots, and Police, CITY J. (June 14, 2020), <https://www.city-journal.org/reflections-on-race-riots-and-police> [<https://perma.cc/Z7YS-UExK>]; John McWhorter, *Is it Racist to Expect Black Kids to Do Math for Real?*, SUBSTACK (Feb. 28, 2021), <https://johnmcwhorter.substack.com/p/is-it-racist-to-expect-black-kids> [<https://perma.cc/54SG-AGQP>]; see also Sullivan, *supra* note 106.