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## Race in America 2021: A Time to Embrace *Beauharnais v. Illinois*?

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# Race in America 2021: A Time to Embrace *Beauharnais v. Illinois?*

Steven A. Ramirez\*

*Hate crimes and racially motivated violence spiked in the United States over the past few years. Our foreign adversaries seek to inflame racial divisions in our nation and turn American against American. This now forms a major threat to our national security and domestic tranquility. Indeed, in light of the attempted insurrection of January 6, 2021, the costs of our festering racial hierarchy now threaten our constitutional republic. The soaring costs of the American racial hierarchy now demands aggressive legal response. This Essay demonstrates that the process of racial formation undergirding the hierarchy relies upon group libel to propagate racial mythology. Consequently, the Supreme Court should continue to permit states to proscribe group libel and governments should expand group libel sanctions to include private actions for victims of group libel.*

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## I. INTRODUCTION

In 2020 and 2021, race fractured America and triggered violent insurrection at the United States Capitol.<sup>1</sup> America saw the power of the

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1. “On January 6th, Americans watched as an insurrection fueled by violent conspiracy theories and white supremacy gripped the nation and attacked our democracy.” *PROTECT Plan to Fight Domestic Terrorism*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/protectplan> [https://perma.cc/5KMY-XK4D] (last visited Feb. 17, 2021); Rashawn Ray, *What the Capitol Insurgency Reveals About White Supremacy and Law Enforcement*, BROOKINGS (Jan. 12, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/01/12/what-the-capitol-insurgency-reveals-about-white-supremacy-and-law-enforcement/> [https://perma.cc/4VCK-MML8] (“Make no mis-

“Big Lie” on January 6, 2021,<sup>2</sup> when its constitutional republic nearly toppled under the weight of a murderous mob bent upon defying democracy and installing an autocrat unlimited by law.<sup>3</sup> Race permeated the scene.<sup>4</sup> The biggest lie driving the events of that dark day revolved around white supremacy.<sup>5</sup> Law and society socially construct race, and it means nothing beyond that social reality.<sup>6</sup> Instead it simply destroys

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take, the Capitol insurgency was about making America great for white people. In erecting a hangman’s noose, waving the Confederate flag, and wearing white nationalist paraphernalia, including an Auschwitz Concentration Camp shirt, the domestic terrorists showed America they fundamentally believe in maintaining and enacting white supremacy.”).

2. According to GOP Senate Leader Mitch McConnell:

There is no question—none—that President Trump is practically and morally responsible for provoking the events of that day. No question about it. The people who stormed this building believed they were acting on the wishes and instructions of their President, and having that belief was a foreseeable consequence of the growing crescendo of false statements, conspiracy theories, and reckless hyperbole which the defeated President kept shouting into the largest megaphone on planet Earth.

167 CONG. REC. S735 (daily ed. Feb. 13, 2021) (statement of Sen. Mitch McConnell).

3. The insurrection narrowly failed—this time. *See, e.g.*, Barton Gellman, *America’s Second Worst Scenario*, ATLANTIC (Jan. 17, 2021, 7:18 PM), <https://www.theatlantic.com/politics/archive/2021/01/how-close-did-us-come-successful-coup/617709/> [<https://perma.cc/XH77-QD69>] (“Trump failed in the end—if we have reached the end—to maintain an illegal grip on power. But his attempted coup made too much headway for comfort, and his supporters are far from finished with their assault on majority rule.”).

4. The President and CEO of the National Urban League highlighted the salience of race in the attempted coup:

Far from trying to contain a violent insurrection where the symbols of white supremacy were on full display, police officers are under investigation for actively participating. On January 6, we witnessed a violent mob motivated by racial resentment, by a conspiracy theory rooted in the effort to invalidate Black votes. The mob was met with empathy and deference from a law-enforcement and military establishment that harbors white supremacists among its own ranks.

Marc H. Morial, *Capitol Insurrection Reveals “Cancer” of Racism Within the Law Enforcement Establishment*, NAT’L URB. LEAGUE (Apr. 16, 2021, 9:00 PM), <https://nul.org/news/capitol-insurrection-reveals-cancer-racism-within-law-enforcement-establishment> [<https://perma.cc/TD4Z-EUNJ>].

5. *See* Kristin Romey, *Decoding the Hate Symbols Seen at the Capitol Insurrection*, NAT’L GEOGRAPHIC (Jan. 12, 2021), <https://www.nationalgeographic.com/history/article/decoding-hate-symbols-seen-at-capitol-insurrection> [<https://perma.cc/SJ5Y-2V3B>] (“When the insurrectionists came at the Capitol, they came with symbols . . . [including] [t]he Confederate flag, first swung on the country’s battlefields by secessionist states who saw their future in the enslavement of others; the gallows and noose, shorthand for the terrorization of African-Americans under Jim Crow as well as quick and dirty frontier justice.”); Associated Press, *Capitol Insurrection Displayed Many of the Symbols of American Racism*, L.A. TIMES (Jan. 14, 2021, 4:29 PM), <https://www.latimes.com/world-nation/story/2021-01-14/years-of-white-supremacy-threats-culminated-in-capitol-riots> [<https://perma.cc/Y7BH-ZKZD>] (“Amid the American flags and Trump 2020 posters at the U.S. Capitol during last week’s insurrection were far more sinister symbols: A man walking the halls of Congress carrying a Confederate flag. Banners proclaiming white supremacy and anti-government extremism. A makeshift noose and gallows ominously erected outside.”).

6. “[R]ace itself is a social construct. Any attempt to use genetics to rank populations demonstrates a fundamental misunderstanding of genetics.” American Society of Human Genetics

human capital while fueling hate and division that now threaten the very existence of the United States.<sup>7</sup> Race as a social reality can no longer survive in a truly diverse United States that soon will no longer harbor more whites than people of color.<sup>8</sup> Law must weigh in powerfully against the big lie of race to preserve the United States.<sup>9</sup> After the near-success of the attempted coup, the legal stakes cannot take on greater gravity.<sup>10</sup> This Essay posits that the reinvigoration of group libel prohibitions can help unify the United States by eliminating a key element of racial formation.<sup>11</sup>

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(ASHG), *ASHG Denounces Attempts to Link Genetics and Racial Supremacy*, 103 AM. J. HUM. GENETICS 636, 636 (2018). The ASHG mirrors earlier scientific denunciations of racial divisions and hierarchies. See, e.g., *AAA Statement on Race*, AM. ASS'N OF ANTHROPOLOGISTS (May 17, 1998), <http://www.americananthro.org/ConnectWithAAA/Content.aspx?ItemNumber=2583> [<https://perma.cc/XJJ2-DL4Y>] (“With the vast expansion of scientific knowledge in this century . . . it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups.”). Basically, “[e]vidence from the analysis of genetics (e.g., DNA) indicates that most physical variation, about 94%, lies within so-called racial groups. Conventional geographic ‘racial’ groupings differ from one another only in about 6% of their genes.” *Id.* This telltale sign of the arbitrary nature of racial construction will form the basis of a more detailed discussion in Part V of this Essay.

7. For example, while the Court applies “strict scrutiny” to college admissions decisions based upon race, it ignores the much more powerful role of legacy admissions preferences, which support the propagation of our racial hierarchy and directly influences human capital formation. See, e.g., Steve D. Shadowen, Sozi P. Tulante & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 135 (2009) (terming such a result “absurd”).

8. William H. Frey, *The Nation Is Diversifying Even Faster Than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> [<https://perma.cc/DV43-YRG4>] (“The new estimates show that nearly four of 10 Americans identify with a race or ethnic group other than white, and suggest that the 2010 to 2020 decade will be the first in the nation’s history in which the white population declined in numbers.”).

9. Dismantling our racial hierarchy will require action on multiple fronts simultaneously as the construction of that hierarchy took decades, even centuries, of racist action and inaction. Obviously, maintaining such a hierarchy requires morally reprehensible and cruel misconduct. In the United States the continuation of the hierarchy, due to the mathematics of diversity; the economics of human capital destruction; and, more recently, concerns regarding the viability of our democracy, national security, and domestic tranquility, demand the most powerful actions on offer. See Steven A. Ramirez & Neil G. Williams, *Deracialization and Democracy*, 70 CASE W. RES. L. REV. 81, 90–100 (2019) [hereinafter Ramirez & Williams, *Democracy*] (tracing recent race-based attacks on U.S. democracy designed to shift power to small bands of entrenched elites).

10. Although a number of articles address the viability of *Beauharnais*, this is the first article to cast the costs of race generally and national security in particular as critical to getting the balance between free speech and hate speech right. See, e.g., Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 511 (2015) (“*Beauharnais*, which the Court has consistently cited as precedent, treated the state’s interest in preventing future group violence instigated by defamatory statements to be so high as to constitutionally justify the punishment of content-based expressions.”).

11. Racial formation consists of “the social, economic, and political forces that determine the ideological content [and] understandings we hold about race and discrimination, as well as the

America's founders recognized the compelling need to forge unity among the people of the new republic.<sup>12</sup> George Washington spent much time and thought about ways to bind the new nation together—advocating for roads, canals, a national university, and a new capital city of splendid grandeur.<sup>13</sup> Alexander Hamilton led a brilliant effort to forge a national economy and to facilitate commerce through a unified national credit, a national bank, and a federal policy of encouraging manufacturing.<sup>14</sup> This encouraged investors to bind their fortunes to the stability of the new nation.<sup>15</sup> Thomas Jefferson favored public education and a national military academy to promote social unity.<sup>16</sup> He also greatly expanded the nation to spread the ideals of self-government and facilitate the growth of a population bound to such unifying ideals.<sup>17</sup> Governing elites today must attend to unity again and heal the gaping wounds of race in America, beginning with prohibition of divisive hate speech—specifically through the recognition of group libel sanctions in accordance with *Beauharnais v. Illinois*.<sup>18</sup>

The failure to disrupt the indefinite replication of our racial hierarchy entails manifold costs (beyond the manifest injustice and immorality) that governing elites (including the Supreme Court) either do not currently fully appreciate, or actively ignore.<sup>19</sup> First, as our nation becomes more ethnically diverse, a greater proportion of our population axiomatically becomes ensnared in the racial hierarchy, and the destruction of human capital inherent in the operation of the hierarchy soars.<sup>20</sup> Second, as

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forces that drive these understandings.” Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 38 (2016) (citing MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 55–56 (2d ed. 1994)).

12. GORDON S. WOOD, *EMPIRE OF LIBERTY* 3–4 (2009) (“The Revolutionary leaders were faced with the awesome task of creating out of their British heritage their own separate national identity” and “to become a homogenous, compassionate, and cosmopolitan people.”). See also *id.* at 103 (“[A]ll of the Revolutionaries [were] preoccupied with finding adhesives to bind people together.”).

13. *Id.* at 78–79.

14. *Id.* at 94.

15. *Id.* at 96–97.

16. *Id.* at 292, 472–73.

17. *Id.* at 248, 368–70, 376.

18. 343 U.S. 250 (1952).

19. See Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 307–22 (2018) [hereinafter Ramirez & Williams, *Possibility of Deracialization*] (summarizing racial hierarchy in United States through a review of evidence demonstrating substantial and enduring disparities across a range of indicia of social well-being).

20. This fact explains the rapid decline of the United States in inequality-adjusted human development relative to the rest of the world. See Laurel Wamsley, *U.N. Report: In the Age of Humans, ‘The Dominant Risk to Our Survival Is Ourselves’*, NPR (Dec. 15, 2020, 3:55 PM),

injustice against a greater proportion of the population takes hold, social instability predictably ensues and social divisions increase.<sup>21</sup> Third, the racial hierarchy and concomitant social instability invite foreign powers to exploit our festering racial divisions and to incite domestic discord to weaken our nation.<sup>22</sup> In short, the American racial hierarchy now poses a direct and substantial threat to domestic tranquility and the common defense—and the law must respond to these threats to finally begin disrupting the legal propagation of white supremacy.

Today, America faces putative acts of war from Russia<sup>23</sup> and other nations that attack us using a new generation of warfare involving cyber-attacks, disinformation, and the use of the American racial hierarchy to incite civil unrest and bloodshed.<sup>24</sup> According to former National Security Advisor and Lt. General (ret.) H. R. McMaster, this Russian new-generation warfare (RNGW) focuses specifically on fomenting “racial division” within the United States by “amplifying white militia content” while at the same time “creating content for black audiences” highlighting mistreatment of African Americans.<sup>25</sup> McMaster shared this assessment of RNGW and its focus on exploiting the U.S. racial hierarchy

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<https://www.npr.org/2020/12/15/946765066/un-report-in-the-age-of-humans-the-dominant-risk-to-our-survival-is-ourselves> [<https://perma.cc/YGG5-HS63>] (“The United States now ranks 17th on the Human Development Index, slipping three spaces from its ranking five years ago. When the index is adjusted for inequality, the U.S. drops another 11 places.”). See also *supra* note 8 (forty percent of Americans identify as nonwhite, and the number is growing).

21. For example, the attempted insurrection of January 6, 2021, revealed that neo-Nazis, white supremacists, and other far-right extremists have successfully infiltrated the U.S. government and military, hampering the ability of the United States to defend itself from domestic terrorism. See Simon Ostrovsky, *Extremism in the Ranks: Some at the January 6 Capitol Riot Were Police, Active Military*, PBS NEWS HOUR (Mar. 13, 2021, 5:18 PM), <https://www.pbs.org/newshour/show/extremism-in-the-ranks-some-at-the-january-6-capitol-riot-were-police-active-military> [<https://perma.cc/ABB7-W7FT>] (reporting the Secretary of Defense’s acknowledgment of extremists’ presence in the military).

22. Most recently, the National Intelligence Council in the Trump Administration reported that Russian President Vladimir Putin ordered his government to interfere in the election of 2020 on behalf of President Trump and to sow discord within the United States. See NAT’L INTEL. COUNCIL, INTELLIGENCE COMMUNITY ASSESSMENT, FOREIGN THREATS TO THE FEDERAL ELECTIONS OF 2020, at i (2021) (declassified Mar. 15, 2021), <https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2021/item/2192-intelligence-community-assessment-on-foreign-threats-to-the-2020-u-s-federal-elections> [<https://perma.cc/3XZS-MK9Q>] (reporting NIC assessment of Russian interference).

23. Laura Kelly, *Barr Says Russia Appears to Be Behind Massive Hack*, HILL (Dec. 21, 2020, 12:27 PM), <https://thehill.com/policy/cybersecurity/531136-barr-says-russia-appears-to-be-behind-massive-hack> [<https://perma.cc/NDX7-H9SA>].

24. Jānis Bērziņš, *The Theory and Practice of New Generation Warfare: The Case of Ukraine and Syria*, 33 J. SLAVIC MIL. STUD. 355, 356–77 (2020) (defining Russian New Generation Warfare with reference to review of decades of military scholarship within Russian sources). “This article’s main aim is to describe the Russian way of ‘sub-threshold warfare’ as defined by Russia itself.” *Id.* at 355.

25. H.R. MCMASTER, BATTLEFIELDS: THE FIGHT TO DEFEND THE FREE WORLD 48 (2020).

with essentially the entire U.S. intelligence community,<sup>26</sup> the entire Senate Select Committee on Intelligence,<sup>27</sup> as well as the Chairman of the Joint Chiefs of Staff, General Mark A. Milley, and former Secretary of Defense General James Mattis.<sup>28</sup> These military and defense leaders all suggest an uncomfortable reality for our governing elites: America today faces the prospect of military defeat because our deficient legal system<sup>29</sup> fails to disrupt the perpetuation of white supremacy and our festering racial hierarchy.<sup>30</sup>

This Essay will contextualize *Beauharnais v. Illinois* through the lens of the compelling national security and domestic tranquility stakes that race presents today. It argues that law must finally take affirmative action to end the American racial hierarchy and to thereby further human development, secure domestic tranquility, and ultimately provide for the

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26. Steven A. Ramirez, *Hate on the Ballot: Election 2020 and the Quest for a Diverse and Inclusive Democracy*, 23 HARV. LATINX L. REV. 255, 258 n.19 (2020) [hereinafter Ramirez, *Hate on the Ballot*] (citing U.S. OFF. DIR. NAT'L INTEL., WORLDWIDE THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 7 (Jan. 29, 2019) ("Russia's social media efforts will continue to focus on aggravating social and racial tensions.")).

27. SENATE SELECT COMM. INTEL., RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, VOLUME 2: RUSSIA'S USE OF SOCIAL MEDIA, WITH ADDITIONAL VIEWS, S. REP. NO. 116-XX, at 6 (2019), [https://www.intelligence.senate.gov/sites/default/files/documents/Report\\_Volume2.pdf](https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf) [<https://perma.cc/8FCF-FFDE>] ("[T]he Russian information warfare campaign exploited . . . divisive issues—such as race, immigration, and Second Amendment rights—in an attempt to pit Americans against one another and against their government.").

28. Steven A. Ramirez, *New Law Review Article: Hate on the Ballot*, CORP. JUST. BLOG (Oct. 7, 2020, 10:37 PM), <http://corporatejusticeblog.blogspot.com/2020/10/new-law-review-article-hate-on-ballot.html> [<https://perma.cc/DLT2-AATM>].

29. High economic inequality now impedes human development in the United States to such an extent that the United States is ranked only twenty-eighth according to the United Nations Human Development Programme. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2020: THE NEXT FRONTIER, HUMAN DEVELOPMENT AND THE ANTHROPOCENE 351 (2020). The United States ranks thirty-first in sustainability measures. *Rankings*, SUSTAINABLE DEV. REP., <https://dashboards.sdindex.org/rankings> [<https://perma.cc/WK3S-UFFY>] (last visited June 10, 2021). I recently posited that sustainable inequality-adjusted human development provides an objective test of the efficacy of a given legal system to serve citizens as well as an aspirational goal for legal systems. Steven A. Ramirez, *The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development*, 83 LAW & CONTEMP. PROBS. 219, 232 (2020).

30. As Richard Delgado states:

Although formally racist laws are now forbidden, African-American disadvantage persists on dozens of fronts, including credit, home purchasing, average income, infant mortality, longevity, and educational attainment. Covert studies employing testers, one white and one black, but otherwise identical, show consistent discrimination when Blacks try to rent a house, buy a car, buy a house, or apply for a job. Handicapped even when they try to sue for redress for discrimination, Blacks and other minorities of color find the judicial system stacked against them.

Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361, 367 (1998).

common defense.<sup>31</sup> The expansion of *Beauharnais* provides a logical first step because at the root of all racial hierarchies lies group libel. Over the long term, this would stem the power of the social construction of race to destroy human capital and capabilities, and thereby secure the general welfare and national security.<sup>32</sup> The social construct of race today threatens the national security of the United States more than ever and demands that lawmakers revise their understanding of how race operates to weaken the nation and leave us more vulnerable to attacks from adversaries seeking to foment domestic violence in the United States.<sup>33</sup>

Part II will review the costs of the social construct of race in America, with a focus on national security, economics, the rule of law, and the continued viability of the United States as a constitutional republic. Part III will contextualize *Beauharnais* as an essential legal tool for addressing continued racial fabrication in view of such costs. Part IV will argue for an expansion of group libel under law and consistent with *Beauharnais*. The Essay concludes that affirmation and expansion of *Beauharnais* gives the Court and other policymakers an opportunity to commence unwinding their obvious and even shrill efforts to maintain white supremacy and accompanying racial oppression indefinitely in the United States.<sup>34</sup> Otherwise, lawmakers—including the Court—can continue to weaken the United States by ignoring the reality of our socially constructed racial hierarchy and facilitating the continuation of white supremacy.

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31. The Preamble clarifies the Founders' intent with respect to the purpose of the Constitution. See John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1137 (2018) (“[T]he Preamble was carefully composed to include each of its fifty-two words. It served as the unifying legal banner raised confidently and decisively in 1787. Its principles reverberate through the preambles of states and nations around the world. It should not be forgotten or ignored.”).

32. Law lags behind science in terms of understanding that law plays a central role in the social construction of race and actively fosters its perpetuation. “Today, the mainstream belief among scientists is that race is a social construct without biological meaning.” Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/> [<https://perma.cc/F4GW-73XX>]. Lawmakers continually fail to disrupt our racial hierarchy with no coherent explanation. See *AAA Statement on Race*, *supra* note 6; see also American Society of Human Genetics, *supra* note 6, at 636 (“Genetics demonstrates that humans cannot be divided into biologically distinct subcategories.”). Therefore, all material differences in indicia of social well-being, including economic disparities, among so-called racial or ethnic groups arise from corrupt law and other social mechanisms of racial oppression.

33. See William J. Aceves, *Virtual Hatred: How Russia Tried to Start a Race War in the United States*, 24 MICH. J. RACE & L. 177, 226 (2019) (“The Russian social media campaign had two strategic goals. . . to support the presidential campaign of Donald Trump . . . and . . . to undermine public faith in the U.S. electoral process and the democratic system. To achieve these goals, the Russian campaign sought to amplify existing political tensions and social divisions in the United States. It did so by focusing on race.”).

34. Ramirez & Williams, *Democracy*, *supra* note 9, at 100–13 (and authorities cited therein).



## II. THE COSTS OF OUR RACIAL HIERARCHY

The true costs to the United States of maintaining its socially and legally constructed racial hierarchy escape precise quantification in part because no legal system secures the maximum potential of its human resources.<sup>35</sup> Nevertheless, macroeconomic assessments suggest that the destruction of human capital implicit in our racial hierarchy costs trillions per annum in forgone productivity.<sup>36</sup> Further, governments waste hundreds of billions more in expenditures related to the highly racialized War on Drugs.<sup>37</sup> Neither these staggering costs nor the immorality of racial oppression inspired lawmakers to take real action to dismantle the American racial hierarchy.<sup>38</sup> Perhaps the domestic terrorism and national security stakes can operate to correct the calculus of governing elites.<sup>39</sup>

Prior to his appointment to the post of National Security Advisor under President Trump, Lt. General H. R. McMaster commissioned a study on Russia's successful use of new generation warfare in its invasion of Ukraine and annexation of Crimea.<sup>40</sup> McMaster directed the Army Capabilities Integration Center, and they coined the term Russia new-generation warfare (RNGW) to denote the integrated use of conventional military power with cyberwarfare and information warfare.<sup>41</sup> RNGW involves full spectrum warfare, including physical and psychological effects arising from disinformation and the use of disruptive technologies.<sup>42</sup> In the United States, McMaster suggests that populist politics and racial divisions allow our adversaries to diminish our will and our confidence in our institutions.<sup>43</sup>

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35. Singapore, a multicultural and market-based system, comes closest, which explains its towering human development ratings including its high life expectancy. Ramirez & Williams, *Possibility of Deracialization*, *supra* note 19, at 331–38 (and authorities cited therein).

36. *Id.* at 321–24 (and authorities cited therein).

37. andre d. p. cummings & Steven A. Ramirez, *Roadmap for Anti-Racism: First Unwind the War on Drugs Now*, 96 TULANE L. REV. (forthcoming 2021).

38. Interest-convergence theory suggests that major geopolitical events can open avenues to racial progress. Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 138 (2003) (“The role of interest convergence in determining the course of minority fortunes is thus a well-known tool of critical analysis, useful both in explaining the course of history and in determining when the time may be right to strike for change.”). *But see* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 197 (2011) (“The interest-convergence theory can offer valuable and formidable insights into the way that change occurs; it should not, however, be viewed as either flawless or all-encompassing.”).

39. *See* RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* 18 (2001) (“[C]ivil rights gains for communities of color coincide with the dictates of white self-interest. Little happens out of altruism alone.”).

40. MCMASTER, *supra* note 25, at 1.

41. *Id.*

42. *Id.* at 2.

43. *Id.* at 19.

More specifically, McMaster demonstrates that Russia used a disinformation campaign and exploited racial divisions to influence the 2016 election in favor of Donald Trump.<sup>44</sup> A front organization for Russian intelligence agencies—the Internet Research Agency (IRA)—exploited U.S. social media to create a vast network of profiles and agents to plant and propagate disinformation that Russian “click farms” could then forward to unwitting victims subjected to an entire ecosystem of disinformation.<sup>45</sup> Russia’s goal entailed nothing less than discrediting American democracy and manipulating Americans to hate each other—to prompt American self-loathing and violence.<sup>46</sup> By discrediting American media sources, Russia enhanced its ability to manipulate angry Americans who felt disenfranchised by the political system.<sup>47</sup>

“The IRA’s main effort was to foment racial division, which it accomplished by amplifying white militia content while creating content for black audiences that highlighted the mistreatment of black Americans by police.”<sup>48</sup> Indeed, McMaster found that of the 1,107 videos produced by the IRA, 1,063 sought to inflame racial discord.<sup>49</sup> Through the support of extremist groups, the IRA even advocated for the secession of Texas and California from the union to exploit anti-immigrant prejudice and racial discord.<sup>50</sup> This mirrored a Soviet effort to create racial unrest and to encourage separatism in the South during the 1930s.<sup>51</sup> Russia also created front organizations and organized rallies and counterrallies to incite violence and even civil war.<sup>52</sup>

McMaster enjoys broad support for each of his critical conclusions

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44. *Id.* at 26, 48.

45. *Id.* at 46–47.

46. *Id.* at 47–48.

47. *Id.* at 46–49.

48. *Id.* at 48.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 48–50. President Trump actively encouraged talk of civil war and insurrection. Catharine Lucey & Alex Leary, *Trump Leads Scattered Strategy on Impeachment*, WALL ST. J. (Oct. 2, 2019, 10:59 AM), <https://www.wsj.com/articles/trump-leads-scattered-strategy-on-impeachment-11570028344> [<https://perma.cc/W3V7-UMFK>] (“His recent tweets have put Republican lawmakers in a difficult position, with calls to expose and question the whistleblower at the center of the impeachment inquiry and the suggestion that a congressman leading the probe be arrested for treason. He has promoted talk of a civil war.”); Howard Kurtz, *The President as Insurgent: Why Trump Is Pushing Protests in Democratic States*, FOX NEWS (Apr. 21, 2020), <https://www.foxnews.com/media/the-president-as-insurgent-why-trump-is-pushing-protests-in-democratic-states> [<https://perma.cc/JNM4-THWD>]. Even Republican lawmakers condemn Trump’s divisive misconduct. Laurie Kellman, *Of Treason and Civil War: An Agitated Trump Amps Up Threats*, ASSOCIATED PRESS (Sept. 30, 2019), <https://apnews.com/f7ba2667deda489ea7eb3e173944e734>, [<https://perma.cc/673F-7RUG>] (quoting GOP Rep. Adam Kinzinger: “I have visited nations ravaged by civil war. . . . I have never imagined such a quote to be repeated by a President. This is beyond repugnant.”).

regarding the Russian exploitation of racial divisions for geopolitical advantage. For example, NBC News recently obtained documents showing that Russia seeks to stoke more racial violence and discord in 2020 and beyond.<sup>53</sup> The plan is run under Yevgeny Prigozhin, who was indicted by special counsel Robert Mueller for meddling in the 2016 election.<sup>54</sup> According to NBC:

The documents contained proposals for several ways to further exacerbate racial discord in the future, including a suggestion to recruit African Americans and transport them to camps in Africa “for combat prep and training in sabotage.” Those recruits would then be sent back to America to foment violence and work to establish a pan-African state in the South, particularly in South Carolina, Georgia, Alabama, Mississippi and Louisiana.<sup>55</sup>

The NBC report, in turn, comports with the assessment of the U.S. intelligence community: “Russia’s social media efforts will continue to focus on aggravating social and racial tensions, undermining trust in authorities, and criticizing perceived anti-Russia politicians.”<sup>56</sup> *USA Today* conducted an in-depth review of IRA ads.<sup>57</sup> It found that “[t]he roughly 3,500 Facebook ads created by the Russian-based Internet Research Agency ‘consistently promoted ads designed to inflame race-related tensions.’”<sup>58</sup>

January 6, 2021, delighted the enemies of the United States as U.S. citizens attacked U.S. democracy because they disagreed with the lawful process of declaring a winner in the presidential election of 2020—and five Americans died.<sup>59</sup> Russian Foreign Ministry officials immediately tried to inflame the distrust within our society stating: “The electoral system in the United States is archaic, it does not meet modern democratic standards, creating opportunities for numerous violations, and

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53. Richard Engel et al., *Russian Documents Reveal Desire to Sow Racial Discord—and Violence—in the U.S.*, NBC NEWS (May 20, 2019, 6:54 PM), <https://www.nbcnews.com/news/world/russian-documents-reveal-desire-sow-racial-discord-violence-u-s-n1008051> [<https://perma.cc/DDB6-KLCA>].

54. *Id.*

55. *Id.*

56. U.S. OFF. DIR. NAT’L INTEL., *supra* note 26, at 7.

57. Jason Stattler, *Trump and Russia Used Race to Divide America. Now It’s a National Security Problem*, USA TODAY (July 22, 2018, 4:34 PM), <https://www.usatoday.com/story/opinion/2018/07/19/putin-trump-race-divide-americans-2016-election-interference-column/799765002/> [<https://perma.cc/ZKU3-2UAN>].

58. *Id.*

59. Jemima McEvoy, *Woman Possibly ‘Crushed to Death’: These Are the Five People Who Died Amid Pro-Trump Riots*, FORBES (Jan 8, 2021, 9:30 AM), <https://www.forbes.com/sites/jemimamcevoy/2021/01/08/woman-possibly-crushed-to-death-these-are-the-five-people-who-died-amid-pro-trump-riots/?sh=276b936b737c> [<https://perma.cc/9K89-G5LG>].

the American media have become an instrument of political struggle.”<sup>60</sup> Another Russian official stated: “The celebration of democracy is over. This is, alas, actually the bottom, I say this without a hint of gloating. America is no longer charting the course, and therefore has lost all its rights to set it.”<sup>61</sup> January 6 gave Putin a stunning victory, even turning so-called patriots against their own government and democracy in fevered hatred of their fellow Americans.<sup>62</sup>

On January 7, 2021, the U.S. Intelligence Community delivered an assessment to President Trump regarding foreign interference with the 2020 election.<sup>63</sup> The assessment found that Russia (operating under the orders of Vladimir Putin) fomented every key myth underlying the attempted insurrection of January 6:

We assess that Russian President Putin authorized, and a range of Russian government organizations conducted, influence operations aimed at denigrating President Biden’s candidacy and the Democratic Party, supporting former President Trump, undermining public confidence in the electoral process, and exacerbating sociopolitical divisions in the US.<sup>64</sup>

Russia also propagated disinformation regarding the integrity of mail-in ballots, Democratic voting fraud, and racial justice protests.<sup>65</sup> Iran also attempted to inflame racial tensions, even to the extent of spoofing threatening emails from the Proud Boys.<sup>66</sup> In short, foreign adversaries helped encourage the white supremacist assault on the Capitol.<sup>67</sup>

### III. *BEAUHARNAIS* IN CONTEXT

On January 7, 1950, in the city of Chicago, Joseph Beauharnais published a leaflet that portrayed “the negro race” as depraved, criminal,

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60. *World Shocked by Trump Supporters’ Attack on U.S. Democracy*, REUTERS (Jan. 6, 2021, 3:43 PM), <https://www.reuters.com/article/us-usa-election-international-reaction-f/world-shocked-by-trump-supporters-attack-on-u-s-democracy-idUSKBN29B2VS> [<https://perma.cc/W632-BTQN>].

61. *Id.*

62. Omer Benjakob, *Putin’s Disinformation Campaign Claims Stunning Victory with Capitol Hill ‘Coup’*, HAARETZ (Jan. 10, 2021), <https://www.haaretz.com/world-news/.premium.HIGHLIGHT-putin-disinformation-campaign-trump-stunning-victory-capitol-hill-coup-1.9432690> [<https://perma.cc/3WLV-BVJJ>].

63. NAT’L INTEL. COUNCIL, *supra* note 22.

64. *Id.* at i.

65. *Id.* at 3–4.

66. *Id.* at 6.

67. Murderous white supremacists of recent years often trace their roots to Timothy McVeigh who killed 168 innocent victims in Oklahoma City in 1995. Mike Levine et al., *Nation’s Deadliest Domestic Terrorist Inspiring New Generation of Hate-Filled ‘Monsters,’ FBI Records Show*, ABC NEWS (Oct. 6, 2020, 5:07 AM), <https://abcnews.go.com/US/nations-deadliest-domestic-terrorist-inspiring-generation-hate-filled/story?id=73431262> [<https://perma.cc/CNL4-4NZB>].

and unchaste.<sup>68</sup> As such, the publication exposed members of a “race” to “contempt, derision, or obloquy.”<sup>69</sup> The state of Illinois brought criminal charges for violation of its group libel statute.<sup>70</sup> A jury convicted Beauharnais, and he appealed his conviction to the Illinois Supreme Court.<sup>71</sup>

The Illinois Supreme Court found that Beauharnais’s publication would inevitably lead to racial violence and thus constituted “fighting words” that therefore did not trigger First Amendment protection.<sup>72</sup> The very statute under which Illinois prosecuted Beauharnais already passed constitutional muster in 1941.<sup>73</sup> The Illinois court noted that the First Amendment did not generally protect libelous statements.<sup>74</sup> Furthermore, an entire series of U.S. Supreme Court precedents seemingly supported the conclusion of the Illinois courts that speech accompanied by manifest threats of violence did not enjoy First Amendment protection.<sup>75</sup> In short, Beauharnais suffered his conviction under Illinois legislation resting upon decades of precedent vindicating government power to curtail false speech accompanied by threat of violence.

In *Beauharnais v. Illinois*,<sup>76</sup> the U.S. Supreme Court upheld the criminal conviction.<sup>77</sup> Beauharnais claimed his conviction violated his right to free speech under the First Amendment.<sup>78</sup> The Court found that the common law criminally sanctioned libel before and after the founding of the republic.<sup>79</sup> Beauharnais distributed leaflets that impugned an entire class of individuals with similar morphological features as rapists, criminals, and marijuana users.<sup>80</sup> The Illinois statutory prohibition sought to stem group libel through criminalization.<sup>81</sup> The Court reasoned that “if

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68. *People v. Beauharnais*, 97 N.E.2d 343, 344–45 (Ill. 1951), *aff’d*, 343 U.S. 250 (1952).

69. *Id.* at 345.

70. *Id.* at 344.

71. *Id.* at 345.

72. *Id.* at 346.

73. *Id.* (citing *Bevins v. Prindable*, 39 F. Supp. 708 (E.D. Ill. 1941), *aff’d*, 314 U.S. 573 (1941)).

74. *Id.* (citing *People v. Doss*, 51 N.E.2d 517 (1943) (criminally punishing libel)).

75. *Id.* (citing *Gitlow v. New York*, 268 U.S. 652 (1925) (allowing the state to prohibit advocacy of anarchy); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (allowing the state to prohibit personal insults likely to lead to violence)). During wartime, the threat of obstructing conscription sufficed to restrict speech. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

76. 343 U.S. 250 (1952).

77. *Id.* at 251–52, 267.

78. *Id.* at 251–52.

79. *Id.* at 254–55. In fact, even truthful statements could support liability until long after the ratification of the Constitution. *Id.*

80. *Id.* at 252.

81. *Id.* at 251. The statute at issue provided:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for

an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group.”<sup>82</sup> Moreover, the Court took notice of the link between racial libel and bloodshed in Illinois and beyond.<sup>83</sup> In 1952, the racial horrors of World War II concretized the costs of unbridled white supremacy and the fascism that must inherently accompany it.<sup>84</sup> The Supreme Court held that *Beauharnais*’s speech constituted libel, and was therefore not protected by the Constitution.<sup>85</sup>

The Court approved of the Illinois trial court’s approach to some key issues. For example, the Illinois trial court did not entertain a jury argument on the issue of truth of the group libel and instead found the racial libel against African Americans false as a matter of law.<sup>86</sup> Justice Frankfurter highlighted the essential truth that group libel sweeps all members of the group into the sting of the libel “willy-nilly” and cannot be true or in any way justifiable.<sup>87</sup> Similarly, the Court found that the state could punish such lies without specific proof that the utterances

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sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.

*Id.* (citing ILL. REV. STAT. 1949, c. 38, s. 471).

82. *Id.* at 258.

83. As Justice Frankfurter stated:

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Love-joy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction.

*Id.* at 258–59.

84. *See id.* (linking racial libel to bloodshed in Illinois).

85. *Id.* at 255–59, 267.

86. *People v. Beauharnais*, 97 N.E.2d 343, 346–47 (Ill. 1951), *aff’d*, 343 U.S. 250 (1952).

87. As Justice Frankfurter stated:

It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois legislature may warrantably believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.

*Beauharnais*, 343 U.S. at 263. Only one dissenter, Justice Black, found that group libel prohibitions absolutely violate the First Amendment. Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 636–37 (2010).

would incite immediate violence.<sup>88</sup> Instead the Court took notice of the history of racial violence in Illinois, including riots, bombings, murders, and bloodshed.<sup>89</sup> Given recent events in El Paso,<sup>90</sup> Pittsburgh,<sup>91</sup> and at the Capitol,<sup>92</sup> along with spiking hate crimes across the nation,<sup>93</sup> group libel arguably triggers violence and mayhem as much today as in the 1950s.<sup>94</sup>

Since *Beauharnais*, several Supreme Court opinions (not involving manifest threats of violence from libelous statements) putatively cast doubt on the continued validity of its holding, at least according to some commentators.<sup>95</sup> For example, in *New York Times v. Sullivan*, the Court

88. 343 U.S. at 254.

89. *Id.* at 258–61.

90. See *Texas Walmart Shooting: El Paso Attack ‘Domestic Terrorism’*, BBC NEWS (Aug. 5, 2019), <https://www.bbc.com/news/world-us-canada-49226573> [https://perma.cc/75KZ-WNT3] (noting the El Paso Walmart shooter’s racist 8chan messages about Hispanic people); see also Erin Coulehan et al., *Federal Hate Crime Charges Filed in El Paso Shooting That Targeted Latinos*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/us/politics/el-paso-shooting-federal-hate-crimes.html> [https://perma.cc/N97F-TQRU] (reporting that the shooter who left twenty-two people dead at a Walmart in El Paso, Texas, on August 3, 2019, was indicted on federal hate crime charges); Eleanor Dearman, *Racism and the Aug. 3, Shooting: One Year Later, El Paso Reflects on the Hate Behind the Attack*, EL PASO TIMES (Aug. 1, 2020, 2:45 PM), <https://www.elpasotimes.com/in-depth/news/2020/07/30/el-paso-walmart-shooting-community-reflect-racist-motive-behind-attack/5450331002/> [https://perma.cc/TU3U-QLSS] (describing the El Paso shooter’s white supremacist views he circulated online).

91. See Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [https://perma.cc/5WPH-YMYZ] (reporting that the Pittsburgh Tree of Life synagogue shooting was among the deadliest attacks against the Jewish community and left eleven people dead); Nicole Chavez et al., *Pittsburgh Synagogue Gunman Said He Wanted All Jews to Die, Criminal Complaint Says*, CNN (Oct. 31, 2018, 12:44 PM), <https://www.cnn.com/2018/10/28/us/pittsburgh-synagogue-shooting> [https://perma.cc/2FFN-8Y23] (describing the Pittsburgh synagogue shooter’s extreme anti-Semitic beliefs posted online).

92. See *supra* notes 1–3, 59, and accompanying text.

93. See, e.g., Sam Cabral, *Covid ‘Hate Crimes’ Against Asian Americans on Rise*, BBC NEWS (Apr. 2, 2021), <https://www.bbc.com/news/world-us-canada-56218684> [https://perma.cc/9KYN-ZUJY] (covering the recent spike in hate crimes against Asians and Asian Americans in the United States since the start of the COVID-19 pandemic); Adeel Hassan, *Hate-Crime Violence Hits 16-Year High, F.B.I. Reports*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html> [https://perma.cc/7W9A-6V9C] (reporting a sixteen-year high in 2018 of violent hate crime assaults); see also *infra* note 112 (demonstrating the rise in hate crimes from 2015 through 2018).

94. Empirical evidence strongly associates recent group libels with surging hate speech and violence. Ramirez, *Hate on the Ballot*, *supra* note 26, at 260–65.

95. E.g., 1 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 6.16 (3d ed. 2011) (“Although the *Beauharnais* case has not been explicitly overruled, [newer cases] likely . . . lead to a different result in a contemporary challenge to an analogous statute.”); Leonard M. Niehoff, *Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition*, 52 U. MICH. J. L. REFORM 859, 885 (2019) (“Although the Court has never formally overruled *Beauharnais*, . . . later developments eclipse its reasoning and render it doctrinally obsolete.”); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1997 n.204

concluded that state defamation law must comport with the First Amendment by requiring a showing of “actual malice” before lies about public figures acting in their official capacity lead to civil liability.<sup>96</sup> In *Brandenburg v. Ohio*, the Court held that “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>97</sup> In 1992, the Court struck down an effort to outlaw nonlibelous, symbolic speech (cross-burning) that would arouse anger in others when based upon race, gender, or religion.<sup>98</sup> In *Matal v. Tam*, the Court allowed trademark protection for a band using a racial slur for its name notwithstanding long-standing federal prohibitions on disparaging trademarks under the Lanham Act.<sup>99</sup>

At other points in time, the Court permitted restrictions on hate speech associated with hate crimes or violence. In *Virginia v. Black*, the Court upheld a “ban on cross burning carried out with the intent to intimidate” because such action constituted a “true threat” of violence.<sup>100</sup> Similarly, in *Wisconsin v. Mitchell*, the Court permitted enhanced criminal sanctions for those acting intentionally because of the victim’s race, disability,

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(2018) (“While . . . *Beauharnais v. Illinois* . . . has never been overturned, its validity has been all but ignored for at least four decades. *See, e.g., Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir.) (questioning whether *Beauharnais* ‘would pass constitutional muster today’), *cert. denied*, 439 U.S. 916 (1978).”); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 330 (1988) (“[A]s a matter of technical precedent *Beauharnais* comes to us as damaged goods.”).

96. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (“The constitutional guarantees [of the First Amendment] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

97. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

98. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (“The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul’s compelling interests; it plainly is not.”).

99. *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (“[W]e hold that the disparagement clause violates the Free Speech Clause of the First Amendment.”).

100. *Virginia v. Black*, 538 U.S. 343, 363 (2003). *See also id.* at 359 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam); *accord R.A.V. v. City of St. Paul*, 505 U.S. at 388 (“[T]hreats of violence are outside the First Amendment”); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 774 (1994); *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 373 (1997)). “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Id.* at 359 (citing *Watts v. United States*, 394 U.S. at 708 (“political hyperbole” is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S. at 388). “The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’” *Id.* at 359–60 (citing *Watts*, 394 U.S. at 708; *R.A.V.*, 505 U.S. at 388).



gender, religion, ancestry, or sexual orientation.<sup>101</sup> The Supreme Court long ago recognized “fighting words” and libel as exceptions to broad First Amendment protection.<sup>102</sup> Furthermore, far from repudiating *Beauharnais*, the Court itself treats it as binding authority.<sup>103</sup> Thus, the better scholarship recognizes the continued vitality of *Beauharnais*.<sup>104</sup>

While some scholars may suggest that the Court somehow reversed *Beauharnais* when in fact it did no such thing, more critical scholars constructed a number of persuasive arguments for its continued vitality.<sup>105</sup> Catharine MacKinnon argues that rather than reinforcing inequality, *Beauharnais* paves the way for using the First Amendment to break down inequality instead of reproducing the status quo, or worse.<sup>106</sup>

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101. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (“Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant’s discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.” (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976)).

102. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

103. *Beauharnais* enjoyed citation with approval in a majority opinion as recently as 1982. *See New York v. Ferber*, 458 U.S. 747, 763 (1982) (“[A] libelous publication is not protected by the Constitution.” (citing *Beauharnais*, 343 U.S. at 261)). Elsewhere the Court treats it as binding authority. *See United States v. Alvarez*, 567 U.S. 709, 747 (2012) (Alito, J., dissenting) (libel criminally punishable under *Beauharnais*); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (defamation not constitutionally protected speech under *Beauharnais*); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (defamation); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) (libel).

104. *See* Tsesis, *supra* note 87 (explaining why, despite some scholars’ claims to the contrary, *Beauharnais* remains binding precedent); Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1179–87 (2013) (countering scholars’ arguments against the continued validity of *Beauharnais*’s holding). Professor Rich’s assessment appropriately casts the viability of *Beauharnais* in terms of probability—saying only that an analogous case would “likely” reach a different result today. RICH, *supra* note 95, at § 6.16.

105. To be fair, I write post-2021 insurrection. Some may view hate speech as more dangerous today than prior to the bloody end of the Trump presidency in 2021. *See* Rodney A. Smolla, *Confessions of a First Amendment Lawyer*, 37 DEL. LAW., Fall 2019, at 8, 13 (“As a young free speech lawyer and litigator, I was once an unabashed and unapologetic zealot for the marketplace theory. I constantly proclaimed that the *Chaplinsky* and *Beauharnais* decisions were misguided and unsound, should be regarded as repudiated and overruled, and banished from our thinking. But to quote the great singer-songwriter Joni Mitchell, ‘I’ve looked at life from both sides now.’”). Professor Smolla wrote in the wake of the murderous white supremacy rally in Charlottesville, Virginia. *Id.* at 8–9.

106. Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106

Mari Matsuda suggests that a lack of basic empathy too often leads many to embrace protections for hate speech regardless of the pain caused to victims of hate speech and its impact on the disempowered where human potential lies dormant.<sup>107</sup> Richard Delgado highlights the tension between protecting First Amendment rights to propagate racial mythology and the harm to equality values.<sup>108</sup> These perspectives provide a more complex and nuanced First Amendment jurisprudence that fundamentally furthers the essential values of the American experiment at the expense of white supremacy ensconced in raw Supreme Court power.<sup>109</sup>

None of the cases upholding First Amendment protections dealt with the present context where manifest evidence links hate speech and group libel of racial groups to violence, murder, and insurrection.<sup>110</sup> Indeed, no Supreme Court case mentions any cost arising from the perpetuation of

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VA. L. REV. 1223, 1223–24 (2020) (“Once a defense of the powerless, the First Amendment . . . has mainly become a weapon of the powerful. . . . [O]nce persuasively conceived by dissenters as a shield for radicals, artists and activists, socialists and pacifists, the excluded and the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers, and corporations buying elections in the dark.”).

107. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2322 (1989) (“The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live. This absence of law is itself another story with a message, perhaps unintended, about the relative value of different human lives. A legal response to racist speech is a statement that victims of racism are valued members of our polity.”). Professor Matsuda urges a focus upon the most disempowered where the greatest human potential remains locked-in. *See id.* (“[O]utsider jurisprudence—jurisprudence derived from considering stories from the bottom—will help resolve the seemingly irresolvable conflicts of value and doctrine that characterize liberal thought.”).

108. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 345–48 (1991) (arguing that hate speech does little to promote First Amendment values and conflicts with equality values). “[R]acist speech is different because it is the means by which society constructs a stigma-picture of disfavored groups. It is tacitly coordinated by its speakers in a broad design, each act of which seems harmless, but which, in combination with others, crushes the spirits of its victims while creating culture at odds with our national values.” *Id.* at 387.

109. *E.g.*, ERWIN CHEREMINSKY, *THE CASE AGAINST THE SUPREME COURT* 293–94 (2014) (concluding that, institutionally, the Court operates to protect the interests of dominant political and economic elites, rather than protecting minorities, individual rights, or long-term values).

110. Today the evidence obviously shows that hate speech (including group libel) leads to bloodshed. Karsten Müller & Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment* 36 (Oct. 31, 2019) (unpublished manuscript), [https://warwick.ac.uk/fac/soc/economics/staff/crschwarz/hashtag\\_to\\_hatecrime.pdf](https://warwick.ac.uk/fac/soc/economics/staff/crschwarz/hashtag_to_hatecrime.pdf) [<https://perma.cc/3NVS-KAWP>] (“[W]e find a tight link between Twitter usage, Donald Trump’s tweets about Muslims, and direct measures of anti-minority sentiment, . . . [and] that Trump’s tweets about Muslims are highly correlated with the number of anti-Muslim hate crimes . . . .”); Griffin Sims Edwards & Stephen Rushin, *The Effect of President Trump’s Election on Hate Crimes* 20 (Jan. 31, 2019) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3102652](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652) [<https://perma.cc/FB72-28Q4>] (“Our analysis finds that President Trump’s election coincided with a statistically significant surge in hate crimes, even when controlling for alternative explanations. And counties that voted for President Trump by the widest margins experienced the largest increases in reported hate crimes.”).

our racial hierarchy—perhaps the greatest failure in law today and throughout history.<sup>111</sup> Traditionally and today, the Supreme Court blithely assumes that continued entrenchment of white supremacy in America today entails zero cost.<sup>112</sup> Nor does the Court ever weigh the harm the racial hierarchy imposes upon the rule of law,<sup>113</sup> our democracy,<sup>114</sup> and the constitutional republic itself.<sup>115</sup> This can only reflect a total failure of the American legal system and the American legal imagination.

Thus, if legal policymakers take democracy, the rule of law, national security, domestic tranquility, and our constitutional republic seriously, they will act urgently to disrupt racial fabrication and lies made under cover of free speech through expansive remedies for victims of group libel that create powerful disincentives for incitement or provocation of bloodshed.

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111. See Jeannine Bell, *The Resistance and the Stubborn but Unsurprising Persistence of Hate and Extremism in the United States*, 26 IND. J. GLOB. LEGAL STUD. 305, 315 (2019) (“The failure to understand the implications of marginalized people being subject to race-based attacks is clear in the First Amendment debate . . . American legal scholars who write in the area of the First Amendment are much more concerned about the government suppression of speech than the ideas in hate speech. [However,] denigrating speech leads to violence . . . With respect to extremism, Americans are arrogant. We think we have got this. The rising level of extremism since November 2016 suggests we are wrong.”).

112. Recent FBI statistics demonstrate the costs of white supremacy. Compare U.S. DEP’T JUST., FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERV. DIV., 2015 HATE CRIME STATISTICS, Table 1 (2015), <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf> [<https://perma.cc/YQ8Y-M2ZJ>], with U.S. DEP’T JUST., FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERV. DIV., 2018 HATE CRIME STATISTICS, Table 1 (2018), <https://ucr.fbi.gov/hate-crime/2018/topic-pages/tables/table-1.xls> [<https://perma.cc/TY3ARW4Z>] (showing hate crimes went from 5,850 incidents in 2015 to 7,120 in 2018—an increase of nearly twenty-two percent). Violent hate crimes increased to a sixteen-year high in 2018. Hassan, *supra* note 93.

113. Ramirez & Williams, *Possibility of Deracialization*, *supra* note 19, at 322–23 (citing WORLD JUST. PROJECT, RULE OF LAW INDEX 2017–2018, at 153 (2018) (ranking the United States a modest nineteenth out of 113 nations in adherence to the rule of law and finding racial discrimination in both the civil and criminal system)). The World Justice Project’s conception of the rule of law focuses on containing power and protecting individual rights, including the right to be free from racial discrimination. *Id.* at 5, 11, 15, 17.

114. Ramirez & Williams, *Democracy*, *supra* note 9, at 99 (“[T]he radical right’s efforts to reinstall an oligarchy through the suppression of democracy and dog-whistle politics have achieved great success. [T]he past forty years witnessed a remarkable after-tax income explosion at the very tip-top (top .001%) of the income distribution at the expense of over ninety-nine percent of all Americans.”).

115. GOP Senator and former Senate Majority Leader Mitch McConnell described the lawlessness at issue: “If this election were overturned by mere allegations from the losing side, our democracy would enter a death spiral. We’d never see the whole nation accept an election again. Every four years would be a scramble for power at any cost.” Anthony Zurcher, *Capitol Riot: What Does a Deadly Day Mean for Trump’s Legacy?*, BBC NEWS (Jan. 7, 2021), <https://www.bbc.com/news/election-us-2020-55567865> [<https://perma.cc/9GPJ-A2PA>]. Power untethered to law negates the rule of law and any constitution.

IV. *BEAUHARNAIS* AS A LEGAL RESPONSE TO THE BIGGEST LIE—RACE IN AMERICA 2021

As previously noted, the telltale sign that our society and law fabricate racial categories emerged over two decades ago when geneticists found that in-group variation among putative racial groups exceeded between-group variation, as the American Association of Anthropologists highlighted in its Statement on Race.<sup>116</sup> Racial groups simply cannot reflect meaningful human genetic variation as a result.<sup>117</sup> To further contextualize that reality, geneticist Luigi Cavalli-Sforza posited long ago that geography or blood type freighted more meaningful genetic variation than traditional “racial” groupings based upon superficial morphological features.<sup>118</sup> Across science today,<sup>119</sup> the recognition of the social construction of race now predominates as the general consensus on meaningful genetic variation<sup>120</sup>—race as traditionally conceived literally reflects only skin-deep genetic variation.<sup>121</sup>

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116. See, e.g., *AAA Statement on Race*, *supra* note 6 (stating that the social construction of race renders racial disparities “products of historical and contemporary social, economic, educational, and political circumstances”).

117. See Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE L. 33, 41 (2001) (“Literally, one cannot judge genetic contents through genetic packaging. . . . [S]cholars have observed that instead of simplistic racial categories, human biological variability should be thought of as ‘marble cake, crazy quilt, and tutti-frutti.’ Simply stated, skin color and other racial markers have about the same significance as shoe size.”).

118. LUIGI LUCA CAVALLI-SFORZA, GENES, PEOPLES, AND LANGUAGES 13, 25–27 (2000). Along these lines, Cavalli-Sforza suggests that the vast and seamless nature of human genetic variation necessitates over 1,000,000 distinct populations groupings to capture such human diversity in a meaningful way. Sharon Begley, *Three is Not Enough: Surprising New Lessons from the Controversial Science of Race*, NEWSWEEK, Feb. 13, 1995, at 67 (reviewing findings of Human Genome Diversity Project and interviewing project Chair, Luca Cavalli-Sforza: “The more we learn about humankind’s genetic differences . . . the more we see that they have almost nothing to do with what we call race.”).

119. American Society of Human Genetics, *supra* note 6, at 636 (“Most human genetic variation is distributed as a gradient, so distinct boundaries between population groups cannot be accurately assigned. There is considerable genetic overlap among members of different populations. . . . In this way, genetics exposes the concept of ‘racial purity’ as scientifically meaningless.”). Basically, humans mixed and migrated (especially Americans) to such an extent that we are all mutts now. *Id.*

120. Race, in countries like the United States at least, is a fuzzy social construct by which people with one or two superficial similarities are often clumped together. It reflects simplistic cultural habits, reinforced by the questionable practices of government statisticians and medical researchers, among others. Ethnic binning may simplify thought processes and, in some cases, negate them altogether. But using genetics to define race is like slicing soup. You can cut wherever you want, but the soup stays mixed.

Editorial, *Slicing Soup*, 20 NATURE: BIOTECH. 637, 637 (2002).

121. In the words of scientists:

Recent analysis of the melanocortin-stimulating hormone receptor gene (MC1R) suggests that various alleles of this single locus may underlie much of observed human variation in skin and hair color. This variation is largely due to varied amounts of eumelanin

The American Association of Anthropologists further states, with respect to the specific issue of the continuing racial disparities in America:

The tragedy in the United States has been that the policies and practices stemming from [the racial] worldview succeeded all too well in constructing unequal populations among Europeans, Native Americans, and peoples of African descent. Given what we know about the capacity of normal humans to achieve and function within any culture, we conclude that present-day inequalities between so-called “racial” groups are not consequences of their biological inheritance but products of historical and contemporary social, economic, educational, and political circumstances.<sup>122</sup>

The social reality of the racial hierarchy ensconced in law and deeply embedded in the culture of whiteness portrays a truly sick society that embraces the replication of random cruelty and disempowerment.<sup>123</sup> After all, as Justice Frankfurter emphasized, membership in racial groupings is “willy-nilly.”<sup>124</sup>

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(brown and black melanins) and phaeomelanin (red and yellow melanins) produced by melanocytes. Eumelanin protects against ultraviolet (UV) radiation, whereas phaeomelanin may contribute to skin damage, including melanoma, induced by UV. The balance of melanins is regulated by melanocyte-stimulating hormone, which acts through its receptor. Amino acid sequence variants occur at multiple sites in the second transmembrane domain, the first extracellular domain, and the seventh transmembrane domain of the MC1R protein. Variation at these sites was found in more than 80% of individuals with red hair and fair skin that burns rather than tans, but in less than 4% of British or Irish individuals with skin that tans without burning, and in no African individuals. Among Asians, still other amino acid substitutions in MC1R are common. Nucleotide diversity at MC1R is several times higher than the average nucleotide diversity in human populations. High nucleotide diversity, coupled with common variation at non-synonymous sites, suggest that MC1R variation is an adaptive response to selection for different alleles in different environments, possibly to differences in day length and hence available sunlight at different latitudes. If true, variation at this locus, which encodes evolutionarily important but superficial traits, has been the cause of enormous suffering. Variation in other traits popularly used to identify “races” is likely to be due to similarly straight-forward mechanisms, involving limited numbers of genes with very specific physiological effects. Of course, prejudice does not require a rational basis, let alone an evolutionary one, but the myth of major genetic differences across “races” is nonetheless worth dismissing with genetic evidence.

Kelly Owens & Mary-Claire King, *Genomic Views of Human History*, 286 SCIENCE 451, 453 (1999).

122. *Supra* note 116.

123. See Jayne O. Ifekwunigwe et al., *A Qualitative Analysis of How Anthropologists Interpret the Race Construct*, 119 AM. ANTHROPOLOGIST 422, 423 (2017) (stating that a “new anthropological synthesis” views “race as a dynamic, historically situated, culturally constructed folk concept that derives symbolic meaning from specific . . . phenotypic differences, such as skin color, hair texture, nose width, lip thickness, and body type;” and, that these differences “are ranked hierarchically and provide social justifications for inequalities and injustices, such as differential access to power, privilege, and opportunities.”).

124. *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952).

Law played a key role in the construction of our racial hierarchy. For example, the Supreme Court actually attempted to define whiteness in a series of decisions arising from the naturalization qualifications during the period (1790 to 1952) when federal law only allowed white people to become naturalized citizens.<sup>125</sup> It settled on a test that centered on the “understanding of the common man” rather than upon the muddled pseudoscience of race as it existed at that time.<sup>126</sup> In more recent years, the Court turned a blind eye to efforts to disenfranchise African American voters and thereby assured that white votes count more in the modern United States.<sup>127</sup> Thus, the Court actively supports the political construction of America’s racial hierarchy.<sup>128</sup> This in turn drives other elements of the hierarchy.

For example, most of the so-called right finds the stark disparities in childhood poverty acceptable and normal.<sup>129</sup> Despite some progress before the COVID-19 pandemic, “Black and Hispanic children were still

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125. Khaled A. Beydoun, *Faith in Whiteness: Free Exercise of Religion as Racial Expression*, 105 IOWA L. REV. 1475, 1477 (2020) (“[T]he law ordained from 1790 until 1952 . . . that whiteness stood as the exclusive passageway to naturalized citizenship.”) (citing IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2006) (analyzing fifty-two judicial opinions defining whiteness)).

126. *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214 (1923) (“What we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man . . .”). The Court summarized the pseudoscience of race: “The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has five races; Keane following Linnaeus, four; Deniker, twenty-nine. The explanation probably is that ‘the innumerable varieties of mankind run into one another by insensible degrees . . .’” *Id.* at 212.

127. “[T]he Roberts Court may be as aware as any other observer of the pathologies of modern American democracy: gerrymandering, voter suppression, the enormous influence of the wealthy, and so on. But a majority of the Justices may realize, consciously or not, that these pathologies redound largely to their ideological benefit.” Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 116–17.

128. *Id.* at 178 (“Running like a red thread through the Roberts Court’s [voting] decisions is perceived, and actual, partisan advantage. Both when the Court intervenes and when it stays on the sidelines, its actions are consistent with the recommendations of conservative elites.”).

129. For example, on March 11, 2021, President Joe Biden signed a \$1.9 trillion stimulus bill in response to the COVID-19 crisis that aimed to slash childhood poverty without a single Republican vote in support. Jacob Pramuk, *Biden Signs \$1.9 Trillion Covid Relief Bill, Clearing Way for Stimulus Checks, Vaccine Aid*, CNBC (Mar. 11, 2021, 3:03 PM), <https://www.cnbc.com/2021/03/11/biden-1-point9-trillion-covid-relief-package-thursday-after-noon.html> [<https://perma.cc/M6C3-VHXG>]. Despite the overwhelming popularity of the bill, only thirty percent of conservatives supported it. Jordain Carney, *GOP Goes on the Attack Against Biden Relief Bill*, HILL (Mar. 13, 2021, 5:00 PM), <https://thehill.com/homenews/senate/543042-gop-goes-on-the-attack-against-biden-relief-bill> [<https://perma.cc/YPX2-K9GL>]. The bill represented a historic shift in U.S. policy against childhood poverty, a longtime embarrassment for the United States relative to other developed nations. Taylor Nicole Rogers, *US Embarks on First National Child Allowance Experiment*, FIN. TIMES (Mar. 23, 2021), <https://www.ft.com/content/cc2a0d8c-123e-4d36-b01a-55cd8a23a166> [<https://perma.cc/KK29-CQCN>]. Some experts expect the new spending to cut childhood poverty in half. *Id.*

about three times as likely as Asian (7%) and White (8%) children to be living in poverty.”<sup>130</sup> According to UNICEF:

[F]ew dispute that childhood experiences have a profound effect not only on children’s current lives, but also on their future opportunities and prospects. Likewise, social and economic disadvantages in early life increase the risk of having lower earnings, lower standards of health and lower skills in adulthood. This in turn can perpetuate disadvantage across generations. None of this is the fault of the child.<sup>131</sup>

This wanton and self-destructive<sup>132</sup> decimation of human potential could only occur in a nation permeated in the rhetoric of white supremacy and the indifference emblematic in our long festering racial hierarchy.<sup>133</sup>

A similar example of indefensible oppression arises from the so-called war on drugs and mass incarceration. Whites use drugs at a higher rate than African Americans (and sell drugs at a very similar rate), but African Americans face far higher rates of arrest and incarceration.<sup>134</sup> These disparities mean that, nationwide, African Americans suffer five times the incarceration rate as whites, and Hispanics suffer three times the rate of whites.<sup>135</sup> These numbers translate into broken lives, families, and communities and directly contribute to the impoverishment of people of color in the United States.

These two seminal oppressions of people of color amplify other disparities. The scars of poverty and mass incarceration translate into

130. Deja Thomas & Richard Fry, *Prior to COVID-19, Child Poverty Rates Had Reached Record Lows in U.S.*, PEW RSCH. CTR. (Nov. 30, 2020), <https://www.pewresearch.org/fact-tank/2020/11/30/prior-to-covid-19-child-poverty-rates-had-reached-record-lows-in-u-s/> [https://perma.cc/3N75-MJBR].

131. U.N. INT’L CHILD.’S EMERGENCY FUND, INNOCENTI REPORT CARD 13: CHILDREN IN THE DEVELOPED WORLD 2 (2016), [https://www.unicef-irc.org/publications/pdf/RC13\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/RC13_eng.pdf) [https://perma.cc/HGT4-3DT7].

132. According to the IMF, increased childhood poverty harms productivity and long-term growth prospects. IMF, UNITED STATES: 2017 ARTICLE IV CONSULTATION—PRESS RELEASE; STAFF REPORT 17 (2017), <https://www.imf.org/en/Publications/CR/Issues/2017/07/27/United-States-2017-Article-IV-Consultation-Press-Release-Staff-Report-45142> [https://perma.cc/F5MB-6TPM].

133. In fact, the United States suffers childhood poverty rates well above the average rate for developed nations, largely as a result of poverty among children of color. *See id.* (noting that one in seven Americans is living in poverty and that children living in poverty are more likely to have significant earnings as adults); ORG. ECON. COOP. & DEV., CO2.2: CHILD POVERTY 2, [https://www.oecd.org/els/soc/CO\\_2\\_2\\_Child\\_Poverty.pdf](https://www.oecd.org/els/soc/CO_2_2_Child_Poverty.pdf) [ https://perma.cc/4SZY-UHXU] (last updated Nov. 2019) (collecting cross-national data on indicators for poverty for families and children, including child poverty).

134. *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, BROOKINGS: HAMILTON PROJECT (Oct. 21, 2016), [https://www.hamiltonproject.org/charts/rates\\_of\\_drug\\_use\\_and\\_sales\\_by\\_race\\_rates\\_of\\_drug\\_related\\_criminal\\_justice](https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice) [https://perma.cc/VNX9-HPBL].

135. John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [https://perma.cc/XM58-NY7J].

future wealth and income disparities.<sup>136</sup> Health disparities further reflect incarceration, poverty, and socioeconomic deprivations.<sup>137</sup> Educational attainment never reaches full potential.<sup>138</sup> Ultimately the oppressive nature of the American racial hierarchy spans the entire life cycle of people of color.<sup>139</sup> From cradle to grave, the operation and reproduction of the racial hierarchy robs people of color of employment and educational opportunities as well as decent nutrition and health care.

The acceptance of excess childhood poverty and unjust mass incarceration forms a crucible for youth of color that inescapably compromises the ability of all to reach their full potential. It costs all Americans untold trillions in forgone income, GDP, innovation, and productivity.<sup>140</sup> Nobel laureate economists now recognize and support efforts to try to quantify such costs.<sup>141</sup> Logically all governments should affirmatively act to stem the staggering costs of the racial hierarchy and unleash the proven benefits of cultural diversity.<sup>142</sup>

Yet the “Big Lie” of race and white supremacy enable and encourage the normalization and acceptance of the American racial hierarchy.

136. Ramirez & Williams, *Possibility of Deracialization*, *supra* note 19, at 311–21.

137. *Id.* at 320–21.

138. *Id.* at 314.

139. *Id.* at 320.

140. According to the MIT economist Peter Temin:

The desire to preserve the inferior status of blacks has motivated policies against all members of the low-wage sector. . . . We are not getting the benefits of all the people who could contribute to the growth of the economy, to advances in medicine or science which could improve the quality of life for everyone—including some of the rich people.

Chloe Farand, *US Has Regressed to Developing Nation Status*, *MIT Economist Warns*, INDEPENDENT (Apr. 21, 2017, 3:06 PM), <https://www.independent.co.uk/news/world/americas/us-developing-nation-regressing-economy-poverty-donald-trump-mit-economist-peter-temin-a7694726.html> [<https://perma.cc/V753-RANY>].

141. Joseph E. Stiglitz, *Foreword* to BRENNAN CTR. JUST., CONVICTION, IMPRISONMENT AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY 4, 4–5 (Sept. 15, 2020), [https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport\\_pdf.pdf](https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf) [<https://perma.cc/DC86-PPKR>].

142. See, e.g., Thomas Barta et al., *Is There a Payoff from Top-Team Diversity?*, MCKINSEY Q. (Apr. 1, 2012), <https://www.mckinsey.com/business-functions/organization/our-insights/is-there-a-payoff-from-top-team-diversity> [<https://perma.cc/R9R3-SGQ7>] (reporting higher earnings and returns on equity for companies with diverse executive boards); Press Release, Credit Suisse, Gender Diversity and Corporate Performance (July 31, 2021), <https://www.credit-suisse.com/about-us-news/en/articles/media-releases/42035-201207.html> [<https://perma.cc/K2AY-UGMR>] (announcing the results of a Credit Suisse Research Institute study showing companies with women on their executive boards outperform those without); Katherine W. Phillips et al., *Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers*, 35 PERSONALITY & SOC. PSYCH. BULL. 336, 336 (2009) (“[S]ocial diversity may have an impact on group performance above and beyond the introduction of unique information or minority viewpoints.”); Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, HARV. BUS. REV., July–Aug. 2018, at 72, 74 (“Diversity significantly improves financial performance on measures such as profitable investments at the individual portfolio-company level and overall fund returns.”).



Consider the opening of the Trump campaign for president. The Trump presidency commenced on the back of group libel.<sup>143</sup> Essentially Trump called Mexican immigrants presumptive criminals and drug dealers.<sup>144</sup> In fact, immigrants commit less crime than the general population.<sup>145</sup> Nevertheless, the public continues to accept the excess incarceration of people of color.

Similarly, the nation recently endured a surge of violence against Asian-Americans, culminating in the murder of six women of Asian descent in Atlanta.<sup>146</sup> Trump's Big Lie regarding Asians and Asian-Americans consisted of the terms "kung flu" and "Chinese Flu" to link COVID-19 to Asians.<sup>147</sup> The truth: the origins of COVID-19 remain mysterious but evidence recently emerged of early circulation in Italy and Brazil<sup>148</sup> before confirmed emergence in China, and its likely zoonotic transmission lacks any link to any particular racial group other than the human race.<sup>149</sup> Yet, a study of the impact of Trump's tweet calling the

143. Reid J. Epstein & Heather Haddon, *Donald Trump Vows to Disrupt Crowded GOP Presidential Race*, WALL ST. J. (June 16, 2015, 5:52 PM), <https://www.wsj.com/articles/donald-trump-to-unveil-plans-for-2016-presidential-race-1434448982> [<https://perma.cc/7TFD-4GDA>]. The group libel consisted of the following words with respect to Mexican immigrants: "They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." *Id.* Thus, Trump presumes Mexican immigrants are violent felons and claims he has seen no evidence to the contrary. As such, the Trump libel strikingly resembles the group libel in *Beauharnais*: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." 343 U.S. 250, 252 (1952).

144. Epstein & Haddon, *supra* note 143.

145. E.g., Michael T. Light et al., *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas*, 117 PROC. NAT'L ACAD. SCI. 32340, 32341 (2020) ("[U]ndocumented immigrants have considerably lower crime rates than native-born citizens and legal immigrants across a range of criminal offenses, including violent, property, drug, and traffic crimes.").

146. Greg Bluestein, *Biden Condemns Anti-Asian Violence in Atlanta After Spa Shootings*, ATLANTA JOURNAL-CONSTITUTION (Mar. 19, 2021), <https://www.ajc.com/politics/biden-harris-to-meet-with-asian-american-leaders-in-atlanta-today/O66KGHCBEVARHIR52R2JW6AZHY/> [<https://perma.cc/93PH-54N9>].

147. Robert Hart, *Trump's 'Chinese Virus' Tweet Helped Fuel Anti-Asian Hate on Twitter, Study Finds*, FORBES (Mar. 19, 2021, 9:26 AM), <https://www.forbes.com/sites/roberthart/2021/03/19/trumps-chinese-virus-tweet-helped-fuel-anti-asian-hate-on-twitter-study-finds/?sh=5400ef531a7c> [<https://perma.cc/7MKM-JTSC>].

148. Jeremy Page & Drew Hinshaw, *China Says Covid-19 Origin Probe Should Shift Focus to Other Countries*, WALL ST. J. (Mar. 31, 2021, 10:13 PM), <https://www.wsj.com/articles/china-says-covid-19-origin-probe-should-shift-focus-to-other-countries-11617186625> [<https://perma.cc/Z6LY-PG4Z>].

149. Smriti Mallapaty, *Where Did COVID Come From? Five Mysteries That Remain*, NATURE (Feb. 26, 2021), <https://www.nature.com/articles/d41586-021-00502-4> [<https://perma.cc/ZG4B-NUB5>] ("[R]esearchers in Europe have reported finding antibodies against SARS-CoV-2 in samples taken at blood banks from November 2019 onwards."). Investigations into the origins of COVID-19 will likely continue for years, but it remains clear the pandemic emerged not due to any putative Asian race or Chinese race. See Jesse D. Bloom et al., Letter, *Investigate the Origins of COVID-19*, SCIENCE, May 14, 2021, at 694.

virus the “Chinese Flu” found that Trump’s group libel led to a surge in online hate speech, a predictor and precursor of hate crimes.<sup>150</sup> Trump’s anti-Asian rhetoric did in fact coincide with a 150 percent surge in hate crimes against Asian Americans.<sup>151</sup>

In fact, the campaign and presidency of Donald Trump led directly to more race-based violence in general in America, the inflammation of social divisions, and domestic terrorism.<sup>152</sup> This furthered the plans of Vladimir Putin according to the unanimous view of the entire national intelligence community of the Trump administration.<sup>153</sup> The Trump presidency ended in a repudiation of democracy, degradation of the rule of law, and the spectacle of a sitting president inciting insurrection in furtherance of a foreign adversary’s plan of attack on the United States.<sup>154</sup> Expanding group libel prohibitions in accordance with *Beauharnais* can mitigate these threats.

Neuroscientific evidence supports this point. Using functional magnetic resonance imaging technology, neuroscientists can observe brain functioning in response to racial images.<sup>155</sup> In our racialized society neuroscientists pinpointed the brain response to the images in the amygdala—which triggers threat response such as fight or flight.<sup>156</sup> Importantly, “neuroscience demonstrates that the amygdala activity

150. Yulin Hsuen et al., *Association of “#covid19” Versus “#chinesevirus” with Anti-Asian Sentiments on Twitter: March 9–23, 2020*, 111 AM. J. PUB. HEALTH 956, 960–61 (2021).

151. Paulina Smolinski, *Reports of Anti-Asian Hate Crimes Rose Nearly 150% in Major U.S. Cities Last Year*, CBS NEWS (Mar. 13, 2012, 7:10 AM), <https://www.cbsnews.com/news/asian-american-hate-crimes-up-150-percent-us/> [<https://perma.cc/4PXP-MNTR>]. Anne A. Cheng, a comparative race scholar and professor at Princeton University, explained: “It’s part of a very long systemic cultural discrimination against Asians in this country. I think that the coronavirus and the way it has been racialized by our previous administration has aggravated and given an alibi to a racism that is always not quite gone but now surging forth.” *Id.*

152. Ramirez, *Hate on the Ballot*, *supra* note 26, at 261–65.

153. *Id.* at 257.

154. *See supra* notes 1–3, 21–22, and 24–25.

155. *See* Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCI. 729, 729 (2000) (“We used [functional magnetic resonance imaging] to explore the neural substrates involved in the unconscious evaluation of Black and White social groups. Specifically, we focused on the amygdala, a subcortical structure known to play a role in emotional learning and evaluation.”). “The amygdala is critically involved in emotional learning as measured by fear conditioning, a task in which a neutral stimulus comes to acquire emotional properties through direct association with an aversive stimulus. In humans, the amygdala’s role extends beyond fear conditioning to the expression of learned emotional responses that have been acquired without direct aversive experience.” *Id.* at 729–30 (citations omitted).

156. Adam M. Chekroud et al., *A Review of Neuroimaging Studies of Race-Related Prejudice: Does Amygdala Response Reflect Threat?*, 8 FRONTIERS HUM. NEUROSCI. 1, 3, 9 (2014) (arguing that bias arises from culturally learned associations rather than innate group affinity). “Scholarship on racism and neuroscience often emphasizes the role of the amygdala, a region of the brain associated with fear and the fight-or-flight reaction.” Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 64 (2020).

requires social conditioning from a young age [which] suggests that racial responses are learned responses.”<sup>157</sup> Simply stated, the racial hierarchy rests on a foundation of culturally learned associations between specific racial groups and stereotypical traits.

Group libel against out-groups plays a central role in this key element of racial fabrication. The Big Lie of race must be taught.<sup>158</sup> Once taught it undercuts rationality and governs individual conduct, subconsciously affecting a range of decisions that cumulatively construct, reconstruct, and propagate the racial hierarchy.<sup>159</sup> The reality of the hierarchy then reinforces the Big Lie.<sup>160</sup> Group libel is key to propagating the Big Lie that is central to the replication of the racial hierarchy—the lie that race is anything more than socially constructed.<sup>161</sup>

This suggests that a rational legal system dedicated to the well-being of all those living within the system would take action commensurate with the threat posed by our festering racial hierarchy. *Beauharnais* approved criminal group libel sanctions given the association of racial hatred with violence throughout history.<sup>162</sup> Such an approach, either federally or within the states, would rationally address the serious threats

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157. Ramirez & Williams, *Possibility of Deracialization*, *supra* note 19, at 326–27 (citing Eva H. Telzer et al., *Amygdala Sensitivity to Race Is Not Present in Childhood but Emerges over Adolescence*, 25 J. COGNITIVE NEUROSCI. 234, 234–35, 240–42 (2013) (suggesting that racial bias is a product of upbringing)).

158. “[P]sychosocial factors such as prejudicial attitudes, group identification, stereotypes and affective orientations, political ideology/affiliations, and beliefs regarding the nature of race itself can affect the racial categorization process.” Jennifer A. Richeson & Samuel R. Sommers, *Toward a Social Psychology of Race and Race Relations for the Twenty-First Century*, 67 ANN. REV. PSYCH. 439, 443 (2016) (citations omitted). Thus, social psychology now recognizes that “racial categorization is far more than a simple matter of physical appearance or biology, but rather a dynamic process informed by any number of sociocultural, motivational, and cognitive factors.” *Id.* These findings complement findings from across a range of disciplines including history, sociology, genetics, and biology. The social psychological evidence enjoys further support from the fundamental malleability of race across time and space. *See id.* at 442 (“The malleability of racial categorization at the societal level may be reflected best in the decision by the US Office of Management and Budget to move from the recognition of roughly 5 mutually exclusive racial categories in 1978 to more than 100 possible racial/ethnic combinations in 2010.” (citations omitted)).

159. Social factors continue to drive “staggering racial disparities . . . in health, wealth, and overall well-being.” *Id.* at 439.

160. *See* DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* 4–5 (2014) (showing how everyday decisions by common people like us reproduce racism).

161. Exposure to diversity early in life mitigates the amygdala response to racial stimuli. Eva H. Telzer et al., *Amygdala Sensitivity to Race Is Not Present in Childhood but Emerges over Adolescence*, 25 J. COGNITIVE NEUROSCI. 234, 242 (2013) (“[W]hen children had more cross-race friends and schoolmates, they were less likely to exhibit a neural bias to [African American] faces, consistent with a body of work highlighting the benefit of racially diverse schools for decreasing in-group biases.” (citations omitted)).

162. *Beauharnais v. Illinois*, 343 U.S. 250, 258–61 (1952).

the continued replication of our racial hierarchy now spawns.<sup>163</sup> Yet policymakers must recognize that criminal enforcement in the United States today is hopelessly corrupted as the powerful avoid criminal accountability and the disempowered are rounded up for crimes common among the powerful.<sup>164</sup>

Private actions depoliticize enforcement.<sup>165</sup> Moreover, group libel actions could benefit from economic incentives, such as treble damages, provision for payment of attorney fees, and broad legislative authorization for class action recoveries.<sup>166</sup> Private actions could both deter demagoguery and provide direct relief to victims; as such, they could stem the power of the Big Lie to end our constitutional republic, empower our geopolitical rivals, and compromise our national security while at the same time protecting all of our citizens and people from the horrors of group libel.<sup>167</sup> Broadly authorized group libel actions can operate to help halt the increasing menace of racial murder, restore the rule of law by holding the powerful to account, and help begin to dismantle our legally and socially constructed self-perpetuating racial hierarchy.

## V. CONCLUSION

Law in the United States today possesses the tools to preserve and promote our diverse and inclusive democratic republic. Yet thus far, our leadership in all branches and all levels of government lacks conviction and courage to vindicate the promise of America. More specifically,

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163. *Supra* Part II.

164. MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, *THE CASE FOR THE CORPORATE DEATH PENALTY* 204 (2017).

165. Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 *LOY. U. CHI. L. J.* 669, 722–24 (2014) [hereinafter Ramirez, *Virtues*].

166. Congress typically incentivizes private enforcement of important statutory prohibitions such as market integrity:

The antitrust statutes provide that violations give rise to automatic treble damages plus “reasonable attorney’s fee[s].” The legislative history and case law indicate that compensation is a goal, perhaps the dominant goal, of antitrust’s damages remedy. In addition, the statutes were primarily aimed at avoiding wealth transfers from purchasers to firms with market power caused by this market power—which is analogous to a compensation goal. The congressional decision to award treble damages certainly could lead one to conclude that two-thirds of antitrust damages were meant for some purpose other than compensation, such as deterrence. However, it is possible that even the “extra” damages were intended to compensate victims for such unawarded items as prejudgment interest, or damages that are difficult to measure, such as umbrella effects of market power or the victims’ time spent pursuing a remedy.

John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 *IOWA L. REV.* 1997, 2014–15 (2015) (showing that most successful antitrust actions settle for less than treble damages).

167. See Ramirez, *Virtues*, *supra* note 165, at 724–25.

America for all its might seems incapable of ending white supremacy. In the legal academy many scholars wish *Beauharnais* would cease to exist, or at least suffer total repudiation in the Supreme Court. If we allow white supremacy to persist, all our core values will dissolve before an antidemocratic, murderous mob that would rather kill the Constitution than see the emergence of a diverse and inclusive democracy with forced power sharing with people of color and other marginalized communities. Logic, common law reasoning, and experience do not compel such an outcome.

Broadening group libel sanctions to the full extent of the law will materially impede further racial divisions and disrupt long-term reproduction of our racial hierarchy. Those peddling big lies for political gain necessarily act with actual malice. They patently incite and provoke bloodshed and murder, as the mounting corpses prove. The law must hold such malefactors to account. All the virtues of our republic are now clearly at stake.