

HATE ON THE BALLOT: ELECTION 2020 AND THE QUEST FOR A DIVERSE AND INCLUSIVE DEMOCRACY

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I. INTRODUCTION

White supremacy and its close companion, white nationalism, rage across America.¹ Too often, these beliefs lead to violence and other criminal activity.² Since the 2016 presidential election, hate crimes skyrocketed in the

* Abner J. Mikva Professor of Law and Director of the Business Law Center at Loyola University Chicago. John Dehn, Michael Kaufman, Mary Ramirez, Barry Sullivan and Neil Williams each provided helpful comments and insights that improved this article. This article also benefited from comments at the LatCrit conference held at Georgia State School of Law in October of 2019. Adrian Gonzalez Cerrillo provided outstanding research assistance. All errors are mine. I welcome comments regarding this article via email to sramir3@luc.edu.

¹ Technically, white supremacy denotes a belief that whites are superior to non-whites while white nationalism denotes a belief that America should be a white nation. Merrill Perlman, *The key Difference between 'Nationalists' and 'Supremacists'*, Colum. J. Rev. (Aug. 14, 2017), https://www.cjr.org/language_corner/nationalist-supremacist.php, archived at <https://perma.cc/7ZAZ-9K2C>. American White Nationalists generally believe that only whites can gain American citizenship and therefore must ascribe to white supremacy, to the detriment of those deemed non-white. See *id.* Further, since “whiteness,” like all racial categories, is socially constructed, the elevation of “whiteness” in all forms suffers from both irrationality and racial mythology. See IAN HANEY LOPEZ, *WHITE BY LAW* 38, 43 (1996). In terms of hate crimes and the threat to national security, the technical difference if any becomes irrelevant to both victim and law enforcement.

² ANTI-DEFAMATION LEAGUE (“ADL”), *HATE BEYOND BORDERS: THE INTERNATIONALIZATION OF WHITE SUPREMACY* 4 (2019), <https://www.adl.org/media/13538/download>, archived at <https://perma.cc/336W-WB99> (“Over the past decade, we have seen surging violence in the United States, Europe and beyond motivated by elements of white supremacy from Anders Breivik in Norway to Brenton Tarrant in New Zealand to Patrick Crusius in El Paso, Texas. These killers influence and inspire one another.”). According to the ADL, the white supremacist movement now operates internationally, with important roots in Russia. *Id.*

U.S.³ In El Paso in 2019, a white supremacist traveled 600 miles to gun down innocent Americans in an area with a rich Latinx population, killing 22 and injuring 25 more.⁴ In Pittsburgh, a white supremacist attacked a Jewish synagogue, killing 11 and wounding 6, and stated, “all these Jews need to die,”⁵ after being shot by police.⁶ According to New York Governor Andrew Cuomo: “This is an intolerant time in this country. We see anger, we see hatred exploded. It is an American cancer in the body politic. It literally turns one cell in the body against others.”⁷

This article addresses potential legal remedies for this growing cancer of hate and violence. It will establish that hate crimes and murder are factually closely associated with the politics and election of Donald Trump, and recent scholarship tightens this association to the point of causation.⁸ Simply

³ Griffin Sims Edwards & Stephen Rushin, *The Effect of President Trump’s Election on Hate Crimes*, 20 (Jan. 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652, archived at <https://perma.cc/9SHK-SVNE> (“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.”).

⁴ Daniel Borunda & Aaron Montes, *El Pasoans unite to remember victims of Walmart mass shooting*, EL PASO TIMES (Aug. 14, 2019, 6:48 PM), <https://www.elpasotimes.com/story/news/crime/2019/08/14/el-pasoans-unite-remember-victims-walmart-mass-shooting/2015533001/>, archived at <https://perma.cc/7V85-PJ2R>.

⁵ Shelly Bradbury, *Timeline of terror: A moment-by-moment account of Squirrel Hill mass shooting*, PITTSBURGH POST-GAZETTE (Oct. 28, 2018, 2:33 PM), <https://www.post-gazette.com/news/crime-courts/2018/10/28/TIMELINE-20-minutes-of-terror-gripped-Squirrel-Hill-during-Saturday-synagogue-attack/stories/201810280197>, archived at <https://perma.cc/LD8S-UHTE>.

⁶ Kris Mamula et al., *Eleven dead, six wounded in massacre at Squirrel Hill synagogue*, PITTSBURGH POST-GAZETTE (Oct. 27, 2018, 3:33 PM), <https://www.post-gazette.com/local/city/2018/10/27/Police-responding-to-incident-in-Squirrel-Hill/stories/201810270069>, archived at <https://perma.cc/L74S-EVNN>. Both the Pittsburgh and El Paso murderers posted their extremist views online. Sarah E. Needleman, *El Paso Murder Spree Renews Spotlight on 8chan Online Forum*, WALL ST. J. (Aug. 4, 2019 10:15 PM), <https://www.wsj.com/articles/el-paso-murder-spree-renews-spotlight-on-8chan-online-forum-11564941070>, archived at <https://perma.cc/YFG6-SGN2>.

⁷ New York State Governor Andrew M. Cuomo, *Audio & Rush Transcript: Governor Cuomo Comments on the Stabbing at Rockland County Synagogue* (Dec. 29, 2019), <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-comments-stabbing-rock-land-county-synagogue>, archived at <https://perma.cc/DA3N-HJTX>.

⁸ Several scholars address the link between Donald Trump and hate. See, e.g., Dr. JoAnne Sweeney, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U. L. REV. 585, 636 (2019) (“Trump and Unite the Right are not anomalies, divorced from the past; they are the natural evolution of modern-day mobs and are just as (if not more) dangerous. The First Amendment does protect offensive speech and unpopular political opinions but it does not overcome the need for protecting public safety.”); Jeannine Bell, *The Resistance & The Stubborn But Unsurprising Persistence of Hate and Extremism in the United States*, 26 IND. J. GLOBAL LEGAL STUD. 305 (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.”). This is the first article to review interdisciplinary empirical evidence linking violence to toxic politics and policies since 2016 and cast it as a threat to national security.

put, Trump's divisive rhetoric, politics and policies pit Americans against fellow Americans, leading to bloodshed, and even encouraging civil war.⁹ Trump's rhetoric also plays into Vladimir Putin's attacks on the domestic tranquility of the U.S. by orchestrating large-scale cyberwarfare operations to inflame the American racial divide.¹⁰ Trump thus presents the gravest threat to our national security.¹¹ In fact, members of Trump's own party have deemed his divisiveness "beyond repugnant."¹²

Attributing any specific crime to Donald Trump implicates counter-factual questions that defy easy answer. One can never know if any given crime would occur even if Hillary Clinton prevailed in the election of 2016. Only rarely have criminals invoked Donald Trump's name as a reason for their crimes.¹³ Even when perpetrators do blame Donald Trump for their criminal misconduct, one wonders if the invocation simply plays the role of an easy excuse; thus, for example, when an airline passenger thought he could sexually assault another passenger because "the president of the United States

⁹ Catherine 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>, archived at <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.").

¹⁰ Jason Stattler, *Trump and Russia used Race to Divide America. Now it's a National Security Problem*, USA TODAY (July 19, 2018, 1:41 PM), <https://www.usatoday.com/story/opinion/2018/07/19/putin-trump-race-divide-americans-2016-election-interference-column/799765002/>, archived at <https://perma.cc/ZKU3-2UAN> ("The roughly 3,500 Facebook ads created by the Russian-based Internet Research Agency 'consistently promoted ads designed to inflame race-related tensions,' a USA TODAY analysis found . . . Race is our Achilles' heel. Putin and Trump have grabbed us by it.").

¹¹ In fact, the evidence mustered herein also demonstrates that Trump lends aid and comfort to Russia's efforts to incite a race war in the U.S. 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.").

¹² See, e.g., Laurie Kellman, *Of Treason and Civil War: An Agitated Trump Amps up Threats*, AP (Sept. 30, 2019), <https://apnews.com/f7ba2667deda489ea7eb3e173944e734>, archived at <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."). More recently, President Trump encouraged insurgencies against states with Democratic governors and inflamed political divisions despite public health risks arising from the COVID-19 pandemic. 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>, archived at <https://perma.cc/JNM4-THWD>.

¹³ ABC News recently tallied 36 such incidents. See Mike Levine, *'No Blame?' ABC News finds 36 cases invoking 'Trump' in Connection with Violence, Threats, Alleged Assaults*, ABC NEWS (Aug. 19, 2019, 4:01 AM), <https://abcnews.go.com/Politics/blame-abc-news-finds-17-cases-invoking-trump/story?id=58912889>, archived at <https://perma.cc/RR6A-4SKF>.

says it's OK to grab women by their private parts," the credibility of the wrongdoer seemed stretched to the least.¹⁴

This article does not seek to attribute any particular hate crime to Donald Trump.¹⁵ Rather, it summarizes the best evidence available to shed light on the link between the politics and rhetoric of Donald Trump and hate crimes generally, with the goal of highlighting the U.S.'s vulnerability to foreign powers seeking to weaken the nation through self-hate.¹⁶ This article brings attention to the burgeoning hate and division within our society as a direct result of Donald Trump's policies and politics.¹⁷ It rests on evidence that he promotes violence against the people of the United States.¹⁸ It rests on the expert and bi-partisan assessments of the risks of this hate and division to national security.¹⁹ This article assesses the dimensions of the risks to our democracy and national security and proposes legal remedies to address these risks over the short and long term.²⁰ The article concludes that law—

¹⁴ See *Man arrested for abusive sexual contact on a plane: Trump 'says it's OK to grab' women*, USA TODAY (Oct. 23, 2018, 7:46 AM), <https://www.usatoday.com/story/travel/flights/2018/10/23/accused-groping-southwest-flight-trump-women-private-parts/1736728002/>, archived at <https://perma.cc/VZ82-P3FC>.

¹⁵ Donald Trump was sued for inciting a riot at one rally. The Sixth Circuit reversed a lower court holding that denied Trump's motion to dismiss, holding that Trump's statements enjoyed First Amendment protection. See *Nwanguma v. Trump*, 903 F.3d 604, 606 (6th Cir. 2018).

¹⁶ The entire Senate Select Committee on Intelligence already found that Russia uses social media to incite racial and other animosity within the U.S. See SENATE SELECT COMMITTEE ON INTELLIGENCE, 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. 116-XX (2019), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf, archived at <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.”).

¹⁷ See Julie Harte, *Trump Tweet, Political Divisions Fuel Rising Discourse about new U.S. Civil War*, REUTERS (Oct. 29, 2019, 6:17 AM), <https://www.reuters.com/article/us-usa-civil-war/trump-tweet-political-divisions-fuel-rising-discourse-about-new-u-s-civil-war-idUSKBN1X812B>, archived at <https://perma.cc/LW8S-2RHW> (“Georgetown University’s Institute of Politics and Public Service this month released a poll that found a majority of Americans think political, racial, and class divisions are worsening, and that the average voter believes the United States is two-thirds of the way to the edge of a civil war.”). In fact, “a YouTube video posted in June that drew 1.4 million views” and “detailed how the electrical grid in ‘major leftist cities’ could be taken down, and concluded that another civil war was inevitable and would be won by the right wing.” *Id.*

¹⁸ Armed militias apparently stand ready to attack the U.S. should Trump call for violence against the U.S. government. Mary B. McCord, *Armed Militias Are Taking Trump’s Civil War Tweets Seriously*, LAWFARE (Oct. 2, 2019, 1:31 PM), <https://www.lawfareblog.com/armed-militias-are-taking-trumps-civil-war-tweets-seriously>, archived at <https://perma.cc/6DML-WEKM>.

¹⁹ The Trump Administration’s Director of National Intelligence recently told Congress that Russia seeks to exploit racial and other social divisions within the U.S. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY 7 (Jan. 29, 2019), <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR—SSCI.pdf>, archived at <https://perma.cc/H9DF-H4NN> (“Russia’s social media efforts will continue to focus on aggravating social and racial tensions.”).

²⁰ Ironically, the very citizens and persons victimized by hate crimes kept the country functioning as essential workers during the height of the COVID-19 pandemic and suffered disproportionate deaths, illustrating the profoundly unpatriotic nature of white nationalism. See Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like State By*

including the judicial power—should rebuke political hate to secure the nation from the domestic and foreign policy consequences of Americans hating fellow Americans. The article proposes interim steps to meet this new and emerging threat.

Donald Trump himself provides the most compelling evidence of his hatred and cruelty, as his toxic rhetoric infamously offends people across the political spectrum.²¹ Trump characterized the white nationalists who organized and attended the protest in Charlottesville that led to the murder of a peaceful protestor as “very fine people.”²² On the other hand, he called protestors of the brutal police murder of George Floyd “thugs” and fanned the flames of the resulting civil disorder in accordance with white supremacist teachings.²³ During his 2016 presidential campaign, a recording of Trump emerged that included a grotesque admission that he routinely sexu-

State?, NPR (May 30, 2020, 6:00 AM), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state>, archived at <https://perma.cc/29E2-L23U>; Carlos Ballesteros, *Working from home not an option for most black, Latino workers during coronavirus crisis*, CHI. SUN-TIMES (Apr. 9, 2020, 4:30 PM), <https://chicago.suntimes.com/coronavirus/2020/4/9/21212043/coronavirus-covid-19-racial-disparity-black-latino-workers-work-from-home>, archived at <https://perma.cc/4DPW-D6S3> (“[O]nly 10% of low-wage workers can clock in from home, compared to two-thirds of high-end earners. . . . Black and Latino workers are much more likely. . . to work in those low-wage jobs. They’re also more likely to be front-facing customer service workers or in so-called ‘essential’ industries.”).

²¹ Gerald F. Seib, *With New Remarks on Charlottesville, Trump Leaves Himself Isolated*, WALL ST. J. (Aug. 15, 2017, 9:22 PM), <https://www.wsj.com/articles/with-new-remarks-on-charlottesville-trump-leaves-himself-isolated-1502841609>, archived at <https://perma.cc/JX97-ECZ3> (assessing political isolation of Trump after his statement that blame for a white supremacist murder of a peaceful protestor should be placed on both sides and noting that after Trump’s statement, “David Duke, a former Ku Klux Klan leader, was tweeting his thanks to the president”).

²² Michael C. Bender and Peter Nicholas, *Trump Says ‘Both Sides’ to Blame in Charlottesville Violence*, WALL ST. J. (Aug. 15, 2017, 9:28 PM), <https://www.wsj.com/articles/trump-says-both-sides-to-blame-in-charlottesville-violence-reversing-mondays-stance-1502830785>, archived at <https://perma.cc/A4AE-BD4P>. According to the then mayor of Charlottesville Trump uses “inflammatory white nationalism to play to his base voters, who are scattered around in only a very small number of states that make sense for his Electoral College strategy.” Neal Augenstein, *Ex-Charlottesville mayor: Trump saw Floyd death, rioting as ‘an opportunity’*, WTOPNEWS (June 4, 2020, 5:00 pm), <https://wtop.com/virginia/2020/06/ex-charlottesville-mayor-trump-saw-floyd-death-rioting-as-an-opportunity/>, archived at <https://perma.cc/GAL7-8WMW>. The now former mayor sees the same pattern at play with respect to protestors of the police murder of George Floyd whom Trump called “thugs.” *Id.*

²³ Daniel L. Byman, *Riots, white supremacy, and accelerationism*, BROOKINGS (June 2, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/02/riots-white-supremacy-and-accelerationism/>, archived at <https://perma.cc/S3AX-RYPW>. Byman suggests that white supremacists seek “accelerationism” of racial discord and civil unrest and Trump provides the accelerant:

[E]ven when President Trump does not openly embrace the white supremacists’ cause, he is often their ally due to the polarization in which he revels. His efforts to claim that the legitimate protesters are all Antifa, blame ‘liberal Governors and Mayors’ for the unrest, and declare that ‘when the looting starts, the shooting starts’ all exacerbate tensions.” Such statements are likely to provoke strong and divergent reactions from across the political spectrum rather than bring Americans together in outrage over George Floyd’s murder and the need to reject violence in favor of genuine reform. *Id.*

ally assaults women.²⁴ In fact, Trump opened his presidential campaign with a libelous characterization of Mexican immigrants. He stated, “They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”²⁵ Each of these statements accommodates and encourages hate and lawlessness in a way that no president in recent history ever dared.²⁶ When similarly hateful rhetoric was employed by a president over one hundred years ago during wartime, murders and hate crimes accompanied it.²⁷

Hate speech leads to hate crimes and enough violence threatens domestic tranquility and ultimately national security. Leaders who pursue the politics of hate encourage foreign adversaries to stir up domestically festering racial animus and other social divisions to weaken our nation. Part I of this article establishes a close association between hate crimes and the politics of Donald Trump. Part II of this article suggests that this close association between Donald Trump and hate crimes means that domestic violence will continue, if not worsen, and that bloodshed, and even death, of historically marginalized groups, will occur if Donald Trump wins reelection. Part III suggests legal responses to vindicate the compelling state interests that divisive hate speech and policies implicate in the U.S. today. The hate spawned by Donald Trump challenges our democracy and threatens our national security. The legal remedies suggested herein address the clear and present danger of the politics of hate overwhelming our democracy and endangering our domestic tranquility and common defense.

II. HATE IN AMERICA SINCE 2015

Racial hatred and white supremacy in the U.S. form an important strand of American history, but also stand in opposition to another important strand of American history: that of pluralism, tolerance, equality and diversity.²⁸ This dichotomy creates opportunities for foreign adversaries to subvert the social fabric of U.S.; in fact, foreign powers wishing us ill, such as Vladimir Putin’s Russia, exploit this opportunity to weaken our country by encourag-

²⁴ Rebecca Ballhaus, *Trump Calls NBC Release of 2005 Video ‘An Illegal Act’*, WALL ST. J. (Oct. 27, 2016, 8:56 PM), <https://www.wsj.com/articles/trump-calls-nbc-release-of-2005-video-an-illegal-act-1477616180>, archived at <https://perma.cc/4BDA-6AZM>.

²⁵ 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>, archived at <https://perma.cc/L7AT-Y5PU>.

²⁶ Adam Hochschild, Opinion, *Woodrow Wilson also Fanned the Flames of Hate*, L.A. TIMES (Aug. 1, 2017, 3:00 AM), <https://www.latimes.com/opinion/story/2019-07-31/trump-woodrow-wilson-discrimination-race>, archived at <https://perma.cc/X388-F9DY>.

²⁷ *Id.*

²⁸ Ryan Cooper, *The White Nationalist Plot to Destroy America*, THE WEEK (Aug. 5, 2019), <https://theweek.com/articles/857001/white-nationalist-plot-destroy-america>, archived at <https://perma.cc/6ATR-VUUL>; see also Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 34–36 (2001) (explaining need to embrace cultural diversity through law and contrasting American tradition of a socially constructed racial hierarchy).

ing racial divisions and even trying to manipulate us into a racial war.²⁹ This exploitation of America's racial hierarchy by a foreign adversary to foment violence and division within the U.S. stands without precedent, and demands that the U.S. legal system take steps to short-circuit this attack on our national security.³⁰

Donald Trump proves that our political leadership can both wittingly and unwittingly aid in this foreign subversion. This article shows that the resurgent racial hatred and white supremacy arising from the politics and policies of Donald Trump has manifested itself in surging racial hate crimes and the policy of cruelty at the southern border.

A. HATE CRIMES

The emergence of Donald Trump as a national political leader coincided with dramatic increases in hate crimes against marginalized groups as reported by the FBI. Hate crimes against Latinos soared from 299 in 2015 to 485 in 2018—an increase of over 62 percent.³¹ Hate crimes against Jews increased by nearly 26 percent.³² African Americans suffered an increase in hate crimes from 1,745 to 1,943, an increase of over 11 percent.³³ Hate

²⁹ Aceves, *supra* note 11, at 240. Putin recently announced a new set of hypersonic weapons aimed at the U.S. See Vladimir Isachenkov, *New Russian Weapon can Travel 27 Times the Speed of Sound*, AP (Dec. 27, 2019), <https://apnews.com/597e7f2b20b21af959e4c6983b255c37>, archived at <https://perma.cc/8D2K-JF5G>. Russian propaganda outlets contextualize the new hypersonic weapons exclusively in terms of its military challenge to the U.S. See Nebojsa Malic, *Avangard Changes Everything: What Russia's Hypersonic Warhead Deployment Means for the Global Arms Race*, RT (Dec. 27, 2019, 8:38 PM), <https://www.rt.com/news/476985-avangard-deployment-arms-race/>, archived at <https://perma.cc/9Y2F-WB9D>. The U.S. levied sanctions against Russia following its invasion of Crimea in 2014. Steve Holland & Jeff Mason, *UPDATE 4-Obama Warns on Crimea, Orders Sanctions over Russian Moves in Ukraine*, REUTERS (Mar. 6, 2014, 8:35 AM), <https://www.reuters.com/article/ukraine-crisis-obama/update-4-obama-warns-on-crimea-orders-sanctions-over-russian-moves-in-ukraine-idUSL1N0M30XQ20140306>, archived at <https://perma.cc/4QAM-NP3C>. These sanctions add to pre-existing sanctions under the so-called Magnitsky Act against certain Russian officials for violations of human rights. See *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*, Pub. L. No. 112-208 (2012); see also Thomas M. Callahan, *Cauldron of Unwisdom: The Legislative Offensive on Insidious Foreign Influence in the Third Term of President Vladimir V. Putin, and ICCPR Recourse for Affected Civil Advocates*, 38 *FORDHAM INT'L L.J.* 1219, 1230 (2015) (noting that the Act resulted in sanctions of 18 Russian officials).

³⁰ See Aceves, *supra* note 11, at 185–89 (recounting Soviet efforts to undermine the influence of the U.S. across the globe through propaganda highlighting racial inequality in the U.S. and the Supreme Court's acceptance of government urging to legally dismantle American apartheid).

³¹ Compare U.S. DEPT. OF JUST., FEDERAL BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, *2015 Hate Crime Statistics, Table 1* (2015), <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf>, archived at <https://perma.cc/YQ8Y-M2ZJ>, with U.S. DEPT. OF JUST., FEDERAL BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, *2018 Hate Crime Statistics, Table 1* (2018), <https://ucr.fbi.gov/hate-crime/2018/topic-pages/tables/table-1.xls>, archived at <https://perma.cc/TY3A-RW4Z>.

³² *Id.*

³³ *Id.*

crimes based upon sexual orientation spiked from 1053 to 1196—with only crimes against heterosexuals and lesbians dipping.³⁴ Gender-based hate crimes increased 29 percent from 167 to 215 incidents in 2018.³⁵ Overall, hate crimes went from 5,850 incidents in 2015 to 7,120 in 2018—an increase of nearly 22 percent.³⁶ Most disturbingly, violent hate crimes increased to a 16-year high in 2018.³⁷ And, hate murders stand at a 27-year high.³⁸

Scholars have parsed the FBI data to further tighten the association between the “Trump Effect” and hate crimes and violence.³⁹ For example, Professors Griffin Edwards and Stephen Rushin concluded that “President Trump’s rise to the Presidency was associated with one of the largest upticks in hate crimes in recorded American history—second only to the spike in hate crimes after the terrorist attacks on September 11, 2001.”⁴⁰ They also traced the increase in hate crimes to the fourth quarter of 2016, at or about the time of the election of Donald Trump, even though the fourth quarter of most years shows marked seasonal declines due to winter conditions.⁴¹ Griffin and Rushin also found that the counties that voted most strongly in favor of Trump have seen the highest increases in hate crimes since the fourth quarter of 2016.⁴² Thus, both the timing and location of the surge in hate crimes strongly tie the election of Donald Trump to increases in hate crime—further evincing the “Trump Effect.”⁴³

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Adeel Hassan, *Hate-Crime Violence Hits 16-Year High, F.B.I. Reports*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html>, archived at <https://perma.cc/7A6K-TRJV>.

³⁸ Erin Donaghue, *FBI: Hate Crime Murders hit Record in 2018; Crimes Targeting Transgender People Soar*, CBS NEWS (Nov. 12, 2019, 8:31 PM), <https://www.cbsnews.com/news/fbi-hate-crimes-data-released-today-2019-11-12/>, archived at <https://perma.cc/AT7F-KUVU> (“Hate crime murders in the U.S. reached a 27-year high in 2018, according to data released Tuesday by the FBI. Hate crime murders totaled 24, which includes the 11 worshipers slain last year at the Tree of Life Synagogue in Pittsburgh, the deadliest anti-Semitic crime in U.S. history.”).

³⁹ See, e.g., Colbert I. King, *The Scary Examples of the Trump Effect*, WASH. POST (Sept. 7, 2018, 5:14 PM), https://www.washingtonpost.com/opinions/the-trump-effect-is-debasing-the-presidency/2018/09/07/e6c95aea-b1ff-11e8-aed9-001309990777_story.html, archived at <https://perma.cc/HVH7-6ULL> (suggesting that Trump Effect reflects the fact that “people who once had to conceal their bigotry are emboldened by Trump’s inflammatory racial and ethnic rhetoric.”); *‘Trump Effect’ Led to Hate Crime Surge, Report Finds*, BBC NEWS (Nov. 29, 2016), <http://www.bbc.com/news/world-us-canada-38149406>, archived at <https://perma.cc/DAE7-C5KG>.

⁴⁰ Edwards & Rushin, *supra* note 3, at 4.

⁴¹ *Id.* (“Such a surge in the number of reported hate crimes in the fourth quarter of a year is highly unusual; generally, the number of reported crimes declines between the third and fourth quarter of each year due to predicable seasonal variations in crime rates.”). Since the fourth quarter of 2016, hate crimes remain elevated. *Id.*

⁴² *Id.* (“[B]y using panel regression techniques, we show that counties that voted for President Trump by the widest margins in the presidential election also experienced the largest increases in reported hate crimes during this time period.”).

⁴³ *Id.* (“Combined, we believe that this provides compelling evidence to support the Trump Effect hypothesis.”).

Other scholars associate Trump's use of Twitter with increased hate.⁴⁴ “[W]e find a tight link between Twitter usage, Donald Trump’s tweets about Muslims, and direct measures of anti-minority sentiment.”⁴⁵ Indeed, the scholars found a “strong . . . correlation” between Donald Trump’s anti-Muslim Tweets and subsequent increases in hate crimes.⁴⁶ The authors of this study additionally found that their initial conclusions based upon the aforementioned FBI data enjoyed confirmatory support from data from the Anti-Defamation League.⁴⁷ The authors note that “[t]he cross-sectional results are entirely driven by one crime category, assault.”⁴⁸ In other words, consistent with data discussed above, hate increasingly leads to violence during the Trump era.

Another study similarly links Trump rallies to increases in local hate crimes. Using data from the Anti-Defamation League’s Hate, Extremism, Anti-Semitism, Terrorism map data (HEAT map), scholars found a correlation between increased hate crimes and counties hosting one of Trump’s 275 presidential campaign rallies in 2016.⁴⁹ The authors of the study “aggregated hate-crime incident data and Trump rally data to the county level and then used statistical tools to estimate a rally’s impact.” They “found that counties that had hosted a 2016 Trump campaign rally saw a 226 percent increase in reported hate crimes over comparable counties that did not host such a rally.”⁵⁰ The correlation of increased hate crimes to Trump political rallies further tightens the association between Donald Trump and hate.⁵¹

Other scholars link Trump’s toxic rhetoric to increased racial hostility.⁵² Scholarship showed that “individuals who are exposed to uncivil elite dis-

⁴⁴ Karsten Müller & Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment* (Oct. 31, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149103, archived at <https://perma.cc/QH49-YRBH>.

⁴⁵ *Id.* at 36.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 35 (“Taken together, we believe our evidence to be more in line with changes in the actual number of hate crimes. This is also consistent with evidence using the alternative data from the Anti-Defamation League we use in robustness exercises.”). The authors also address and rule out possible changes in FBI reporting of hate crimes. *See id.* at 35 (“We focus on within-county changes of hate crime after taking out state-level averages. This rules out any persistent differences in the propensity to report hate crimes, as well as dynamic changes across states.”).

⁴⁸ *Id.*

⁴⁹ Ayal Feinberg, Regina Branton & Valerie Martinez-Ebers, *Counties that Hosted a 2016 Trump Rally saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019, 7:45 AM), <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/?noredirect=ON#click=https://t.co/bYXsN60xzH>, archived at <https://perma.cc/5VZH-PUXW>.

⁵⁰ *Id.*

⁵¹ At the very least, Trump expressly encouraged violence at his rallies through offers to pay the legal fees of those accused of assault. *See* Michael Finnegan & Noah Bierman, *Trump’s Endorsement of Violence Reaches New Level: He May Pay Legal Fees for Assault Suspect*, L.A. TIMES (Mar. 13, 2016), <https://www.latimes.com/politics/la-na-trump-campaign-protests-20160313-story.html>, archived at <https://perma.cc/LR9G-8CNX>.

⁵² Brian F. Schaffner, *Follow the Racist? The Consequences of Trump’s Expressions of Prejudice for Mass Rhetoric 2* (Sept. 2018) (unpublished manuscript), http://www.ashford.zone/images/2018/09/followtheracist_v2.pdf, archived at <https://perma.cc/RWL4-DC6H>.

course are more likely to be uncivil in their own discussions about politics.”⁵³ Surveys conducted after the 2016 election found that teachers concluded that the election outcome emboldened students to use racially charged language including slurs and name-calling, and students reported increases in racial and gender targeted bullying.⁵⁴ Political leaders like Donald Trump present unique dangers when they deploy hateful political rhetoric for gain.

Professor Brian F. Schaffner tested the hypothesis that toxic rhetoric from elites affects social behavior through two experiments based upon two different surveys of voters.⁵⁵ Schaffner reports on his findings from two experiments testing links between Trump’s hostile rhetoric and how individuals speak about other identity groups. He found that Trump’s remarks cue norms regarding acceptable speech. Professor Schaffner concluded “that whites do react to his rhetoric by saying more negative and offensive things not only about the group targeted by Trump’s remarks, but often by commenting more negatively about other groups as well.”⁵⁶ Schaffner’s findings help explain why all outgroups suffer from elite rhetoric that focuses only on specific outgroups—this rhetoric signals that hatred is generally acceptable.⁵⁷

In the end, Trump’s own political behavior and strategy closely link him to the surge in hate crimes. “[T]here is substantial evidence that Trump has encouraged racism and benefitted politically from it.”⁵⁸ For example, political scientists concluded, based upon surveys of likely voters, that racial and gender hostility explain much of Donald Trump’s electoral success and political appeal. In particular, the racial rhetoric helped explain a historically unprecedented gap between educated and uneducated white voters in favor of

⁵³ *Id.* at 1 (citing Bryan T. Gervais, *Following the news? Reception of Uncivil Partisan Media and the use of Incivility in Political Expression*, 31 POLI. COMM. 564 (2014), and Bryan T. Gervais, *Incivility Online: Affective and Behavioral Reactions to Uncivil Political Posts in a Web-based Experiment*, 12 J. INFO. TECH. & POL. 167 (2015)).

⁵⁴ Rosemary K.M. Sword & Philip Zimbardo, *The Trump Effect: An Update*, PSYCH. TODAY, Jan. 30, 2018, <https://www.psychologytoday.com/us/blog/the-time-cure/201801/the-trump-effect-update>, archived at <https://perma.cc/Z56V-F8A3> (citing MAUREEN B. COSTELLO, S. POVERTY L. CTR., *THE TRUMP EFFECT: THE IMPACT OF THE PRESIDENTIAL CAMPAIGN ON OUR NATION’S SCHOOLS* (2016), https://www.splcenter.org/sites/default/files/splc_the_trump_effect.pdf, archived at <https://perma.cc/H5EV-YB2Y>, and HUMAN RIGHTS CAMPAIGN, *POST-ELECTION SURVEY OF YOUTH* (2017), https://assets2.hrc.org/files/assets/resources/HRC_Post_ElectionSurveyofYouth.pdf, archived at <https://perma.cc/R53R-MEC3>).

⁵⁵ Schaffner, *supra* note 52, at 6–8.

⁵⁶ *Id.* at 2.

⁵⁷ *Id.* at 7. The specific quotes from Donald Trump used in Professor Schaffner’s first experiment were: 1) “Our great African-American President hasn’t exactly had a positive impact on the thugs who are so happily and openly destroying Baltimore”; and 2) “When Mexico sends its people, they’re not sending their best. They’re sending people that have lots of problems. . . . They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.” *Id.* The second experiment used one quote focused on Muslims and a quote for Hillary Clinton stating that racists and sexists supported Trump. *See id.* at 9. The experiments presented the quotes in randomized order. *Id.* at 7–9.

⁵⁸ Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What do the Data Say?*, BROOKINGS (Aug. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/>, archived at <https://perma.cc/V3PN-AXAL>.

Trump—a gap that totaled 40 points and proved crucial in propelling Donald Trump into the White House.⁵⁹ Another study found that voters’ anti-immigrant and racist attitudes acted as “an important determinant” of a Trump vote.⁶⁰ The evidence strongly suggests that Trump specifically courted the votes of racists and crafted a campaign seeking to exploit and inflame racial divisions in the U.S., which foreseeably led to more racial hate crimes and violence—as predicted by GOP governor Nikki Haley, an eventual Trump appointee.⁶¹

B. *The Cruelty at the Southern Border*

The Trump Administration’s association with hate also manifests itself in the cruelty our nation displays at its southern border.⁶² Naturally, an official policy of contempt towards any segment of the population facilitates hate, hostility and violence towards those associated with that segment.⁶³ Contempt summarizes the treatment of humans (including U.S. Citizens) at or near the southern border or seeking entry into the U.S.⁶⁴ Indeed, across

⁵⁹ Brian F. Schaffner et al., *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9, 10–11 (2018) (“We find that while economic considerations were an important part of the story, racial attitudes and sexism were much more strongly related to support for Trump; these attitudes explain at least two-thirds of the education gap among white voters in the 2016 presidential election.”). Other scholars found that Trump benefitted from whites holding high ethnic identification who responded to the threat of increased social diversity. See, e.g., Brenda Major et al., *The Threat of Increasing Diversity: Why many White Americans Support Trump in the 2016 Presidential Election*, 21 GROUP PROC. & INTERGROUP REL. 931, 938 (2016) (finding that strong white identity transcended party affiliation and predicted Trump support in the face of facts showing increased diversity).

⁶⁰ Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racism, Resentment and Anti-Immigrant Sentiments*, 51 PS: POL. SCI. & POLITICS 528, 532 (2018) (“The most important finding of the analysis, however, is that racism—regardless of how it was measured—appears to have been an important motive in voting for Trump” and “that negative attitudes toward ethnic minorities and immigrants swayed independents and some Democrats to opt for candidate Trump, thereby considerably strengthening his electoral-support base.”).

⁶¹ Jenna Johnson, *S.C. Gov. Nikki Haley Warns that Trump’s Rhetoric could Lead to Violent Tragedy*, WASH. POST (June 3, 2016, 10:53 AM), <https://www.washingtonpost.com/news/post-politics/wp/2016/06/03/s-c-gov-nikki-haley-warns-that-trumps-rhetoric-could-lead-to-violent-tragedy/>, archived at <https://perma.cc/ZPM8-VX4C> (quoting Nikki Haley: “I know what that rhetoric can do. I saw it happen.”). Then Governor Haley spoke at the one-year anniversary of racist and murderous violence against African American churchgoers in Charleston, South Carolina. *Id.*

⁶² While the locus of national cruelty appears limited to the southern border the official policy of hostility toward immigration from Latin America traumatizes significant elements of the Latinex community across the nation. See Bradford S. Jones et al., *Trump-induced Anxiety Among Latinos/as*, GROUP PROC. & INTERGROUP REL. 1 (forthcoming 2020).

⁶³ Jonathan Blitzer, *A Veteran ICE Agent, Disillusioned with the Trump Era, Speaks Out*, NEW YORKER (July 24, 2017), <https://www.newyorker.com/news/news-desk/a-veteran-ice-agent-disillusioned-with-the-trump-era-speaks-out>, archived at <https://perma.cc/4PM9-ZHTR> (quoting an ICE agent: “now there are lots of people who feel free to feel contempt”).

⁶⁴ No citizen should assume an exemption from this official contempt. See Nomaan Merchant, *ICE releases US Citizen, 18, Wrongfully Detained near Border*, AP (July 24, 2019), <https://apnews.com/82d8d010d0214d3981c2700fa2db3b87>, archived at <https://perma.cc/MSK>

America “Latinos have more reason to feel that living in the Trump era amounts to living under a state of siege.”⁶⁵ Thus, the cruelty at the border directly relates to the hate generated by the Trump Administration.⁶⁶

The United Nations High Commissioner for Human Rights, former Chilean President Michelle Bachelet, recently expressed outrage at the U.S. mistreatment of Latinx children at the southern border: “As a pediatrician, but also as a mother and a former head of State, I am deeply shocked that children are forced to sleep on the floor in overcrowded facilities, without access to adequate healthcare or food, and with poor sanitation conditions.”⁶⁷ Bachelet echoed an Inspector General’s report finding serious deficiencies within the Department of Homeland Security with respect to immigrants at the southern border, including “dangerous overcrowding” and “prolonged detention of children.”⁶⁸ The inhumanity of the conditions of detention is best conveyed through photos accompanying the Inspector General’s report showing humans and children crowded into cages and “standing room only” cells packed to twice of ordinary capacity.⁶⁹

The basic cruelty of the overcrowding at facilities along the border remains officially uncontested, but media reports further detail the inhumanity. For example, NBC obtained 30 “serious incident reports” prepared by the Department of Health and Human Services. These reports catalogued findings of sexual and physical abuse of children, children forced to sleep on concrete floors, and unacceptable food and sleeping conditions at an Arizona detention center.⁷⁰ The *New York Times* interviewed “dozens” of Border Pa-

8-9DMV (“A U.S.-born 18-year-old has been released from immigration custody after wrongfully being detained for more than three weeks. Francisco Erwin Galicia . . . lives in the border city of Edinburg, Texas, and was traveling north with a group of friends when they were stopped at a Border Patrol inland checkpoint. . . [A]gents apprehended Galicia on suspicion that he was in the U.S. illegally even though he had a Texas state ID.”); Kevin Sieff, *U.S. is Denying Passports to Americans Along the Border, Throwing their Citizenship into Question*, L.A. TIMES (Aug. 29, 2018), <https://www.latimes.com/nation/la-na-passports-20180829-story.html>, archived at <https://perma.cc/8CYB-5GGV> (“a growing number of people whose official birth records show they were born in the United States . . . are now being denied passports — their citizenship suddenly thrown into question.”).

⁶⁵ Raul A. Reyes, *El Paso shooting: ‘Open season’ on Hispanics in America Thanks to ‘racist in chief’ Trump*, USA TODAY (Aug. 12, 2019, 11:23 AM), <https://eu.usatoday.com/story/opinion/2019/08/05/el-paso-shooting-open-season-on-hispanics-thanks-to-trump-column/1917590001/>, archived at <https://perma.cc/6DSG-J5KG>.

⁶⁶ *Id.*

⁶⁷ *UN rights chief ‘appalled’ by US border detention conditions, says holding migrant children may violate international law*, UN NEWS (July 8, 2019), <https://news.un.org/en/story/2019/07/1041991>, archived at <https://perma.cc/U63N-4SGH>.

⁶⁸ DEP’T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-19-51, MANAGEMENT ALERT—DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY (REDACTED) 1 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf, archived at <https://perma.cc/8Z4L-MS7P>.

⁶⁹ *Id.* at 6; figures. 1 and 6.

⁷⁰ Jacob Soboroff & Julia Ainsley, *Migrant Kids in Overcrowded Arizona Border Station Allege Sex Assault, Retaliation from U.S. Agents*, NBC NEWS (July 9, 2019, 8:30 PM), <https://www.nbcnews.com/politics/immigration/migrant-kids-overcrowded-arizona-border-station-allege-sex-assault-retaliation-n1027886>, archived at <https://perma.cc/E95A-GM95> (“A 15-year-old girl from Honduras described a large, bearded officer putting his hands inside her bra,

trol agents and their supervisors, as well as individuals who visited a Texas facility, who described the facility as filthy, overcrowded, and rife with contagious diseases such as scabies, chicken pox and the flu.⁷¹ A volunteer reflected on a facility she visited in these terms:

As I listened to women recount the horrors they endured, I could not help but think of my own family's history of fleeing persecution in Eastern Europe — and of the historical luck of arriving at a time when refugee policy offered easier entrance. As an American Jew, I am ashamed of my country, but I know we can be better. It is our Jewish imperative to stop the unconscionable treatment of asylum seekers.⁷²

The Trump Administration denies detained children soap, toothpaste, toothbrushes and beds.⁷³ The Administration refuses to allow concerned physicians to provide potentially life-saving flu vaccines for free.⁷⁴ These reports of conditions from across the nation suggest that the cruelty at the southern border transcends any single facility and reflects systematic decisions and cruelty within the Trump Administration.⁷⁵ Recently, a 16-year-old boy died of the flu in immigration detention as a result of reckless disregard for the well-being of humans detained by the government at the southern border.⁷⁶

Certainly, the so-called “zero-tolerance” policy that the Trump Administration instituted—a policy which mandated the separation of families at

pulling down her underwear and groping her as part of what was meant to be a routine pat-down in front of other immigrants and officers” and stated that “she felt embarrassed as the officer was speaking in English to other officers and laughing.”).

⁷¹ Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html>, archived at <https://perma.cc/LKX5-CLPP> (“Outbreaks of scabies, shingles and chickenpox were spreading among the . . . children and adults who were being held in cramped cells, agents said. The stench of the children’s dirty clothing was so strong it spread to the agents’ own clothing — people in town would scrunch their noses when they left work.”).

⁷² Opinion, Shiriel King Abramson, *Fear, Trauma and Sickness: This Migrant Detention Center is no Summer Camp*, JEWISH NEWS N. CAL. (Nov. 5, 2019), <https://www.jweekly.com/2019/11/05/fear-trauma-and-sickness-providing-legal-aid-in-a-migrant-detention-center/>, archived at <https://perma.cc/7Y4N-NKWQ>.

⁷³ *Are US child Migrant Detainees Entitled to Soap and Beds?*, BBC News (June 20, 2019), <https://www.bbc.com/news/world-us-canada-48710432>, archived at <https://perma.cc/YY5Q-DUW9>.

⁷⁴ Suzanne Gamboa, *Doctors Offer to give free flu shots to Detained Migrants, Warn Trump Admin. of Epidemic*, NBC NEWS, <https://www.nbcnews.com/news/latino/doctors-offer-give-free-flu-shots-detained-migrants-warn-trump-n1085206>.

⁷⁵ See Robert Moore, *Inside the Cell Where a Sick 16-Year-Old Boy Died in Border Patrol Care*, PROPUBLICA (Dec. 5, 2019, 1:30 PM), <https://www.propublica.org/article/inside-the-cell-where-a-sick-16-year-old-boy-died-in-border-patrol-care>, archived at <https://perma.cc/2Z9N-ME38>.

⁷⁶ *Id.* (“ProPublica has obtained video that documents the 16-year-old’s last hours, and it shows that Border Patrol agents and health care workers at the Weslaco holding facility missed increasingly obvious signs that his condition was perilous. The cellblock video shows Carlos writhing for at least 25 minutes on the floor and a concrete bench. It shows him staggering to the toilet and collapsing on the floor, where he remained in the same position for the next four and a half hours.”).

the border—evinces an intent to inflict cruelty.⁷⁷ The Administration only stopped tearing children of asylum seekers from their families after the American Civil Liberties Union (“ACLU”) successfully sued on behalf of asylum seekers to enjoin the administration.⁷⁸ The U.S. District Court for the Southern District of California held that the when the government separated class members from their minor children without any showing of unfitness, it violated due process. Further, the court held that because the government implemented the separation without any effective process for notifying parents of the whereabouts of their children, or providing mechanisms for communication, the violation was “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”⁷⁹ The government has admitted that it separated at least 5,460 children (many under five years old) from asylum seekers and did not keep track of the separated children in order to reunify them with their families.⁸⁰

The *Associated Press* and *Frontline* report that children in immigration detention reached a record high of nearly 70,000 in 2019.⁸¹ While not all of these children suffered separation from their parents, they all continue to suffer from the horrendous conditions plaguing detention facilities. Moreover, even when children are placed in foster care, the government does not secure their basic security, and the government is currently facing hundreds of millions of dollars in damages claims arising from alleged sexual and physical abuse.⁸² “A review of 38 legal claims obtained by *The Associated Press*—some of which have never been made public—shows that taxpayers could be on the hook for more than \$200 million in damages from parents who said their children were harmed while in government custody.”⁸³ De-

⁷⁷ Reality Check Team, *US border: Who decided to separate families?*, BBC NEWS (June 26, 2019), <https://www.bbc.com/news/world-us-canada-44303556>, archived at <https://www.bbc.com/news/world-us-canada-44303556> (“Under a ‘zero-tolerance’ immigration policy introduced in April 2018, adult undocumented migrants crossing the US-Mexico border were criminally charged and jailed. These had previously been treated as civil violations. Because the children of prosecuted migrants were not charged with any crime, they were not permitted to be jailed with their parents, which led to children being placed in shelters or foster care. In addition to removing children from apprehended illegal migrants, children have also been separated from asylum seekers.”). This zero-tolerance policy led directly to the overcrowding at the southern border.

⁷⁸ See *Ms. L. v. U.S. Immigration and Customs Enforcement* (“ICE”), 310 F.Supp.3d 1133, 1136 (S.D. Cal. 2018).

⁷⁹ *Id.* at 1145–46 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998)).
⁸⁰ *Tally of Children Split at Border tops 5,400 in new Count*, PBS NEWS HOUR (Oct 25, 2019, 10:54 AM), <https://www.pbs.org/newshour/nation/tally-of-children-split-at-border-tops-5400-in-new-count>, archived at <https://perma.cc/U3DW-PXNZ>; Jacob Soboroff, *Emails show Trump admin had ‘no way to link’ separated migrant children to parents*, NBC NEWS (May 1, 2019, 7:30 PM), <https://www.nbcnews.com/politics/immigration/emails-show-trump-admin-had-no-way-link-separated-migrant-n1000746>, archived at <https://perma.cc/L9X6-A6E5>.

⁸¹ Christopher Sherman et al., *US Held Record Number of Migrant Children in Custody in 2019*, AP (Nov. 12, 2019), <https://apnews.com/015702afdb4d44fb85cf5070cd2c6824>, archived at <https://perma.cc/AW2B-LJHI>.

⁸² Garance Burke et al., *Claims: Migrant Children Molested in US-Funded Foster Care*, AP & FRONTLINE, Aug. 16, 2019, <https://www.pbs.org/wgbh/frontline/article/migrant-kids-split-border-harmed-foster-care/>, archived at <https://perma.cc/6HLH-DR9S>.

⁸³ *Id.*

spite so many claims on file, the Trump Administration ignores the possibility of legal rebuke and continues the policy of cruelty at the southern border.⁸⁴

As early as 2018, the UN Human Rights Council High Commissioner also rebuked the U.S. for its practice of separating families,⁸⁵ but to no avail. The Trump Administration responded to this rebuke by withdrawing from the UN Human Rights Council and limiting financial support for the UN.⁸⁶ This likely will negatively impact the ability of the U.S. to promote human rights around the world for years to come and compromise its soft power and international influence.

Commentators continue to search for reasons for the Trump Administration's commitment to cruelty at the southern border. *The Washington Post* suggests that the Trump Administration acted out of "brutality and incompetence" and even now defends its family separation policy in litigation with the ACLU, an organization which has essentially assumed the Administration's duty to reunify families.⁸⁷ This intransigence and reckless disregard for the well-being of children has led some to conclude that the cruelty of the Administration's policy arises from the intent of some in the Administration to inflict harm for political gain.⁸⁸ "Trump's supporters actively enjoy inflicting suffering on those they hate and fear, and his administration is more than happy to give them what they want."⁸⁹ Others suggest: "[C]ruelty, far from being the point, is actually beside the point. Maybe the administration, from the president on down to detention center guards, doesn't care one bit about the health and well-being of the children in its care."⁹⁰ According to this argument, amoral indifference, not moral turpitude, drives the cruelty under this administration.

To the victims of hate and cruelty, the question of why the Trump Administration has implemented these policies is purely semantic, as their suffering does not in any way relate to the President's state of mind or the state of mind of any particular government agent. The next section attempts to decipher a related conundrum: to determine whether the hate that became

⁸⁴ See *id.*

⁸⁵ Opening Statement and Global Update of Human Rights Concerns by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein at 38th Sess. of the Human Rights Council (June 18, 2018), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23206&LangID=E>, archived at <https://perma.cc/95CV-WE86>.

⁸⁶ Jean Galbraith, *Contemporary Practice of the United States Relating to International Law: United States Withdraws from the UN Human Rights Council, Shortly after Receiving Criticism About its Border Policy*, 112 AM. J. INT. L. 745, 745-46 (2018).

⁸⁷ Editorial Board, *Only Now do we Understand the True Cruelty of Trump's Family Separation*, WASH. POST (Oct. 29, 2019), <https://www.washingtonpost.com/gdpr-consent/?destination=%2fopinions%2f2019%2f06%2f19%2fshanahan-debacle-exemplifies-trumps-incompetence%2f%3f>, archived at <https://perma.cc/7K8Q-FAVX>.

⁸⁸ Damon Linker, *Trump's Border Policy: If Cruelty isn't the Point, What is?*, THE WEEK (June 25, 2019), <https://theweek.com/articles/848837/trumps-border-policy-cruelty-isnt-point-what>, archived at <https://perma.cc/A8MB-N2CN>.

⁸⁹ *Id.* (citing Adam Serwer).

⁹⁰ *Id.*

manifest after the 2016 election will continue, worsen or abate after the 2020 election. The aforementioned violence and deaths have devastated individuals and families across the nation. Consequently, an attempt to assess the future of hate under a potential second Trump Administration and whether the hateful rhetoric encourages physical harm or death is a critical component to assessing the risks posed to national security by Donald Trump.

III. PROJECTING HATE AFTER ELECTION 2020

As the previous section highlighted, the Trump Administration persists in its misconduct in spite of international or judicial rebuke. Even popular opinion seems to hold only transitory sway over the Administration. Polls showed that Americans generally disfavored family separation by more than a 2 to 1 margin in mid-2018.⁹¹ Shortly thereafter, President Trump signed an executive order to curtail family separations.⁹² Nevertheless, the Trump Administration continues to contest the scope of its power to separate families and leaves the ACLU in the difficult position of litigating against the government while at the same time trying to reunite families in the face of government indifference in assisting in reunification efforts.⁹³ Neither contrition nor regret marks the Trump Administration, which acts with lawless recidivism.

In terms of international rebuke, the above-referenced statements of the UN High Commissioners for Human Rights expressing outrage and horror at the Administration's cruelty at the southern border mirrors an array of international voices condemning Trump's border policies.⁹⁴ Human Rights Watch found that the "United States continued to move backward on human rights at home and abroad in the second year of President Donald Trump's administration."⁹⁵ The NGO highlighted hate crimes and immigration policies as contrary to human rights norms.⁹⁶ "Of 15 recent deaths in immigration detention, Human Rights Watch found that eight were linked to poor medical care."⁹⁷ The Americas Advocacy Director of Amnesty International USA recently testified to Congress that the U.S. has "repudiated" its legal obliga-

⁹¹ Dhrumil Mehta, *Separating Families At The Border Is Really Unpopular*, FIVETHIRTYEIGHT (June 19, 2018, 1:25 PM) <https://fivethirtyeight.com/features/separating-families-at-the-border-is-really-unpopular/>, archived at <https://perma.cc/4YUV-F8UV>.

⁹² Exec. Order, *Affording Congress an Opportunity to Address Family Separation* (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>, archived at <https://perma.cc/5J6M-NE5B>

⁹³ See Opinion, Michelle Goldberg, *The Terrible Things Trump Is Doing in Our Name*, N.Y. TIMES (June 21, 2019) <https://www.nytimes.com/2019/06/21/opinion/family-separation-trump-migrants.html>, archived at <https://perma.cc/3HGJ-ZXDZ>.

⁹⁴ See UN NEWS, *supra* note 67; Burke et al., *supra* note 82.

⁹⁵ HUMAN RIGHTS WATCH, *WORLD REPORT 2019: EVENTS OF 2018*, UNITED STATES 619 (2019).

⁹⁶ *Id.* at 625–26.

⁹⁷ *Id.* at 626.

tions with respect to asylum seekers and instead denigrates them as illegal aliens and attacks their rights to seek safety and refuge.⁹⁸

Courts in the U.S. do not disagree that the Trump Administration is violating the law with respect to its policies at the border. In *East Bay Sanctuary Covenant v. Trump*,⁹⁹ the U.S. District Court for the District of Northern California enjoined the Trump Administration's efforts to restrict asylum to those entering at a designated port of entry as contrary to 8 U.S.C. § 1158(a) (1), which states that anyone "physically present in the United States or who arrives in the United States . . . whether or not at a designated port of arrival" qualifies to apply for asylum.¹⁰⁰ In *Flores v. Barr*,¹⁰¹ the U.S. District Court for the Central District of California found that the Trump Administration's efforts to impose indefinite detention upon children because their parents had crossed the border illegally violated the Flores Settlement, a binding settlement agreement that the government previously agreed to in order to settle claims brought against it in 1997.¹⁰² Finally, in *Ms. L v. ICE*,¹⁰³ the U.S. District Court for the Southern District of California noted that although President Trump signed an executive order "to maintain family integrity" at the southern border, the Administration did nothing to help reunite the nearly 2,000 families it had torn apart. Instead, it essentially left non-governmental actors to deal with the humanitarian mess it created.¹⁰⁴ The *Ms. L* court noted that the Administration's practice of separating families without any system for tracking the children, enabling communication between the parents and their children, or reuniting the families, was "a startling reality."¹⁰⁵ The level of cruelty evinced in each of these judicial cases that rebuked the administration, in the face of clear legal obligations, challenges the imagination and can only reflect a level of dehumanization that is inherent in all racism.

⁹⁸ Written Testimony of Charanya Krishnaswami, Americas Advocacy Director, Amnesty International USA, Submitted to the Subcommittee on Africa, Global Health, Global Human Rights and International Organizations, House Committee on Foreign Affairs, Hearing on "Humanitarian Aspects of the United States Migratory Crisis" (Nov. 22, 2019), https://www.amnestyusa.org/wp-content/uploads/2019/11/11.18.2019-AI-Testimony-for-HFAC-Hearing-on-Humanitarian-Crisis-at-the-Border_FINAL.pdf, archived at <https://perma.cc/ABF9-QF2Z>.

⁹⁹ 354 F.Supp.3d 1094, 1121 (N.D. Cal. 2018).

¹⁰⁰ *Id.* at 1101. The District Court previously issued a temporary restraining order against the rule which the Ninth Circuit and Supreme Court refused to stay. See *Trump v. E. Bay Sanctuary Covenant*, 139 S.Ct. 782 (2018) (mem.).

¹⁰¹ 407 F.Supp.3d 909 (C.D. Cal. 2019).

¹⁰² *Id.* at 931 ("The blessing or the curse—depending on one's vantage point—of a binding contract is its certitude. The Flores Agreement is a binding contract and a consent decree" and the Trump Administration "cannot . . . ignore the dictates of the consent decree [and] simply impose their will by promulgating regulations that abrogate the consent decree's most basic tenets. That violates the rule of law.>").

¹⁰³ 310 F. Supp.3d 1133 (S.D. Cal. 2018).

¹⁰⁴ *Id.* at 1141–42.

¹⁰⁵ *Id.* at 1144.

Donald Trump's appointments also reflect accommodation of white nationalists. Trump appointed Steve Bannon as senior strategist.¹⁰⁶ Prior to his appointment, Bannon ran *Breitbart News*, which he characterized as a "platform for the alt-right."¹⁰⁷ The alt-right includes a "motley crew of white nationalists, neo-Confederates, and outright Nazis who share a common belief that culture is inseparable from ethnicity. To these folks, Western civilization cannot exist unless it is a white civilization."¹⁰⁸ While Bannon claims not to embrace white supremacy, numerous white supremacists celebrated his appointment—including the former head of the Ku Klux Klan.¹⁰⁹ During his time in the Trump Administration, Bannon pushed for a travel ban against Muslims and harsher treatment for immigrants, and praised President Trump's statements regarding violence and murder at the far-right protests at Charlottesville.¹¹⁰ Bannon also foments talk of war with the Muslim world, a form of hate speech that all too often inspires actual violence.¹¹¹

Or, consider Stephen Miller, a key White House advisor on immigration issues who holds staunchly anti-immigrant views.¹¹² The Southern Poverty Law Center ("SPLC") recently released a report demonstrating that Miller became enthralled with the propaganda of a variety of white supremacist hate groups and actively propagated white supremacist hate literature through (among other means) over 900 emails to *Breitbart News*.¹¹³ Significantly, the White House does not contest the authenticity or content of the emails but instead chose to attack the SPLC as "left-leaning."¹¹⁴ In reality, "[w]hat the [SPLC] is and has been doing for several years is exposing hate groups and trying to shed light on white supremacists and white nationalist groups."¹¹⁵ According to author Jean Guerrero:

¹⁰⁶ Damian Paletta, *Donald Trump Draws Criticism Over Steve Bannon Appointment*, WALL ST. J. (Nov. 14, 2016, 6:42 PM), <https://www.wsj.com/articles/democrats-criticize-donald-trump-over-steve-bannon-appointment-1479155088>, archived at <https://perma.cc/5L4P-JPF6>.

¹⁰⁷ David French, *Fire Steve Bannon*, NATIONAL REV. (Aug. 17, 2017, 8:58 PM), <https://www.nationalreview.com/2017/08/fire-steve-bannon-white-house-no-place-alt-right-apolo> gists/, archived at <https://perma.cc/8FVX-NBAP>.

¹⁰⁸ *Id.*

¹⁰⁹ Andrew Kaczynski & Chris Massie, *White Nationalists see Advocate in Steve Bannon who will hold Trump to his Campaign Promises*, CNN (Nov. 15, 2016, 7:28 PM), <https://www.cnn.com/2016/11/14/politics/white-nationalists-on-bannon/index.html>, archived at <https://perma.cc/LY6J-NBCW>.

¹¹⁰ Jeff Mason & Steve Holland, *Trump Dumps Controversial Chief Strategist Bannon in Latest Upheaval*, REUTERS (Aug. 18, 2017, 12:25 PM), <https://www.reuters.com/article/us-usa-trump/trump-dumps-controversial-chief-strategist-bannon-in-latest-upheaval-idUSKCN1AY1WH>, archived at <https://perma.cc/AZ5H-ZBTT>.

¹¹¹ See Flemming Rose, *I Told Steve Bannon: 'We Are Not At War With Islam.' He Disagreed.*, HUFFPOST (Feb. 13, 2017, 1:59 PM), https://www.huffpost.com/entry/steve-bannon-islam_b_58a1cee7e4b094a129ed3537, archived at <https://perma.cc/CA8V-QMPF>.

¹¹² Judy Woodruff, *Alleged Stephen Miller Emails Reference White Nationalist and Anti-immigrant Perspectives*, PBS NEWSHOUR (Nov. 14, 2019, 6:45 PM), <https://www.pbs.org/newshour/show/alleged-stephen-miller-emails-reference-white-nationalist-and-anti-immigrant-perspectives>, archived at <https://perma.cc/SUD9-S288>.

¹¹³ *Id.* (quoting author Jean Guerrero).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

[S]o, Stephen Miller is the architect of the Trump administration's border and immigration policies. And President Trump has repeatedly said that he's focused on cutting off illegal immigration, that he wants to go after criminals, after drug traffickers, after rapists. But what we have actually seen over the course of the past — over the course of his presidency is that they have limited legal immigration. They have gone after refugees, they have gone after asylum seekers, largely from non-white countries.¹¹⁶

The painfully obvious bias against non-white immigrants strongly suggests that in spite of the Administration's law and order rhetoric, Trump's immigration policies seek to re-impose white supremacy in accordance with the now well-known views of the architect of the cruelty at the southern border, Stephen Miller.¹¹⁷ In fact, the SPLC uncovered a series of emails in which Miller championed racial quotas designed to maintain white supremacy in the U.S.¹¹⁸ While over 50 civil rights organizations (ranging from the Anti-Defamation League to the National Organization for Women) united to called upon the President to fire Miller, Trump and the White House suffer moral paralysis in the face of these new revelations about their underling and immigration czar and have declined to fire Miller.¹¹⁹ In addition, leading Jewish theological organizations joined the call for firing Miller.¹²⁰

Professors Griffin and Rushin posit another reason for concern that the reelection of Donald Trump will lead to more hate and more hate-fueled violence: Validation Theory.¹²¹ “We hypothesize that it was not just Trump's inflammatory rhetoric throughout the political campaign that caused hate crimes to increase. Rather, we argue that it was Trump's subsequent election

¹¹⁶ *Id.*

¹¹⁷ See Ben Fields, *I think you're a Nazi, Baby*, CHARLESTON GAZETTE, Nov. 13, 2019, https://www.wvgazette.com/opinion/columnists/ben-fields-i-think-you-re-a-nazi-baby-opinion/article_4963320f-f7a6-5b82-ba06-8d9a7cec785c.html, archived at <https://perma.cc/U9T6-VQ4Y> (“The Southern Poverty Law Center recently released a report on Miller's fanaticism concerning white supremacy, mostly coming from emails he sent to reporters at organizations like Brietbart. These communications provide insight into a dark soul consumed with brutalizing and containing nonwhite immigrants.”).

¹¹⁸ *Stephen Miller's Affinity for White Nationalism Revealed in Leaked Emails*, S. POVERTY L. CTR. (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails>, archived at <https://perma.cc/VQV7-24FV>.

¹¹⁹ Letter from The Leadership Conference on Civil and Human Rights & The Leadership Conference to the White House: Civil Rights Groups Call for Stephen Miller's Removal (Nov. 18, 2019), <https://civilrights.org/resource/letter-to-the-white-house-civil-rights-groups-call-for-stephen-millers-removal>, archived at <https://perma.cc/J7LV-ZH6N> (“Unless and until you fire Stephen Miller — and all who promulgate bigotry — and abandon your administration's anti-civil rights agenda, you will continue to be responsible for the violence fueled by that hate.”).

¹²⁰ Marcy Oster, *Jewish Streams call on Trump to fire Stephen Miller for Supremacist Views*, JERUSALEM POST (Nov. 25, 2019, 9:14 AM), <https://www.jpost.com/Diaspora/Jewish-streams-call-on-Trump-to-fire-Stephen-Miller-for-supremacist-views-608922>, archived at <https://perma.cc/4RA5-44QJ>.

¹²¹ Edwards & Rushin, *supra* note 3.

as President of the United States that validated this rhetoric in eyes of perpetrators and fueled the hate crime surge.”¹²² Logically, this Validation Theory would lead to enhanced validation if Trump wins a second term that will give rise to more hate and more hate-fueled violence.

Moreover, the Trump Administration fails to attend to the risks highlighted by the U.S. Intelligence Community that Russia seeks to weaken the U.S. by turning us against our fellow citizens. First, Trump himself accepts Putin’s “strong and powerful” denials of interference in the 2016 presidential election, despite the findings of the entire U.S. Intelligence Community—consisting of 17 intelligence agencies.¹²³ Second, the fact that Trump sought and benefited from Russian meddling in the 2016 election precludes the image-obsessed Administration from appropriately addressing the threat that the U.S. faces from exposure to political and cyberwarfare seeking to exploit our unresolved racial tensions.¹²⁴ Third, Trump openly admits that he would accept foreign political help and solicits such help when possible.¹²⁵ Fourth, Trump consistently bows to Russian interests when possible—such as delaying critical military aid to Ukraine for personal political benefit. A second Trump Administration would likely continue its efforts to fan internal hatred, furthering Russia’s efforts to engage in political and cyber warfare against the U.S.

Trump habitually favors powerful autocrats over the socially marginalized or disadvantaged. Thus, he favors Vladimir Putin for being “a better leader” than President Obama even though Putin operates as a ruthless autocrat who kills opposition journalists, and as an enemy of the West and the U.S.¹²⁶ Trump claims he fell “in love with” Kim Jong Un even though the North Korean dictator holds dozens of nuclear weapons and regularly conducts weapons tests targeting the U.S.¹²⁷ Moreover, international observers state that North Korea operates the world’s most brutal concentration camps.¹²⁸ Trump’s preference for autocratic dictators no matter how ruthless

¹²² *Id.*

¹²³ Rebecca Ballhaus, *Trump Questions Finding of Russia’s 2016 Meddling as He Appears With Putin*, WALL ST. J. (July 16, 2018, 10:04 PM), <https://www.wsj.com/articles/trump-blames-u-s-for-poor-relations-with-moscow-1531732220>, archived at <https://perma.cc/YU4U-FH5M>.

¹²⁴ Rep. Eric Swalwell, *It’s time for Trump’s impeachment. Mueller’s report gave us everything we need.*, NBC NEWS (July 26, 2019, 4:48 AM), <https://www.nbcnews.com/think/opinion/it-s-time-trump-s-impeachment-mueller-s-report-gave-ncna1034586>, archived at <https://perma.cc/4E55-MV59>.

¹²⁵ *Id.*

¹²⁶ David Remnick, *Trump and Putin: A Love Story*, NEW YORKER (Aug. 3, 2016), <https://www.newyorker.com/news/news-desk/trump-and-putin-a-love-story>, archived at <https://perma.cc/5ELN-VUNG>.

¹²⁷ Sue Mi Terry, *North Korea’s Strong Hand Against the U.S.*, WALL ST. J. (Nov. 1, 2019, 2:21 PM), <https://www.wsj.com/articles/north-koreas-strong-hand-against-the-u-s-11572632466>, archived at <https://perma.cc/2HTM-DAHP>.

¹²⁸ Yeonmi Park & Thor Halvorssen, *Focus on the Suffering of North Koreans*, WALL ST. J. (May 9, 2017, 1:21 PM), <https://www.wsj.com/articles/focus-on-the-suffering-of-north-koreans-1494350470>, archived at <https://perma.cc/58NJ-SMQN> (“The United Nations 2014 Commission of Inquiry detailed such “unspeakable atrocities” as complete denial of free

or threatening to the U.S. does not bode well for the disadvantaged, who often fall prey to the whims of brutal dictators.

In sum, the Trump Administration seems impervious to both public opinion and international reproach with respect to its hateful policies. Furthermore, the trajectory of hate-motivated violence in the U.S., the nature of Trump's hate-inspired appointees, the revealed intent of Russia, and Trump's obsession with ruthless autocrats at the expense of the victims of unbridled power, all suggest one conclusion: a second Trump Administration would lead to more hateful violence and death in the U.S. The Trump Administration aggressively pursues a policy of American self-hatred, and Trump's re-election would validate that policy.

IV. LAW AGAINST HATE

The prior sections show that the policies and politics of Donald Trump led to American self-loathing and violence. The hate speech of politicians such as Donald Trump generates hate, violence and death because people tend to follow authority figures.¹²⁹ As the ultimate authority figure in our society, the President can sway society informally through inflammatory speech in a far more damaging way than an ordinary speaker, and social scientists can empirically show that even a far lesser authority figure than the President can incite physical harm.¹³⁰

A. *The Stakes*

Hate murders reached a 27-year high in 2018.¹³¹ “[C]rimes against individuals, or assaults, rose to 4,571 in 2018, a 11.8% increase compared to 2017. Latinos and transgender individuals appeared to have borne the brunt of these attacks. While anti-Latino hate crimes went up about 14%, the number of crimes targeting transgender individuals surged 41%.”¹³² These increases in violence against individuals serve as a barometer of Putin's success in dividing and weakening the U.S. during the Trump Administration.

thought and belief; state-sponsored trafficking and sexual violence; and gulags akin to Holocaust concentration camps.”)

¹²⁹ See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* 8, 165 (1974).

¹³⁰ Jack Mather, *Trump Supporters and the Milgram Effect*, BALTIMORE SUN (Aug. 16, 2016, 10:07 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-trump-experiment-20160825-story.html>, archived at <https://perma.cc/7F3D-G92B> (“Mr. Trump’s supporters fall almost universally into what Milgram called an ‘agentive’ state in which a person allows another individual to take responsibility for, and dictate the direction of, their actions. They rationalize and attempt to validate the actions of their authority figure.”).

¹³¹ Deepa Bharath, *FBI Report Shows Surge in Hate Crime Murders and Crimes against Latinos, Transgender People*, MERCURY NEWS (Nov. 13, 2019, 5:29 AM), <https://www.mercurynews.com/2019/11/13/fbi-report-shows-surge-in-hate-crime-murders-and-crimes-against-latinos-transgender-people/>, archived at <https://perma.cc/TSF6-NAX9>.

¹³² *Id.*

Moreover, Putin appears poised to extend and expand his efforts after 2020. NBC News recently reported that it obtained access to documents showing that Russia seeks to stoke more racial violence and discord in 2020 and beyond.¹³³ The plan is run under Yevgeny Prigozhin, who was indicted by special counsel Robert Mueller for meddling in the 2016 election.¹³⁴ 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.¹³⁵

The NBC report 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.”¹³⁶ Russia poses an existential threat to the U.S. and can only be termed an enemy of the U.S.; its continued efforts to exploit racial divisions to divide and weaken us to the point where hate crimes and violence committed by Americans against fellow Americans continue their upward trajectory further establishes Russia’s inimical intent.¹³⁷

In the U.S. today, legally fostering a diverse and inclusive society constitutes a compelling state interest.¹³⁸ The growing presence of people of color in our society means that the law should strive to secure social harmony and cohesion to the maximum extent possible.¹³⁹ The persistence of America’s racial hierarchy necessarily means that as the population becomes more diverse, more economic and strategic strength remains stranded in the oppressive reality of that hierarchy.¹⁴⁰ The macroeconomic toll taken by the continuation of this hierarchy increases exponentially as more Americans suffer from the hierarchy and the hierarchy becomes more deeply rooted.¹⁴¹ On many measures—the incarceration rate, life expectancy, and economic

¹³³ 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>, archived at <https://perma.cc/DDB6-KLCA>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ U.S. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, *supra* note 19, at 7.

¹³⁷ *See id.*

¹³⁸ Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 328–38 (2018) (articulating economic and demographic realities underlying the costs of allowing our racial hierarchy to fester).

¹³⁹ *See id.* at 332–38 (demonstrating successful efforts in Singapore to create a multicultural society).

¹⁴⁰ *See id.* at 329–30.

¹⁴¹ *See id.* at 331.

gaps—the racial hierarchy has deepened. America’s greatest potential for growth and strategic strength lies within the deeply oppressive reality now inflicted on communities of color.¹⁴² Moreover, as in the Cold War, the oppressive nature of Trump’s policies has not escaped international notice and has taken a toll on the U.S.’s global stature and influence.¹⁴³ The costs of America’s racial hierarchy sap its strategic strength and create strategic vulnerabilities.

The Supreme Court long ago recognized that the “the Constitution . . . is not a suicide pact.”¹⁴⁴ When legal issues implicate national security concerns, the legal system should respond in ways to vindicate such concerns.¹⁴⁵ At times, the Court betrays core American values in ways that do not materially further national defense.¹⁴⁶ Other times, the Court comes to regret affirming an expansive government power—even in times of war—to oppress minorities in the name of defense.¹⁴⁷ When national security concerns coincide with other core values of the nation, such as equality and domestic tranquility, national security should weigh heavily in any legal analysis as the next sections of this part of the article will demonstrate.¹⁴⁸ Simply stated, national security should play a critical role in the exercise of government power, including the judicial power, particularly when it also furthers core American values.

B. *Incitement of Domestic Mass Violence and Impeachment*

Donald Trump faced an impeachment inquiry in late 2019 and early 2020. Only one GOP Senator joined the entire Democratic delegation to vote

¹⁴² *Id.*; see also Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 375 (2004) (estimating macroeconomic costs of race to approach \$1 trillion per year).

¹⁴³ See Matt Stieb, *Pentagon: U.S. Is Falling Behind Russia in Global Influence*, N.Y. MAG. (July 1, 2019), <https://nymag.com/intelligencer/2019/07/pentagon-u-s-is-falling-behind-russia-in-global-influence.html>, archived at <https://perma.cc/3CRY-DMQM>.

¹⁴⁴ *Apiheker v. Secretary of State*, 378 U.S. 500, 509 (1964) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 563 (1963)).

¹⁴⁵ See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (unanimously ending *de jure* segregation during height of cold war).

¹⁴⁶ See, e.g., *Debs v. United States*, 249 U.S. 211, 214 (1919) (affirming conviction of socialist political leader for stating: “you need to know that you are fit for something better than slavery and cannon fodder.”).

¹⁴⁷ See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (citing *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)) (“The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. . . . The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history.”).

¹⁴⁸ See Derrick Bell, *The Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980) (arguing that *Brown* reflected the national securities needs of the nation); see also Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 123–24, 138 (2003) (book review) (suggesting that national security goals and racial justice may overlap).

for Trump's removal, and the President remained in office.¹⁴⁹ The Constitution defines the process of impeachment and scholars periodically seek to illuminate its history and the founders' intent with respect to that process.¹⁵⁰ Congress determines what if any high crimes and misdemeanors President Trump committed that warrant impeachment in the House, and ultimately conviction in the Senate.¹⁵¹ Overturning a presidential election presents the highest imaginable stakes to a representative democracy and could inflict an "enduring national trauma" that "could persist for generations."¹⁵²

Nevertheless, at some point, the safety and security of citizens, as well as domestic tranquility and the common defense must form core constitutional values that no President should compromise either intentionally or recklessly.¹⁵³ A President should not incite racial, ethnic, religious and other violence, nor hatred and divisions for political gain.¹⁵⁴ This axiom holds in times of war as well as peace, and particularly when a president risks pitting Americans against Americans in violent conflict.¹⁵⁵ A sitting President can-

¹⁴⁹ Lindsay Wise & Natalie Andrews, *Mitt Romney Goes Against Party in Vote to Convict President Trump*, WALL ST. J. (Feb. 6, 2020, 12:32 AM), <https://www.wsj.com/articles/mitt-romney-goes-against-party-in-vote-to-convict-president-trump-11580951651>, archived at <https://perma.cc/E5GH-M4GR>.

¹⁵⁰ See, e.g., LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 231-241 (2018); Lawrence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 713-717 (1999) (reviewing constitutional text governing impeachment along with the history of impeachment and concluding that while "it appears to be all but universally agreed that an offense need not be a violation of criminal law at all in order for it to be impeachable as a high crime or misdemeanor" but that "must refer to major offenses against our very system of government, or serious abuses of the governmental power with which a public official has been entrusted."). See also Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1277, 1330 (2018) ("A president commits obstruction of justice when he significantly interferes with an investigation, prosecution, or other law enforcement action to advance narrowly personal, pecuniary, or partisan interests.").

¹⁵¹ Elaine Godfrey, *Democrats Are Already Arguing Over Trump's Impeachment Articles*, THE ATLANTIC (Oct. 22, 2019), <https://www.theatlantic.com/politics/archive/2019/10/impeachment-trump-democrats/600448/>, archived at <https://perma.cc/X2SN-ZMZQ>.

¹⁵² TRIBE & MATZ, *supra* note 150, at xiii.

¹⁵³ The Constitution communicates these very values in its first sentence: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl. See also John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1137 (2018) ("the 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.").

¹⁵⁴ IAN HANEY LOPEZ, MERGE LEFT: FUSING RACE AND CLASS, WINNING ELECTIONS, AND SAVING AMERICA 19-45 (2019) (summarizing Trump's use of racial divisions for political advantage).

¹⁵⁵ Thus, for example, a president should never threaten, encourage or countenance civil war or threats of civil war. That would be tantamount to inciting citizens to take up arms against the United States which is expressly prohibited under 18 U.S.C. § 2381, which defines treason to include levying war against the United States, or lending aid and comfort to its enemies. Yet, President Trump seems to want civil war and voices apparent support for civil war if the law ever does hold him to account or otherwise interferes with or limits his powers. Nicole Hemmer, *Why it's so Scary when Trump Tweets about Civil War*, CNN (Oct. 1, 2019,

not lawfully endorse or encourage civil war under any circumstances.¹⁵⁶ Doing so could have dangerous consequences; for instance, reports indicate that a video demonstrating how to shut down urban electricity supplies in democratic areas went viral after Trump threatened civil war.¹⁵⁷ A president should not accept what some have termed American “concentration camps” on U.S. soil,¹⁵⁸ nor permit agency action that results in the massive separation of children from their parents and families. Even in times of war, such concentration camps, involving the separation of children from parents, did not exist.¹⁵⁹ The hatred and cruelty of Donald Trump has led to mass suffering, violence and death.¹⁶⁰

For example, at least seven children have died at the southern border while in government custody.¹⁶¹ The Trump Administration repeatedly vio-

10:27 AM), <https://www.cnn.com/2019/09/30/opinions/trump-civil-war-tweets-make-america-less-safe-hemmer/index.html>, archived at <https://perma.cc/234Q-FHE3>. Trump therefore must immediately denounce calls for a civil war from his supporters. See Astead W. Herndon, *‘Nothing Less Than a Civil War’: These White Voters on the Far Right See Doom Without Trump*, N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/us/politics/trump-2020-trumpstock.html>, archived at <https://perma.cc/4WBQ-NNR5> (quoting Trump supporter who threatened “civil war” if Trump loses the election of 2020).

¹⁵⁶ Alexandra Hutzler, *Trump’s ‘Civil War’ Quote Tweet Is Actually Grounds for Impeachment*, SAYS HARVARD LAW PROFESSOR, NEWSWEEK (Sept. 30, 2019, 8:36 AM), <https://www.newsweek.com/trump-civil-war-tweet-grounds-impeachment-1462044> (quoting Harvard Law Professor John Coates), archived at <https://perma.cc/D7NG-7QNW>.

¹⁵⁷ Harte, *supra* note 17.

¹⁵⁸ Andrea Pitzer, *Donald Trump Is Still Setting Up Concentration Camps on American Soil*, HAARETZ (June 24, 2019, 4:35 PM), <https://www.haaretz.com/world-news/premium-donald-trump-is-still-setting-up-concentration-camps-on-american-soil-1.6197513>, archived at <https://perma.cc/M4UH-3JUH> (“Years of the rhetoric of infestation and dehumanization from the President and administration officials culminated in the erection of a tent city for children. Civilians sit confined like dangerous criminals, corralled in pens or cages like animals, all due to policies (not laws) that place asylum-seekers outside the normal legal process. It is clear that this was planned months ago to punish a vilified minority.”). Numerous Jewish history and Holocaust scholars concur with Ms. Pitzer that the term “concentration camps” fits the camps that the Trump Administration oversees; on the other hand, United States Holocaust Memorial Museum condemned the analogy. See Omer Bartov et al., *An Open Letter to the Director of the US Holocaust Memorial Museum*, N.Y. REV. BOOKS (July 1, 2019), <https://www.nybooks.com/daily/2019/07/01/an-open-letter-to-the-director-of-the-holocaust-memorial-museum/>, archived at <https://perma.cc/2JBR-K46A>.

¹⁵⁹ See *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (holding that internment of U.S. citizens based upon Japanese ethnicity complied with Constitution based upon “military urgency”). The detention of U.S. citizens during World War II did not entail family separation. Further, the Supreme Court cast strong condemnation upon *Korematsu* in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

¹⁶⁰ In fact, recent reports suggest that a new culture of hatred and cruelty pervades the Border Patrol fueled by anti-immigrant racism and propaganda from alt-right sources. Jenn Bean, *It’s not Just Donald Trump. Immigration Agencies and Officials also use Language of Hate*, USA TODAY (Aug. 8, 2019, 3:30 AM), <https://www.usatoday.com/story/opinion/2019/08/08/trump-not-alone-white-supremacy-some-border-agents-also-guilty-column/1935895001/>, archived at <https://perma.cc/U5M2-GENN>.

¹⁶¹ Cynthia Pompa, *Immigrant Kids Keep Dying in CBP Detention Centers, and DHS Won’t Take Accountability*, ACLU (June 24, 2019, 12:45 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/immigrant-kids-keep-dying-cbp-detention>, archived at <https://perma.cc/49FQ-XYXN>. The government does not track deaths of those in its custody, at least not in a way available to the public. Many adults die in government custody at the southern border too and the American Immigration Lawyers Association tallies

lates human rights obligations and statutory mandates.¹⁶² The responsibility that Donald Trump bears for the increases in hate crimes since his election and the pervasive human rights violations implicit in the cruelty at the border independently justifies impeachment (and conviction) of the President beyond inquiries into his misconduct relating to Ukraine and Russia.¹⁶³ President Richard Nixon exited the Presidency involuntarily but not because of unnecessary cruelty or death at his hands.¹⁶⁴ President Bill Clinton suffered impeachment unconnected to misconduct leading to death and physical suffering.¹⁶⁵ Detention of asylum-seekers in the U.S. and soaring racial violence as a result of the President's divisive politics and rhetoric should not legally stand in a time when diversity and inclusion form such a compelling state interest.¹⁶⁶

Ultimately, the vote to impeach and remove a president from office constitutes a political act.¹⁶⁷ Some values should transcend partisan politics, and that reality animated the GOP senators who informed President Nixon that he did not enjoy sufficient support in the senate to avoid removal from office in 1974.¹⁶⁸ Presidential acts and words that incite violence and death of American citizens axiomatically should meet that threshold.¹⁶⁹ Traumatizing U.S. residents and citizens of Latinx descent with the fear of government action leading to concentration camps also crosses the line.¹⁷⁰ This particularly holds true when such domestic pain operates in furtherance of foreign powers seeking to harm Americans.¹⁷¹ At least two senior GOP officials agree.¹⁷² If the House of Representatives pursued an impeachment

those deaths. See AMERICAN IMMIGRATION LAWYERS ASSOCIATION, Deaths at Adult Detention Centers (Oct. 16, 2019), <https://www.aila.org/infonet/deaths-at-adult-detention-centers>, archived at <https://perma.cc/AY7V-DEHY>.

¹⁶² See *supra* Section I.B.

¹⁶³ *Trump Impeachment: The Short, Medium and Long Story*, BBC (Feb. 5, 2020), <https://www.bbc.com/news/world-us-canada-49800181>, archived at <https://perma.cc/Q5FU-HTVE>.

¹⁶⁴ See Jason Silverstein, *What have Presidents been Impeached for? These were the Articles of Impeachment for Andrew Johnson, Richard Nixon and Bill Clinton*, CBS NEWS (Dec. 19, 2019, 6:31 PM), <https://www.cbsnews.com/news/what-have-presidents-been-impeached-for-these-were-the-articles-of-impeachment-johnson-nixon-and-clinton/>, archived at <https://perma.cc/XBM2-9Y7Q>.

¹⁶⁵ The House impeached Clinton for lying about a sexual relationship with an intern. Domenico Montanaro, *'Impeachment Lite'? How Articles Against Trump Compare To Clinton's And Nixon's*, NPR (Dec. 13, 2019, 5:01 AM), <https://www.npr.org/2019/12/13/787496291/trump-dismisses-charges-against-him-as-impeachment-lite-is-he-right?t=1576258472600>, archived at <https://perma.cc/7SBX-KPHH>.

¹⁶⁶ Cf. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that diversity constitutes a compelling state interest in college admissions).

¹⁶⁷ See, e.g., Calvin Woodward, *Impeachment a Political Judgment call, Crime not Required*, AP (Dec. 3, 2019), <https://apnews.com/3f8dcd6feb9e540da4e80a218a87fb89>, archived at <https://perma.cc/JVC7-WTGY>.

¹⁶⁸ Dan Nowicki, *In 1974, Goldwater and Rhodes told Nixon he was Doomed*, AZCENTRAL (Aug. 2, 2014, 9:27 PM), <https://www.azcentral.com/story/azdc/2014/08/03/goldwater-rhodes-nixon-resignation/13497493/>, archived at <https://perma.cc/Z3XB-KG8C>.

¹⁶⁹ *Supra* Section I.

¹⁷⁰ *Supra* Section II.

¹⁷¹ *Supra* notes 11, 16 and 132.

¹⁷² *Supra* notes 12 and 59.

charge arising from this misconduct then a senate vote on this point could well set precedent on the limits of presidential misconduct.

C. *Recalculating the Costs of Hate Speech*

The Supreme Court currently fails to apprehend the costs to society from allowing hate and hate speech run amok.¹⁷³ It also fails to properly assess the strategic benefits of embracing diversity and need to make diversity work from a national defense perspective.¹⁷⁴ Consequently, the Court has permitted hate speech and uses the First Amendment to strike down limitations on hate speech notwithstanding the efforts of prominent legal scholars to educate the Court about the true costs of race and racial hate speech.¹⁷⁵

Legal scholars previously demonstrated that hate speech can even lead to genocide.¹⁷⁶ Richard Delgado showed that hate speech wounds victims in ways that the Supreme Court fails to comprehend.¹⁷⁷ Trump proves that hate speech leads to bloodshed and violence.¹⁷⁸ The Court's approach to hate speech regulation seems specifically intended to preserve white supremacy and political appeals to white supremacy.¹⁷⁹ The costs to the U.S. arising from the Supreme Court's stubborn adherence to white supremacy and blatant ignorance of the costs of a racial hierarchy to a given society suggests

¹⁷³ See Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 69 CASE W. RES. L. REV. 275, 279, 287–89 (2018). Professor Delgado notes that many nations regulate hate speech without stifling their traditional values for free speech and inquiry. *Id.* at 290.

¹⁷⁴ Secretary of Defense Dr. Mark T. Esper, Secretary of Defense Esper Addresses Reporters Regarding Civil Unrest, June 3, 2020, <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2206685/secretary-of-defense-esper-addresses-reporters-regarding-civil-unrest/>, archived at <https://perma.cc/V5QQ-6XXX> (“I’ve always been proud to be a member of an institution—the United States military—that embraces diversity and inclusion and prohibits hate and discrimination in all forms. More often than not, we have led on these issues. And while we still have much to do on this front, leaders across DOD and the services take this responsibility seriously, and we are determined to make a difference.”); see also *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (citing military leaders for the proposition that the military needs diversity to effectively defend the nation).

¹⁷⁵ See, e.g., *Maat v. Tam*, 137 S.Ct. 1744 (2017) (holding that Lanham Act could not operate to decline trademark protection to racist trademarks). The Court did not consider hate speech that opposing autocrats could use to threaten U.S. domestic tranquility and national security.

¹⁷⁶ E.g., ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 26 (2002) (Hate works insidiously through a culture such that it “becomes culturally acceptable first to libel, then to discriminate, and finally to persecute outgroups.”).

¹⁷⁷ See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 157 (1982) (“this review of the social science literature revealed that racism and racial insults influence the parenting practices of minority individuals and have a very great effect on children, thus perpetuating the harms of racism.”).

¹⁷⁸ *Supra* Section I.

¹⁷⁹ The Supreme Court operates to preserve the American racial hierarchy. Ramirez & Williams, *supra* note 138, at 301–04.

that the Court is woefully out of touch.¹⁸⁰ This article suggests that, now, racially divisive rhetoric and politics can constitute a strategic threat.

The Court must recalculate the costs of hate speech. Hate speech in the political arena operates with particular toxicity.¹⁸¹ Indeed, the very foundations of a governing consensus eludes a racially-charged politics because hate speech necessarily injects irrationality into the political discourse.¹⁸² The Founders recognized the costs to democracy of factions operating against the general welfare.¹⁸³ Racial factions also can operate to tear apart our society and empower our enemies to destroy us. Vladimir Putin now proves this reality. At the very least, the Court should widely allow actions for group libel against minority groups for political gain.¹⁸⁴

The very presence of a racial hierarchy means that politicians can play upon racial fears and thereby reinforce the racial hierarchy in anti-social ways with anti-social costs. The next section suggests that beyond sanctioning hate speech, the Court must begin efforts to break down the elements of racial hierarchy, as other nations have done.¹⁸⁵ This will require valuing a diverse and inclusive democracy as well as facilitating cultural diversity and affirmative action to finally break down the festering American racial hierarchy.

D. *Building a Diverse Democracy*

A wide range of social science demonstrates the many ways in which culturally diverse groups outperform homogenous groups.¹⁸⁶ A culturally diverse society forms a polar extreme to a society driven by a racial hierarchy.¹⁸⁷ Properly managed cultural diversity unleashes enhanced innovation, higher levels of effort, superior levels of critical thinking, and better complex problem solving.¹⁸⁸ Due to differing and heterogeneous acculturation,

¹⁸⁰ Ramirez & Williams, *supra* note 138, at 301–02.

¹⁸¹ See Schaffner, *supra* note 52.

¹⁸² Race is a social construct with no scientific rationale. Ramirez, *supra* note 26, at 40 to 51.

¹⁸³ The classic definition of factions is James Madison’s definition in *The Federalist No. 10*. He stated:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

THE FEDERALIST NO. 10, at 123 (James Madison) (Isaac Kramnick ed., 1961).

¹⁸⁴ See *Beauharnais v. Illinois*, 343 U.S. 250, 276 (1952) (upholding Illinois law prohibiting group libel based upon race, creed, or color). Notably, *Beauharnais* occurred in the immediate aftermath of Nazi atrocities and during the height of the cold war.

¹⁸⁵ Ramirez & Williams, *supra* note 138, at 334–36.

¹⁸⁶ See, e.g., STEVEN A. RAMIREZ LAWLESS CAPITALISM 131–59 (2013).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; see also Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/>, archived at <https://perma.cc/3KGZ-YKSR> (stating, based upon decades of social science research, that: “Diversity enhances creativity. It encourages the search for novel information and perspec-

diverse groups bring different ethical and risk sensitivities to bear in a way that can lead to more rigorous risk and ethicality assessments.¹⁸⁹ The antithesis of racial hatred and group marginalization, the power of cultural diversity within a legal system that fully actualizes the potential of all persons promises a maximum level of diffused human development. Diversity in the U.S. today constitutes a national strategic strength.

In short, societies that overcome race and function to embrace diversity outperform those that do not.¹⁹⁰ Because race is social construct, a racial hierarchy across important indicia of human well-being means an inferior legal system permits oppressive mechanisms that irrationally suppress the human potential of people within a given society.¹⁹¹ Performance-based elements of the U.S.—including the business sector and the military—already support and embrace diversity.¹⁹² Embracing diversity also allows a higher level of social cohesion than an unremediated racial hierarchy, which leads to racial resentment and reinforces racial stereotypes.¹⁹³ This in turn creates social vulnerability that demagogues and foreign powers can exploit.¹⁹⁴ All of this suggests a historic fork in the road for voters in election 2020: the continuation and validation of racial hierarchy or recommitting to the American project of *E Pluribus Unum*.¹⁹⁵

The Supreme Court will have the opportunity to strike a blow in favor of national security and diversity and against racial cruelty and animus in *Department of Homeland Security v. Regents of the University of California*.¹⁹⁶ The Court will review the Trump Administration's rescission of De-

tives, leading to better decision making and problem solving. Diversity can improve the bottom line of companies and lead to unfettered discoveries and breakthrough innovations. Even simply being exposed to diversity can change the way you think.”).

¹⁸⁹ See, e.g., Steven A. Ramirez, *Diversity and Ethics: Toward an Objective Business Compliance Function*, 49 LOYOLA U. CHI. L.J. 581, 609 (2018).

¹⁹⁰ Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 331–337 (2018) (reviewing Singapore's successful efforts to embrace diversity and break-down hierarchy and its world leading position developing human capital).

¹⁹¹ *Id.* at 307–24 (“Racial hierarchy arises from corrupt law.”).

¹⁹² Derrick A. Bell, Jr., *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1623 (2003) (noting interests of military and Fortune 500 firms in tapping a more diverse pool to enhance performance).

¹⁹³ IAN HANEY LOPEZ, *DOG WHISTLE POLITICS* 191–211 (2014).

¹⁹⁴ See *id.* at 127–47.

¹⁹⁵ See Robert D. Putnam, *E. Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture*, 30 SCAND. POL. STUD. 137 (2017). Indeed, the failure of governing elites to dismantle America's racial hierarchy compromises not just our national security but our the functioning of our constitutional democracy. See Steven A. Ramirez & Neil G. Williams, *Deracialization and Democracy*, 70 CASE W. RES. L. REV. 81, 90–100 (2019) (tracing recent race-based attacks on U.S. democracy designed to shift power to small bands of entrenched elites); see also Barry Sullivan, *Democratic Conditions*, 51 LOYOLA U. CHI. L.J. 555, 620 (2020) (“[W]e can say that the current political climate is rife with fear, distrust, envy, loathing, exclusion, condescension, indifference, despair, and cynicism. These are not the virtues needed for the successful practice of constitutional democracy.”).

¹⁹⁶ 139 S. Ct. 2779 (2018) (order granting *certiorari*). Three Circuit Court decisions, *Regents of the University of California v. U.S. Department of Homeland Security*, 908 F.3d 476 (9th Cir. 2018), *National Association for the Advancement of Colored People v. Trump*, 298 F.

ferred Action for Childhood Arrivals (“DACA”), a policy of declining to prosecute and deport certain undocumented immigrants who arrived to the U.S. as children.¹⁹⁷ The rescission of DACA would adversely affect nearly 700,000 young, law abiding individuals who are either high school graduates or veterans.¹⁹⁸ The Fourth Circuit held that that the Administration acted arbitrarily and with racial animus sufficient to justify a nationwide preliminary injunction and denial of a significant part of the government’s motion to dismiss the challenge to the Administration’s proposed rescission of DACA.¹⁹⁹ The DACA case raises many issues beyond the scope of this article. However, from the perspective of the negative impact of the politics of hate and cruelty upon national security and domestic tranquility, the Court would need to exercise willful blindness to deny that the rescission of DACA is both a part of and reflective of racial animus and the politics of hate and cruelty. Russian efforts to ignite a civil war would be furthered from upholding this negative message directed toward all Latinx people in the U.S.

Ultimately, the Court must determine if its hostility to embracing multiculturalism vindicates the national interest of the U.S. in 2020 and beyond. If the U.S. wishes to remain a global leader and enjoy uncompromised national security, it must find a path towards a diverse and vibrant democracy where racial, ethnic and religious hatred finds no legal shelter. Otherwise, as diversity increases in America, it could invite further foreign manipulation rather than serve as a basis for the country’s long-term strategic strength. Law forms the fulcrum on which this compelling issue will rest.

V. CONCLUSION

Donald Trump has normalized hatred and cruelty in our society since his election in 2016. The growing animosity toward minorities and other disadvantaged groups did not occur out of any conceivable policy or war-time necessity. The hatred and cruelty always focused on those, such as innocent immigrant children, who do not hold power, as opposed to those who abuse power, such as Vladimir Putin or Kim Jong Un. This hatred and cruelty from the most prominent political figure has emboldened and empowered those who commit hate crimes, and has facilitated unprecedented brutality on the disempowered in a way unparalleled since slavery and Jim Crow segregation. No President in modern American history has inspired more hatred and cruelty than Donald Trump.

Supp. 3d 209 (D.D.C. 2018), *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), were consolidated.

¹⁹⁷ See *Regents of the University of California v. Trump*, 908 F.3d 476, 489–92 (9th Cir. 2018).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 520. The Fourth Circuit vacated the rescission of DACA because the government acted arbitrarily and capriciously. See *Casa de Maryland v. U.S. Dept. of Homeland Security*, 924 F.3d 684, 706 (4th Cir. 2019).

This article is not only about Donald Trump. Instead, this article is about imposing legal limits on the political use of hate speech that undermines the general welfare and domestic tranquility, and threatens the common defense. Hate and cruelty threatens the American project to create a sustainable and robust society that boasts a rich cultural diversity and advanced levels of human development. We cannot succumb to foreign adversaries and others who seek to destroy the U.S. through the exploitation of weaknesses that emerged from deficient and archaic notions of judicially constructed “law” that turns the constitution into a suicide pact.

This article argues that the legal system needs to respond to hate. First, it argues that impeachment can set an important precedent against political hate speech and the promotion of civil war in furtherance of the intent of foreign powers. Second, the Court needs to impound potential national security concerns and racial hate crimes into its approach to hate speech regulation. Third, the Court needs to rethink its approach to the festering American racial hierarchy which operates as an open wound and national security threat. That hierarchy must meet its demise, and law must take the lead in undoing the legal handiwork that led to the hierarchy. In sum, the legal system should respond as in the past, to preserve the security of the United States. This article seeks to initiate a scholarly discussion of how best to dismantle America’s racial hierarchy in favor of pursuing cultural diversity as a long-term strategic asset.

