
Michelle Obama:
A Contemporary Analysis of Race and Gender
Discrimination through the Lens of Title VII

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“Meet the new political wife. She has a career; she has opinions — a partner in every way. . . . And now, she’s become controversial.”

– Ted Koppel¹

I. INTRODUCTION

The 2008 presidential campaign is historic given the presence of a Black candidate (Barack Obama) and a woman candidate (Hillary Clinton). Not only is it historic that Americans had a real opportunity to elect the first Black or woman president, it is also the first time that Americans are faced with the prospect of having a Black First Lady — Michelle Obama. As such, the presidential campaign provides a useful context in which to analyze how race and gender attitudes influence voting behavior.² Even Senator Clinton analogized the 2008 presidential election campaign to a hiring decision in the employment context.³ Underlying this analogy is the

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* Although the 2008 Presidential election has passed, this article continues to uses “Senator Obama” when referring to now President-elect Obama as this analysis is focused on his candidacy, not his actions as or society’s perception of him as President-elect. – Eds.

1. Joan Vennoch, Op-Ed., *A Delicate Line for Michelle Obama*, B. GLOBE, March 2, 2008, at D9 (quoting Ted Koppel’s reference to First Lady Hillary Clinton).

2. See generally Gregory S. Parks & Jeffrey J. Rachlinski, A Better Metric: The Role of Unconscious Race and Gender Bias in the 2008 Presidential Race 37-40 (Cornell Legal Stud. Research, Paper No. 08-007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102704.

3. Jim Acosta et al., *Clinton: Think About This as a Hiring Decision*, CNN.COM POLITICS, May 18, 2008, <http://www.cnn.com/2008/POLITICS/05/18/campaign.wrap/index.html>.

notion that voters stand in the shoes of employers, and candidates stand in the shoes of prospective employees. Thus, the same principles and modes of analysis that apply to employment discrimination may apply to voting behavior. If it is apropos to analogize elections to hiring decisions, new frontiers in employment discrimination law that involve the intersection of race and gender,⁴ the role of implicit bias,⁵ and third-party associative discrimination⁶ are implicated. In essence, the Title VII framework provides a template for how certain aspects of the 2008 Presidential election can be understood. Here, we focus on the role of Michelle Obama.

If voters harbored race stereotypes and biases about Senator Obama, and if voters harbored gender stereotypes and biases about Senator Clinton during her campaign, then it is reasonable to believe that both types of preconceptions may have influenced voters' perceptions about Mrs. Obama. Some researchers have proposed models that describe the role of First Ladies.⁷ Gladys Lang offered a model of status based upon a woman's relationship with her spouse. According to that model, women may possess one of the following types of status: 1) satellite status, which implies that a woman defines herself through her spouse and possesses no independent ideas; 2) sponsored status, which implies that a woman achieves recognition by her relationship with a prominent spouse; or 3) autonomous status, which implies that a woman's conferred recognition is based on her own ideas and actions independent of her spouse.⁸ Watson presents a similar typology (specific to First Ladies) categorizing the wives on a continuum from non-partners to full partners based on their relationships with their husbands.⁹ He argues that only Eleanor Roosevelt, Rosalyn Carter, and Hillary Clinton, have achieved full partnership based on their professionalization, integration into the political agenda, and activism.¹⁰ While such spousal roles have earned these First Ladies

4. See *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1982); *Payne v. Travenol Lab., Inc.*, 673 F.2d 798 (5th Cir. 1982); *Jeffries v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980); *DeGraffenreid v. Gen. Motors Assembly Div.*, 558 F.2d 480 (8th Cir. 1977); *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981); *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224, at *1 (N.D. Ga. 1981); Paulette M. Caldwell, *A Hairpiece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-381 (1991).

5. See Section III *infra* on Implicit Bias and Voter/Employment Discrimination.

6. See Section IVF *infra* on Third-Party Standing and Voter/Employment Discrimination.

7. See HEARTH AND HOME: IMAGES OF WOMEN IN THE MASS MEDIA (Gaye Tuchman et al. eds., 1978).

8. Gladys Engel Lang, *The Most Admired Woman: Image-making in the News*, in HEARTH AND HOME: IMAGES OF WOMEN IN THE MASS MEDIA 147 (Gaye Tuchman et al. eds., 1978).F

9. R. P. WATSON, THE PRESIDENT'S WIVES: REASSESSING THE OFFICE OF THE FIRST LADY 1-10 (1999).

10. WATSON, *supra* note 9, at 6.

acclaim for their knowledge of, and involvement in, the political agenda, these women have also received the most criticism for their roles as “co-presidents.”¹¹ That is, until now.

Michelle Obama, wife of President-elect, Senator Barack Obama, contravenes conventional stereotypes of presidential candidates’ wives. First, she has been direct and plain spoken — described as “tough, and even a little steely.”¹² In February of 2008, Republicans branded her as unpatriotic.¹³ The critique stemmed from her comment during a discussion of the level of political engagement she was witnessing among Americans: “For the first time in my adult lifetime, I am really proud of my country.”¹⁴ Second, when asked about what role she saw for herself as the potential First Lady, she noted that work-family balance would be one of her top priorities.¹⁵ This is not surprising given that she seems concerned about empowering women. Speaking of that broader concern, during a speech she gave in Las Vegas, she noted, “We sat back too long, suffering in silence, avoiding these challenges. We can’t do that any longer. We need a man,” stopping to correct herself, “a person who happens to be a man, who is ready to help us turn the page to bring a new conversation to the table, to change the lives of women and children across America.”¹⁶

Mrs. Obama also was not shy about expressing her views on race issues. At Princeton, Mrs. Obama was interested in social change and ran a literacy program for local neighborhood children.¹⁷ She also wrote her senior sociology thesis on “Princeton-Educated Blacks and the Black Community.”¹⁸ In it she wrote, “[Princeton] made me far more aware of my ‘blackness’ than ever before.”¹⁹ She went on to write, “Regardless of the circumstances under which I interact with Whites at Princeton it often seems as if, to them, I will always be Black first and a student second.”²⁰ As a student at Harvard Law School, she protested that institution’s paucity of minority students and professors.²¹ On the campaign trail, she noted her awareness that some voters were concerned about Senator Obama’s

11. G.D. Weekin, *Role Constraints and First Ladies*, 37 SOC. SCI. J. 601-10 (2000); Gil Troy, *Mr. & Mrs. President? The Rise and Fall of the Co-Presidency*, 37 SOC. SCI. J. 591-600 (2000).

12. Richard Wolfe, *Barack’s Rock*, NEWSWEEK, Aug. 28, 2007, at 5.

13. Vennoch, *supra* note 1, at 9D; Lisa Wangsness, *Michelle Obama’s Candor Cuts 2 Ways: Backers Delighted, but Her Critics Fume*, B. GLOBE, Feb. 21, 2008, at B1.

14. Wangsness, *supra* note 13, at B1 (Mrs. Obama later clearly indicated that what she meant was that she was “proud of this country, and I’m proud of the fact that people are ready to roll up their sleeves and do something phenomenal.”).

15. Liz Halloran, *From the Soccer Field to the Stump*, U.S. NEWS & WORLD REP., Feb. 11, 2008, at 14.

16. Gwen Ifill, *Beside Barack*, ESSENCE, Sept. 2007, at 5.

17. Wolfe, *supra* note 12, at 5.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

electability due to his race. In response, she was more than willing to draw parallels between Senator Obama's candidacy and Black freedom fighters of the past.²² She also was quite willing to indicate that such hesitance is "the bitter legacy of racism and discrimination and oppression in this country."²³

Mrs. Obama is an ardent supporter and fierce defender of her husband. After one of his debates, she called his campaign team and bluntly made her concerns clear. She indicated that Senator Clinton had packed the crowd with her supporters, and that as a result, Senator Obama had been booed whenever he criticized Senator Clinton. She told Senator Obama's aides that she did not want that to happen again. One senior Obama aide who attended the meeting described the incident as one of "a spouse saying, 'Do not do this to my husband again.'"²⁴

Despite her support for her husband, Mrs. Obama is no "traditional Stepford booster, smiling vacantly at her husband and sticking to a script of carefully vetted blandishments."²⁵ She was, in her words, making sure Senator Obama was "keeping it real."²⁶ She did this by holding him accountable for his responsibilities, even the most mundane, as a husband and father. For instance, she insisted that Senator Obama return to Chicago despite being on the campaign trail to attend his daughters' ballet recitals and parent-teacher conferences.²⁷ Additionally, she has poked fun at her husband — commenting on his snoring, morning breath, failure to put his socks in the hamper, and leaving the butter out after breakfast.²⁸ When introduced at a speech in Wisconsin, the woman who introduced Michelle accidentally said she was "honored to introduce the next president!" Mrs. Obama stepped to the podium with a big smile and told the crowd, "I like that promotion that I got. I don't know if Barack knows yet. We can announce it on the news tonight. He's going to be the First Lady."²⁹ Her tactic, in her words, was to humanize her husband for the public, so when he turns out not to be perfect, they will not be disappointed.³⁰ Ultimately she scaled back such comments, realizing that some supporters believed her comments were emasculating.³¹

In addition to her outspokenness, Mrs. Obama's educational and

22. See Allison Samuels, *Daring to Touch the Third Rail: Barack Obama Avoids Talking About the 'Race Issue,' but His Wife Doesn't*, NEWSWEEK, Jan. 28, 2008, at 39, 40.

23. Margaret Talev, *Obama's Wife Reaches Out to Black Women*, CHARLOTTE OBSERVER, Nov. 22, 2007, at 7A.

24. Wolfe, *supra* note 12, at 33.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*; Melinda Henneberger, *The Obama Marriage*, SLATE, Oct. 26, 2007, at 5.

29. Wolfe, *supra* note 12, at 29.

30. Henneberger, *supra* note 28.

31. *Id.*

professional background is also notable. She grew up on the South Side of Chicago to working-class parents. She excelled in school, skipping second grade and went on to earn her undergraduate degree from Princeton and a law degree from Harvard.³² After law school, she practiced law at the Chicago offices of the law firm Sidley Austin and most recently worked as a vice president of Community Relations for the University of Chicago Hospitals.³³ By all accounts, Mrs. Obama is an unconventional spouse to a presidential candidate and will likely be so as First Lady.

Part II of this Article investigates the role that explicit attitudes about race and gender play on voting decisions and the way they intersect in employment decisions. Scholarship from the areas of political science and law illustrate the challenges that Michelle Obama faced as a candidate's spouse and soon-to-be First Lady. Part III investigates implicit ("unconscious") race and gender biases and the role they play in behavior, including voting and employment discrimination. Despite the racial progress the United States has made, scholarship from the areas of cognitive and social psychology as well as law illustrate the deep-seated biases Mrs. Obama likely faced and will continue to face. Part IV investigates the role of third-party employment discrimination, where employees (typically White) are discriminated against because of the race of their associates (typically Black). We extrapolate from jurisprudence in this area to make some inferences about how attitudes about Michelle Obama may have worked against her husband's candidacy for the presidency of the United States. We conclude by exploring why negative attitudes about Mrs. Obama may have dissipated over the course of Senator Obama's presidential run and the role her presence in the White House will have in de-biasing people— at the implicit level — about Black women.

II. RACE AND GENDER: INTERSECTIONALITY IN EMPLOYMENT AND VOTING DISCRIMINATION

Race and gender are powerful variables that influence people's decision making and behavior in a variety of contexts. Politics and employment are among them. However, in addition to these variables in isolation, their intersection has multiplicative predictive value.

A. EMPLOYMENT DISCRIMINATION

If we assume Senator Clinton's assessment that elections are like

32. Karen Springen & Jonathan Darman, *Ground Support*, NEWSWEEK, Jan. 29, 2007, at 40.

33. *Id.*

“hiring decisions,”³⁴ then voter discrimination becomes an analog of employment discrimination. In this context, Title VII of the Civil Rights Act of 1964 is implicated by the roles of race and gender in the 2008 presidential election. Under Title VII, employers may not discriminate because of — among other factors — race, color, and sex.³⁵ The landmark cases that provide the litmus test for race and sex discrimination in the workplace are *McDonnell Douglas Corp. v. Green*³⁶ and *Price Waterhouse v. Hopkins*,³⁷ respectively. Under the burden-shifting framework of *McDonnell Douglas*, a complainant establishes a prima facie case for racial discrimination when he shows that: (i) he is a racial minority; (ii) he applied and was qualified for a job for which the employer was seeking applicants; (iii) despite his qualifications, he was rejected; and (iv) after his rejection, the position remained open and the employer continued to seek applicants with the complainant’s qualifications.³⁸ If the complainant establishes his prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for rejecting the applicant.³⁹ The employer cannot, however, use the applicant’s conduct as pretext for discrimination nor may the employer engage in racial double-standards.⁴⁰ The burden then shifts back to the applicant to demonstrate that the reason proffered by the employer was pretextual — that is, was not the true reason for the employment decision. Rather, the employer’s true motive for rejecting the candidate was discriminatory.⁴¹ This may be done directly by demonstrating that a discriminatory reason more than likely motivated the employer’s decision or indirectly by showing that the employer’s proffered explanation is unworthy of credence.⁴²

In *Price Waterhouse*, the Supreme Court found clear signs that some of the company’s partners reacted negatively to a female employee’s personality because she was a woman.⁴³ Partners described her as “macho,” suggested that she “overcompensated for being a woman,” and advised her to take “a course at charm school.”⁴⁴ Another representative of the company described the employee as someone who had “matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner]

34. Acosta, *supra* note 3.

35. 42 U.S.C. § 2000e-2(a)(1) (2000).

36. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

37. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

38. *McDonnell Douglas*, 411 U.S. at 802.

39. *Id.* at 802-03.

40. *Id.* at 804.

41. *Id.* at 804-805.

42. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

43. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

44. *Id.*

candidate.”⁴⁵ Most significant was the statement from one board member as to what the employee needed to do in order to improve her chances to be promoted to partner. He advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴⁶ Social psychologist Dr. Susan Fiske, an expert witness, testified “that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping.”⁴⁷ Her testimony focused on the overtly sex-based comments of partners as well as on the gender-neutral remarks made by partners who knew Hopkins only slightly, but were intensely critical of her.⁴⁸ According to Fiske, Hopkins’ status as the only woman in the pool of candidates, combined with the subjectivity of the evaluations, made it likely that the sharply critical remarks resulted from sex stereotyping.⁴⁹ The Court found that in previous years, other female candidates for partnership were also evaluated in sex-based terms.⁵⁰ Those who maintained their femininity were viewed favorably while “women’s lib[b]er” was used as a pejorative term for other female employees.⁵¹

The Court held in *Price Waterhouse* that sex-stereotyped remarks in the employment setting “do not inevitably prove that gender played a part in a particular employment decision.”⁵² The employee “must show that the employer actually relied on her gender in making its decision.”⁵³ “In making this showing, stereotyped remarks can certainly be *evidence* that sex played a part.”⁵⁴ The Court went on to hold that in a mixed-motive case (where there is both a possible legitimate as well as a discriminatory motive for the employment decision) the employer must show that its legitimate reason, standing alone, would have induced it to make the same decision.⁵⁵

B. VOTING BEHAVIOR

Voting is not always based on rational choice; emotions also play a significant role.⁵⁶ William Christ, for example, found that emotional responses to candidates accurately predict voter preferences for more than ninety percent of decided voters and eighty percent of undecided voters.⁵⁷

45. *Id.*

46. *Price Waterhouse*, 490 U.S. at 235.

47. *Id.*

48. *Id.*

49. *Id.* at 235-36.

50. *Id.* at 236.

51. *Id.*

52. *Id.* at 251.

53. *Id.*

54. *Id.*

55. *Id.* at 252.

56. See DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* xiii-xv (2007).

57. William G. Christ, *Voter Preference and Emotion: Using Emotional Response to*

Most political advertisements are designed to either inspire voter enthusiasm, by motivating their political engagement and loyalty, or induce fear, by stimulating vigilance against the risks some candidates supposedly pose.⁵⁸ Other research shows that political advertisements that provoke anxiety stimulate attention toward the campaign and discourage reliance on habitual cues for voting; in other words, advertisements of this type can induce crossover voting.⁵⁹ Likeability also affects voting. One study has shown that disengaged voters who watched entertainment-oriented talk show interviews of Al Gore and George W. Bush were more likely to vote against their party loyalties when they found the crossover candidate likeable.⁶⁰ As with most decisions, both passion and reason influence voting, so it is no surprise that emotionally evocative concepts like race and gender impact voting.

1. Race and Voting

Race has long held currency among Americans in their determinations of whom to elect to public office. Because Black and White voters typically prefer candidates of their own race in elections where one candidate is Black and the other is White, Black candidates rarely succeed outside of political jurisdictions in which Blacks are a majority of the voters.⁶¹

Experimental research supports the idea that Black candidates face significant hurdles in gaining support from White voters. In one study, Nayda Terkildsen found that given two fictitious candidates described

Classify Decided and Undecided Voters, 15 J. APPLIED SOC. PSYCHOL. 237, 250 (1985).

58. Ted Brader, *Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotions*, 49 AM. J. POL. SCI. 388, 393-97 (2005).

59. George E. Marcus & Michael B. Mackuen, *Anxiety, Enthusiasm, and the Vote: The Emotional Underpinnings of Learning and Involvement During Presidential Campaigns*, 87 AM. POL. SCI. REV. 672, 677-78 (1993).

60. Matthew A. Baum, *Talking the Vote: Why Presidential Candidates Hit the Talk Show Circuit*, 49 AM. J. POL. SCI. 213, 223-30 (2005).

61. See LUCIUS J. BARKER ET AL., *AFRICAN AMERICANS AND THE AMERICAN POLITICAL SYSTEM* 247 (1999); HANES WALTON, JR. & ROBERT C. SMITH, *AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM* 178-81 (2000). At the state level, only one of the fifty "elected" state governors is Black (Deval Patrick of Massachusetts); Senator Obama is the only Black member of the U.S. Senate. Up to year the 2000, only four Blacks had ever served in the U.S. Senate, and only two since Reconstruction. *Id.* The House of Representatives is more representative, with nearly ten percent of its members being Black, but this success is attributable to racial gerrymandering of House Districts. In areas dominated by Whites, Black electoral success is rare. This relationship between racial make-up of districts and electability of Blacks has been well-demonstrated. See David A. Bostis, *The Future of Majority-Minority Districts and African-American and Hispanic Legislative Representation*, in *REDISTRICTING AND MINORITY REPRESENTATION: LEARNING FROM THE PAST, PREPARING FOR THE FUTURE* 9-42 (David A. Bostis ed., 1998); Lisa Handley et al., *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, in *RACE AND REDISTRICTING IN THE 1990s* 13-38 (Bernard Grofman ed., 1998).

identically on dimensions other than race, White voters are more likely to vote for the White candidate over either a dark-skinned or light-skinned Black candidate.⁶² Furthermore, racially prejudiced White voters expressed more negative attitudes about Black candidates than less prejudiced White voters.⁶³

Experimental research by Donald Kinder and David Sears demonstrates the mechanism through which race can influence voting.⁶⁴ Kinder and Sears tested competing theories of White prejudice against Blacks — realistic group conflict theory (emphasizing tangible threats that Blacks might pose to Whites' private lives) and symbolic racism (emphasizing moralistic resentment of Blacks) — as predictors of Whites' voting behavior. Specifically, they tested these theories in light of the 1969 and 1973 Los Angeles mayoral campaigns in which Thomas Bradley (Black/liberal) and Samuel Yorty (White/conservative) were the candidates.⁶⁵ They found that more prejudiced individuals supported Yorty and that symbolic racism better predicts White voting behavior than group conflict theory.⁶⁶

The success of Black candidates is related to several factors. First, Whites are less likely to engage in racial cross-over voting (in mayoral, city council, or congressional elections) when the incumbent is White.⁶⁷ They are also less likely to vote for Black candidates who run for higher level (i.e., top (city)) positions.⁶⁸ Furthermore, Whites are less likely to engage in cross-over voting in general elections or run-off elections.⁶⁹ They are also less likely to engage in cross-over voting when the local press does not endorse the Black candidate.⁷⁰

Second, few Blacks vis-à-vis Whites at the community level have a negative impact on Whites' cross-over voting.⁷¹ Presumably, as close

62. Nayda Terkildsen, *When White Voters Evaluate African-American Candidates: The Processing Implications of Candidate Skin Color, Prejudice, and Self-Monitoring*, 37 AM. J. POL. SCI. 1032, 1040 (1993).

63. *Id.* at 1043.

64. Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414 (1981).

65. *Id.* at 417.

66. *Id.* at 421-26.

67. Charles S. Bullock, III, *Racial Crossover Voting and the Election of Black Officials*, 46 J. POL. 238, 247 (1984).

68. *Id.*

69. *Id.*

70. *Id.* Endorsements of the Black candidate by local white-controlled newspapers in biracial elections provide White voters with "important voting cues as to the candidates' qualifications and political acceptability. . . ." Joel Lieske, *The Political Dynamics of Urban Voting Behavior*, 33 AM. J. POL. SCI. 150, 154 (1989).

71. Thomas M. Carsey, *The Contextual Effects of Race on White Voter Behavior: The 1989 New York City Mayoral Election*, 57 J. POL. 221, 225-27 (1995); Lisa C. DeLorenzo et al., *The Impact of Cross-Racial Voting on St. Louis Primary Election Results*, 33 URB. AFF. REV. 120, 125-30 (1997).

inter-racial interactions increase, “the probability that [Whites] will adopt political attitudes and behaviors similar to those [Blacks] with whom they interact increases.”⁷² Conversely, at the macro-level (e.g., statewide), with more Blacks vis-à-vis Whites, the perception of racial threat provokes negative reactions to Black candidates among Whites.⁷³ Among the factors that seem to enhance such sentiments are the size of the Black population,⁷⁴ the history of race relations in the community, and the salience of racial issues in the campaign.⁷⁵

2. Gender and Voting

Blatant and widespread discrimination among the electorate against female candidates has diminished considerably in recent years.⁷⁶ Moreover, compared to race, gender has been a less divisive issue.⁷⁷ Some studies have found that voters harbor little bias against women;⁷⁸ and in some instances, women candidates may have an advantage over their male counterparts.⁷⁹ Once on the ballot, women are as successful as men at being elected into office.⁸⁰

This is not to say that there are no gender divisions among the electorate. Since Ronald Reagan's first presidential term, a partisan gender gap has existed in national elections; women voters disproportionately favor Democratic candidates, and men generally lean toward Republicans.⁸¹ Furthermore, women voters frequently favor Democratic Party policies.⁸² However, this has not led candidates to engage in a gender analogue to race-baiting.⁸³ The reason for this may be that most successful women politicians are themselves people whose profiles are counter-stereotypical. As such, they do not seem as vulnerable to subtle efforts to invoke stereotypes. And there is no contemporary history of an

72. Carsey, *supra* note 71, at 223.

73. *Id.* at 222.

74. V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 5 (Alfred A. Knopf ed., Vintage Books 1949) (indicating that Whites fear maintenance of control over Blacks where Blacks are a large part of the population).

75. THOMAS F. PETTIGREW, *Black Mayoral Campaigns*, in *URBAN GOVERNANCE AND MINORITIES* 15 (Herrington J. Bryce ed., 1976); RAYMOND E. WOLFINGER, *THE POLITICS OF PROGRESS* 15 (1974).

76. See, e.g., Carol Chaney & Barbara Sinclair, *Women and the 1992 House Elections*, in *THE YEAR OF THE WOMAN* 123, 123-39 (Elizabeth Adell Cook et al. eds., 1994).

77. *Id.*

78. *Id.*

79. See *id.*

80. Leonie Huddy & Theresa Capelos, *Gender Stereotyping and Candidate Evaluation: Good News and Bad News for Women Politicians*, in *THE SOCIAL PSYCHOLOGY OF POLITICS* 30 (Victor C. Ottati et al., eds., 2002).

81. *Id.*

82. See Mark Schlesinger & Caroline Heldman, *Gender Gap or Gender Gaps?: New Perspectives on Support for Government Action Policies*, 63 *J. POL.* 59, 73-83 (2001).

83. See Parks & Rachlinski, *supra* note 2.

analogous “Bradley Effect” in elections involving women.⁸⁴ The Bradley Effect, which has come to define Black politician electoral losses when wins are expected but wins by smaller margins than expected occur, is attributed to White voters lying to pollsters about who they are likely to vote for in elections where one candidate is Black and the other is White.⁸⁵

Yet, scholars find that gender stereotyping linked to traditional sex-roles still pervades electoral politics.⁸⁶ Experimental research by Leonie Huddy and Nayda Terkildsen, for example, finds that women candidates who demonstrate stereotypically female characteristics are at a great disadvantage.⁸⁷ Similarly, voters who prioritize issues such as terrorism, homeland security, and United States involvement in Iraq are more likely to believe that a man would better handle these issues as President.⁸⁸ Furthermore, party leaders (who are as much aware of the stereotypes as researchers) focus primarily on finding winning candidates.⁸⁹ Party leaders believe there is a greater tendency toward increased uncertainty over a woman’s electability than a man’s.⁹⁰

C. RACE AND GENDER IN THE 2008 CAMPAIGN

Gregory Parks and Jeffrey Rachlinski address the various ways in which race and gender have expressly manifested themselves in the 2008 election.⁹¹ Their research provides a great deal of context and nuance to this issue and connects these forms of bias in the campaign with Title VII case law.⁹² Exit polls, however, provide the clearest and most concise indication of race and gender bias.⁹³

84. *See id.* The Bradley Effect, named for former Mayor Tom Bradley of Los Angeles, is the tendency for polls to overestimate White support for a Black political candidate. Kent Jenkins, Jr. & R.H. Melton, *Wilder Revels in His Triumph: Slim Margin Puzzles Analysts*, WASH. POST, Nov. 9, 1989, at A1.

85. *See* Patrick Reddy, *Does McCall Have a Chance?: Yes, He Does, but African-American Candidates for Top State Offices Face an Uphill Climb*, BUFF. NEWS, Jan. 20, 2002, at H1; Jenkins & Melton, *supra* note 84.

86. Deborah Alexander & Kristi Andersen, *Gender as a Factor in the Attributions of Leadership Traits*, 46 POLI. RES. Q. 527 (1993); KATHLEEN A. DOLAN, VOTING FOR WOMEN: HOW THE PUBLIC EVALUATES WOMEN CANDIDATES 8, 9, 59-67 (2004); RICHARD LOGAN FOX, GENDER DYNAMICS IN CONGRESSIONAL ELECTIONS 173-75 (1997); David Niven, *Party Elites and Women Candidates: The Shape of Bias*, 19 WOMEN & POL. 57, 75 (1998); Kira Sanbonmatsu, *Gender Stereotypes and Vote Choice*, 46 AM. J. POL. SCI. 20, 28-30 (2002).

87. Leonie Huddy & Nayda Terkildsen, *The Consequences of Gender Stereotypes for Women Candidates at Different Levels and Types of Office*, 46 POL. RES. Q. 503, 518 (1993).

88. Erika Falk & Kate Kenski, *Issue Saliency and Gender Stereotypes: Support for Women in Times of War and Terrorism*, 87 SOC. SCI. Q. 1, 12 (2006).

89. KIRA SANBONMATSU, WHERE WOMEN RUN: GENDER & PARTY IN THE AMERICAN STATES 3, 22, 26-30, 37-86, 97-115, 118-19 (2006).

90. *Id.* at 28-29.

91. Parks & Rachlinski, *supra* note 2.

92. *Id.*

93. *See app.*, tbl.1-2.

As illustrated by the accompanying tables, blatant and express racial attitudes played a significant role in the 2008 presidential primary race.⁹⁴ Table 1 demonstrates that in twenty-eight out of thirty-seven primaries/caucuses for which we have exit poll data, Whites voted for Senator Clinton in higher numbers than for Senator Obama.⁹⁵ Asian and Latino Americans also voted for Senator Clinton in higher numbers in eight out of eleven of those primaries/caucuses.⁹⁶ Furthermore, as illustrated in Table 2, where voters indicated that race influenced their voting decisions, a higher percentage of individuals voted for Senator Clinton in sixteen states compared to twelve states for Senator Obama.⁹⁷ When we subtract from Senators Clinton's and Senator Obama's columns those states that they would likely have won due to their roots there — Arkansas and New York for Clinton and Illinois for Obama — Senator Clinton still benefits.⁹⁸ This was most pronounced in West Virginia and Kentucky.⁹⁹ Such preference of a White candidate over a Black candidate simply because of race implicates Title VII.

As illustrated in Table 1, in twenty-six out of thirty-seven primaries/caucuses for which we have exit poll data, men voted for Senator Obama in higher numbers than Senator Clinton.¹⁰⁰ As illustrated in Table 2, however, in states where voters indicated that gender was a deciding factor in their decision to cast their votes, only six out of twenty-nine went to Senator Obama.¹⁰¹ Among these states, one was Illinois, while the other five were states with sizeable Black populations.¹⁰² These results suggest that though gender was a factor in the 2008 presidential primary campaign, it was not as large a factor as race. Openly acknowledged male support for Senator Obama, at least, seems to be complicated by home-state advantage and votes arising from racial solidarity.¹⁰³

These findings are in a sense unremarkable. There is a lingering question that emanates from the 2008 Presidential Primary campaign: Are Americans more racist or more sexist?¹⁰⁴ Despite Gloria Steinem's assertion that "gender is probably the most restricting force in American

94. See app., tbl.2.

95. App., tbl.1.

96. *Id.*

97. App., tbl.2.

98. *Id.*

99. *Id.*

100. App., tbl.1.

101. App., tbl.2.

102. *Id.*

103. Cf. Kevin J. Flannelly, *Voting for Female Candidates: Effects of Voters' Age, Ethnicity, and Gender*, 142 J. SOC. PSYCHOL. 397, 398 (2002).

104. See Benjamin Wallace-Wells, *Is America Too Racist for Barack? Too Sexist for Hillary?* WASH. POST, Nov. 12, 2006, at B1.

life,” at least in this section, the data suggest that race was more of a driving force.¹⁰⁵ Such findings amplify those of Jeffrey Timberlake and Sarah Estes, who demonstrate that where race and gender are analyzed together — in particular with regard to stereotyping — race provides greater predictive power.¹⁰⁶

D. INTERSECTIONALITY AND EMPLOYMENT DISCRIMINATION

Race and sex are two classifications on which a prima facie case of employment discrimination may be based.¹⁰⁷ Although color is yet another classification for a prima facie showing of employment discrimination,¹⁰⁸ colorism claims (discrimination based upon gradations in skin color) are one example of the more complex race discrimination claims courts face.¹⁰⁹ Racism (including colorism) and sexism are interconnected systems of discrimination and oppression.¹¹⁰ The juncture at which they intersect provides a fruitful and unique area of discrimination study.¹¹¹

A number of employment discrimination cases have wrangled with the intersection of race and gender, particularly regarding Black women. Some circuits fail to demonstrate an appreciation of this race-gender interaction. For example, in *DeGraffenreid v. General Motors Assembly Div.*, five Black women sued their former employer charging, among other things, that the company’s seniority system and “last hired-first fired” layoff policy was discriminatory.¹¹² The plaintiffs sought to represent a class of exclusively Black women who were the victims of GM’s alleged discrimination.¹¹³ The Eighth Circuit held that the plaintiffs were not

105. Gloria Steinem, Op-Ed, *Women Are Never Front-Runners*, N.Y. TIMES, Jan. 8, 2008, at 23A (“I’m not advocating a competition for who has it the toughest.”).

106. Jeffrey M. Timberlake & Sarah Beth Estes, *Do Racial and Ethnic Stereotypes Depend on the Sex of Target Group Members? Evidence from a Survey-Based Experiment*, 48 SOC. Q. 399, 419-20 (2007).

107. 42 U.S.C. § 2000e-2(a) (2000). The statutory language expressly provides “[I]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”

108. *Id.*

109. See, e.g., Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1724 (2000); see generally Leonard M. Baynes, *If It’s Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131 (1997); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

110. See Caldwell, *supra* note 4, at 371-72 (stating, “[r]acism and sexism are mutually-reinforcing components of a system of dominance rooted in patriarchy.”).

111. *Id.* at 372 (“No significant and lasting progress in combating [racism or sexism] can be made until . . . the perspectives gained from considering their interaction are reflected in legal theory and public policy.”).

112. *DeGraffenreid v. Gen. Motors Assembly Div.*, 558 F.2d 480, 482 (8th Cir. 1977).

113. *Id.*

allowed to create a “super-remedy” by combining both race and sex discrimination.¹¹⁴ In *Payne v. Travenol Laboratories, Inc.*, Payne, a Black woman, and several other plaintiffs sued their employer for discrimination based on differential referrals of men and women to certain positions and the absence of Black employees above a certain level.¹¹⁵ The Fifth Circuit held that the interests of the Black women plaintiffs conflicted with those of Black men, since the plaintiffs attempted to prove that men were promoted at women's expense despite the court's finding of racial discrimination.¹¹⁶ In *Moore v. Hughes Helicopter, Inc.*, Moore, a Black woman, filed suit on behalf of a class of Black women employees alleging discrimination in the selection of employees for various labor grades and positions.¹¹⁷ The Ninth Circuit upheld a district court decision refusing to allow Moore to represent either White women employees or Black male employees.¹¹⁸ The Court of Appeals agreed with the lower court that Moore was an inadequate representative of white women employees, not because she did not claim sex discrimination, but rather because she was also Black.¹¹⁹ Similarly, Moore was not allowed to represent Black male employees, not because she did not allege race discrimination but because she was also a woman.¹²⁰

Other circuits, however, have acknowledged the realities of intersectionality. In *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, Jenkins, a Black woman, sued her employer on her own behalf and on behalf of a class.¹²¹ The suit alleged denial of promotion, better assignments, and ultimately termination for “race, sex, and black styles of hair and dress.”¹²² After relying on *Vuyanich v. Republic National Bank*,¹²³ the Seventh Circuit held that the plaintiff was eligible to represent a class of Blacks and women.¹²⁴

In *Jefferies v. Harris County Community Action Assoc.*, Jefferies, a Black woman, sued her employer on the grounds that during the nearly four

114. *DeGraffenreid*, 558 F.2d at 483. The lower court similarly held that Title VII did not create a new sub-category of “Black women” with standing independent of Black men. See *DeGraffenreid v. Gen. Motors Ass. Div.*, 413 F. Supp. 142, 145 (E.D. Mo. 1976).

115. *Payne v. Travenol Lab., Inc.*, 673 F.2d 798, 805 (5th Cir. 1982).

116. *Id.* at 810-12.

117. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1982).

118. *Id.* at 480.

119. *Id.*

120. *Id.*

121. *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 165 (7th Cir. 1976).

122. *Id.*

123. *Vuyanich v. Republic National Bank*, 409 F. Supp 1083, 1089 (N.D. Tex. 1976) (holding that the plaintiff could sue on race and gender inasmuch as her superior told her that she (a Black woman) “probably did not need a job anyway, because her husband was a Caucasian,” since that statement discriminated against both Blacks and women, as it could not be made to either a white person or a male).

124. *Jenkins*, 538 F.2d at 169.

years she was employed, she failed to receive any promotions.¹²⁵ When she applied for a field representative position during her fourth year with the company, a Black man was promoted over her.¹²⁶ In looking to the specific language of Title VII,¹²⁷ the Fifth Circuit construed “or” to imply congressional “intent to prohibit employment discrimination based on any or all of the listed characteristics.”¹²⁸

E. THE RACE/GENDER NEXUS AND MICHELLE OBAMA

Political science and legal scholarship illustrates two important challenges for Michelle Obama. With regard to gender, a significant challenge for Mrs. Obama is to not wield too much power or influence. As much progress as women have made in electoral politics, the role of First Lady has evolved more slowly.¹²⁹ Historically, First Ladies have served conventional roles. Not only did they serve as the official hosts to the White House,¹³⁰ they also reached out to women during their husbands’ campaigns.¹³¹ In addition, they served as a liaison between the White House and women’s organizations¹³² and promoted the administration’s women-oriented programs and policies.¹³³ However, First Ladies are now faced with the paradox of traditional, aristocratic demands that they act like “ladies” and more modern demands that they be models of social concern and actively involved in the political agenda.¹³⁴ Failure to conform to these constrained gender roles incites critical media reaction.¹³⁵ In other words, the more politically active the First Lady, the more negative press coverage she receives.¹³⁶ Being outspoken and recognized for her critical role in her husband’s campaign, voter attitudes towards Michelle Obama were likely influenced by gender.

With regard to race, Mrs. Obama may be perceived as “too Black.”

125. *Jeffries v. Harris County Cmty. Action Ass’n*, 615 F.2d 1025, 1029 (5th Cir. 1980).

126. *Jeffries*, 615 F.2d at 1029.

127. 42 U.S.C. § 2000e-2(a) (2000). Title VII provides a remedy against employment discrimination based upon an employee’s “race, color, religion, sex, *or* national origin.” (emphasis added by authors).

128. *Jeffries*, 615 F.2d at 1032.

129. Erica Scharrer & Kim Bissell, *Overcoming Traditional Boundaries: The Role of Political Activity in Media Coverage of First Ladies*, 21 *WOMEN & POL.* 55, 56 (2000).

130. See generally Edith P. Mayo, *Party Politics: The Political Impact of the First Ladies’ Social Role*, 37 *SOC. SCI. J.* 577 (2000).

131. See Jill Abraham Hummer, *First Ladies and American Women: Representation and the Modern Presidency* (May 2007) (unpublished Ph.D. dissertation, University of Virginia) (on file with *Hastings Women’s Law Journal*).

132. See *id.* at 137-218.

133. See *id.* at 219-63.

134. See Wekkin, *supra* note 11, at 601-08.

135. Betty Houchin Winfield, “*Madame President*”: *Understanding a New Kind of First Lady*, 8 *MEDIA STUD. J.* 59, 61 (1994).

136. Scharrer & Bissell, *supra* note 129, at 69-74.

To some degree, this idea may be taken literally. People have long held more negative attitudes towards darker-skinned Blacks vis-à-vis those who are fairer-skinned.¹³⁷ For instance, light-skinned Blacks are perceived as more attractive than dark-skinned Blacks, which is particularly true in the case of Black women.¹³⁸ As such, Black women's closer approximation to Whiteness is deemed to be a particularly feminine characteristic among Blacks¹³⁹ and may be so among Whites as well. Similarly, intersectionality affects Whites' perception process, which leads to gender categorization errors for Black women.¹⁴⁰ Consequently, "Blackness" and "maleness" are highly associated for Black men and women.¹⁴¹ Furthermore, women are deemed as unattractive commensurate with their perceived masculinity, leading Whites to rate Black women as less attractive than other women.¹⁴² More fitting, however, is a less literal and more philosophical assessment of Michelle Obama's blackness. Blacks who downplay their race and attempt to assimilate with the larger White society are deemed to be less threatening by Whites than those who assimilate less.¹⁴³ Furthermore, Blacks who assimilate more are, in turn, viewed as "good Blacks" by Whites.¹⁴⁴ Preference for a White over Black is neither a dichotomous issue nor a simple matter of skin color. Perceptions about a Black person's racial ideology, on a continuum, may also provoke discrimination. In the employment context, for example, *Gordon v. JKP Enterprises, Inc.* held that a Black plaintiff was discriminated against by her employer for being "too ethnic" or "pro-Black."¹⁴⁵ Thus, because she has been more pointed about racial issues (or at least more so than Senator Obama) voters' negative attitudes about Mrs. Obama may be largely influenced by race.

Much research on discrimination has focused separately on the effects of race or gender, ignoring the reality that Black women must deal with the joint effects of dual minority statuses, originally termed

137. See generally Banks, *supra* note 109, at 1714-24; see also Jones, *supra* note 109.

138. Mark E. Hill, *Skin Color and the Perception of Attractiveness Among African Americans: Does Gender Make a Difference?*, 65 SOC. PSYCHOL. Q. 77, 83-86 (2002).

139. *Id.* at 80.

140. See generally Phillip Atiba Goff et al., "Ain't I a Woman?": Towards an Intersectional Approach to Person Perception and Group-based Harms, 59 SEX ROLES 392 (2008).

141. *Id.* at 397-401.

142. *Id.*

143. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1164 (2007).

144. *Id.*; Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1899 (2007).

145. *Gordon v. JKP Enter. Inc.*, No. 01-20420, 2002 WL 753496, at *1, *10 (5th Cir. April 9, 2002).

“double jeopardy.”¹⁴⁶ Interactive models utilize the concept of “multiple jeopardy,” further accounting for Black women’s unique social location at the intersection of many different status hierarchies (including race, gender, and class), which produces experiences distinct from those of White women.¹⁴⁷ Such models highlight the challenges faced by Michelle Obama. Specifically, the intersection of Michelle Obama’s racial and gender identity and politics — discussing issues of race, critiquing her husband openly and honestly, and discussing work-family balance for women — could ultimately leave voters fearing that she is an “angry Black woman”¹⁴⁸ or wondering and critiquing, “Why is she so womanish?”¹⁴⁹

III. IMPLICIT BIAS AND VOTER/EMPLOYMENT DISCRIMINATION

Undeniably, Americans have made tremendous progress with regards to attitudes about race and gender in the past several decades. This progress, however, has occurred primarily at a surface level within society. Research on implicit attitudes, which are judgments that are automatically activated without a person’s awareness or intention,¹⁵⁰ suggests that negative, stereotypical attitudes about Blacks and women are still pervasive. These attitudes are evidenced in both voting and employment decisions.

A. IMPLICIT ATTITUDES

People’s reports of their cognitive processes are often not consistent with their judgments.¹⁵¹ Many influences on judgment seem to operate

146. FRANCIS BEALE, *Double Jeopardy: To be Black and Female*, in *THE BLACK WOMAN: AN ANTHOLOGY* 111-114 (Toni Cade, ed., 1970).

147. Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 *SIGNS* 42-72 (1988).

148. See Erica Chito Childs, *Looking Behind the Stereotypes of the “Angry Black Woman”: An Exploration of Black Women’s Responses to Interracial Relationships*, 19 *GENDER & SOC’Y* 544 (2005); see also *Verdict: Beat the Press, Fox News Host Discusses “Angry Black Women”* (MSNBC television broadcast June 16, 2008), available at http://www.huffingtonpost.com/2008/06/17/fox-news-host-discusses-a_n_107526.html.

149. See Katrice Annette Albert, *Why Is She So Womanish?: The Relationship Between Racial Identity Attitudes and Womanist Identity Attitudes in African American College Women* (August 2002) (unpublished Ph.D. dissertation, Auburn University) (on file with *Hastings Women’s Law Journal*). The term “womanist” is a synonym for black feminist or feminist of color. See ALICE WALKER, *IN SEARCH OF OUR MOTHERS’ GARDENS: WOMANIST PROSE* xi-xii (1983).

150. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, 102 *PSYCHOL. REV.* 4-5 (1995).

151. See, e.g., Timothy D. Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports about the Effects of Stimuli on Evaluations and Behavior*, 41 *SOC. PSYCHOL.* 118, 121-23, 125, 127 (1978).

outside of people's awareness.¹⁵² Combining this observation with contemporary research on thought processing, psychologists now argue that people rely on parallel cognitive systems of judgment: one is rapid, intuitive, and unconscious; the other is slow, deductive, and deliberative.¹⁵³ The intuitive system often dictates choice, with the deductive system lagging behind, struggling to produce reasons for a choice that comports with the accessible parts of memory.¹⁵⁴ Thus, an intuitive, gut reaction against a candidate can dictate choice. The rational account follows later and might not provide a fully accurate account of the decision.

Research on implicit bias indicates that race and gender biases can influence unconscious, emotional processes, wholly apart from the conscious, rational ones.¹⁵⁵ Psychologists term these unconscious, emotional influences "implicit biases"—attitudes or thoughts that people hold but might not explicitly endorse.¹⁵⁶ These attitudes might conflict with expressly held values or beliefs. Many people who embrace the egalitarian norm that skin color should not affect their judgment of a job or political candidate also unwittingly harbor negative associations about minorities.¹⁵⁷ People might not even be aware that they hold these attitudes.¹⁵⁸ Even so, these implicit cognitions influence how people evaluate others.¹⁵⁹ The implicit cognitive processes might heavily influence the final choice of a voter who does not otherwise clearly embrace one candidate over another.¹⁶⁰

Over the last ten years, psychologists have identified ways to measure implicit cognitions. These methods have proven to be particularly useful for studying bias against Blacks or stereotypes about women. This is so for two key reasons. First, when explicit measures are used, individuals may not reveal their true attitudes or preferences because of social desirability

152. *See id.*

153. *See* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6-9 (2007) (reviewing this literature).

154. *Id.* at 153.

155. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).

156. Greenwald & Banaji, *supra* note 150 at 4-5; *see also* Brian A. Noeske et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265-267 (John A. Bargh ed., 2007).

157. *See* Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Age 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 55-56 (2006); Greenwald & Krieger, *supra* note 155, at 951.

158. Greenwald & Banaji, *supra* note 150, at 4-5 (1995).

159. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 4 (October 12, 2007) (unpublished manuscript, on file with the J. PERSONALITY AND SOC. PSYCHOL.); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 435-37 (2007) (reviewing evidence that the implicit social cognition predicts behavior).

160. *See infra* notes 165 to 227 and accompanying text.

biases, thus not elucidating the actual magnitude of the relationship that would exist between attitudes and, for example, political outcomes.¹⁶¹ The second comparative advantage is that individuals may not even be aware of their true preferences or attitudes and thus cannot report them if asked.¹⁶²

The Implicit Association Test (“IAT”) has rapidly become the most widely used measure of implicit bias.¹⁶³ The IAT is a procedure that seeks to assess latent attitudes by measuring their underlying automatic evaluation.¹⁶⁴ Using cognitive priming procedures, it measures the relative strength of associations between pairs of concepts to determine automatic affect or attitude. In the initial IAT task, participants are required to separate different images into categories (e.g., race, gender, weight, etc.). Next, participants are required to sort different attributes as pleasant or unpleasant in meaning. In the next steps, the images and attributes are superimposed, pairing images with closely associated and not-so-closely associated attributes. The more closely associated two concepts are, the easier it is to respond to them as a pair. Thus, the IAT measures relative strength of associations between targets and certain attributes based on the difficulty (i.e., response time) of the sorting process.

1. Race

Research on the IAT, which pairs White and Black faces with positive and negative words, shows that roughly seventy percent of Whites harbor anti-Black/pro-White biases.¹⁶⁵ Web-based IAT samples with thousands of participants reveal strong biases with several characteristics: People associate light skin with good and dark skin with bad;¹⁶⁶ White faces with harmless objects and Black faces with weapons.¹⁶⁷ The proper interpretation of these results has been a matter of some debate,¹⁶⁸ but most scholars conclude that the IAT can measure implicit biases.¹⁶⁹

A study by Leslie Ashburn-Nardo and colleagues shows just how broad-based implicit biases can be. In this study, participants found it

161. Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 POL. BEHAV. 343, 345 (2007).

162. Kam, *supra* note 161, at 345.

163. See Lane et al., *supra* note 159, at 430 (noting that techniques that assess response times are the most widely used methods for ascertaining implicit attitudes).

164. See Greenwald & Banaji, *supra* note 150, at 4-5.

165. Brian A. Nosek, et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 45 (2007).

166. Kristin A. Lane, et al., *Understanding and Using the Implicit Association Test: IV: What We Know So Far About the Method*, in *IMPLICIT MEASURES OF ATTITUDES* 62-67 (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

167. B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 183-86, 188 (2001).

168. See Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or “Would Jesse Jackson ‘Fail’ the IAT?”*, 15 PSYCHOL. INQUIRY 257, 260-61 (2004).

169. Lane et al., *supra* note 166, at 72, 91.

easier to associate their in-group (i.e., American names) with pleasant words and the out-group (i.e., Surinamese names) with unpleasant words than they found it to make reverse pairings, even though participants lacked experience with Suriname.¹⁷⁰ Even with equally unfamiliar exemplars for both in-group and out-group, they nevertheless displayed a pro-in-group IAT bias. Thus, even with only minimal experiential or historical input, peoples' minds are prepared to display bias effortlessly.¹⁷¹

A study by Thierry Devos and Mahzarin Banaji found that individuals make no distinction between Blacks and Whites on explicit measures of "Americanness."¹⁷² On implicit measures, however, participants more easily paired American symbols with White faces than with Black faces.¹⁷³ In a second study, Devos and Banaji used photos of eight Black and eight White United States track and field athletes who participated in the 2000 Olympics.¹⁷⁴ The assumption was that Blacks who represented their country in the Olympics should appear more American than those who did not.¹⁷⁵ On the measure of familiarity, participants reported being more familiar with Black athletes than with White athletes.¹⁷⁶ Taking the two explicit self-report measures together, participants were both more familiar with Black than White athletes and reported a stronger association between Black athletes and American than White athletes and American.¹⁷⁷ On the IAT, however, the reverse was found, with White athletes being more strongly associated with the category "American" than Black athletes.¹⁷⁸ White and Asian Americans associated Whites with the concept "American" to a greater extent than Blacks.¹⁷⁹ Furthermore, in a study by Melissa Ferguson and colleagues, they found that when Whites and Asians were primed with the American flag (shown subliminal images), their attitudes toward Blacks become even more negative.¹⁸⁰

A study by Phillip Goff and colleagues investigated the relationship

170. Leslie Ashburn-Nardo et al., *Implicit Associations as the Seeds of Intergroup Bias: How Easily Do They Take Root?*, 81 J. PERSONALITY & SOC. PSYCHOL. 789, 792 (2001).

171. See Ashburn-Nardo, *supra* note 170, at 794-95. See also Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 321-23 (2000) (finding that positive attributes were more strongly associated with White than Black Americans even when: (a) pictures of equally unfamiliar Black and White individuals were used as stimuli; and (b) differences in stimulus familiarity were statistically controlled).

172. Thierry Devos & Mahzarin R. Banaji, *American = White*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 452-53 (2005).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 455.

179. *Id.* at 459.

180. Melissa J. Ferguson et al., *The American Flag Increases Prejudice Toward African-Americans*, 4-28 (unpublished manuscript)(on file with authors).

between implicit racial attitudes and dehumanization of Blacks. In their first study, individuals were subliminally shown images of Black faces, White faces, or neutral images.¹⁸¹ Then they were shown fuzzy images of animals (apes and non-apes), which gradually became clearer.¹⁸² Individuals were instructed to indicate the point at which they could identify the image.¹⁸³ Goff and colleagues found that both Whites and non-Whites more quickly associated Blacks, as compared to Whites, with apes.¹⁸⁴ In a second study, individuals were first subliminally shown images of ape line drawings or jumbled line drawings.¹⁸⁵ Second, they were given a facial interference task designed to gauge how distracted participants would become when presented with faces prior to a test measuring their attentional bias to Black and White faces.¹⁸⁶ Their results indicated that priming individuals with images of apes demonstrated more attentional bias towards Black faces.¹⁸⁷ Moreover, Goff and colleagues found that implicit anti-Black biases predicted this ape-Black association.¹⁸⁸

These biases generally begin at an early age. Baron and Banaji assessed White American six-year-olds, ten-year-olds, and adults using a child-oriented version of the IAT. Remarkably, even the youngest group showed implicit pro-White/anti-Black bias, with self-reported attitudes revealing bias in the same direction.¹⁸⁹ The ten-year-olds and adults showed the same magnitude of implicit race bias, but self-reported racial attitudes became substantially less biased in older children and vanished entirely in adults, who self-reported equally favorable attitudes toward Whites and Blacks.¹⁹⁰ It seems that people learn bias early but only later learn to cover the bias by publicly embracing more egalitarian norms.

The latter point shows the striking divergence between explicit attitudes towards race and measures of implicit bias.¹⁹¹ Although explicit and implicit measures of bias are related, even people who openly embrace egalitarian norms often harbor very negative associations concerning Blacks.¹⁹² Even participants who are told that the IAT measures

181. Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 294 (2008).

182. *Id.* at 295.

183. *Id.*

184. *Id.* at 296.

185. *Id.* at 297.

186. *Id.*

187. *Id.* at 298-99.

188. *Id.* at 301.

189. Baron & Banaji, *supra* note 157, at 55.

190. *Id.* at 56.

191. See Lane et al., *supra* note 166.

192. See generally Baron & Banaji, *supra* note 156 (indicating that whereas seemingly egalitarian views about race emerge over time, implicit racial attitudes stay the

undesirable racist attitudes and who explicitly self-report egalitarian attitudes find it difficult to control their biased responses.¹⁹³ These findings suggest that the explicit and implicit studies measure somewhat different cognitive systems. The explicit measures show that most adults have learned the importance of egalitarian norms — or at least the importance of embracing such norms publicly.

2. Gender

The research on implicit bias also indicates that most people hold implicit biases about gender. People misattribute high status more readily to unknown men than to unknown women.¹⁹⁴ They associate “male” with “hierarchical” and “female” with “egalitarian”¹⁹⁵ and evaluate male authority figures more favorably than their female counterparts.¹⁹⁶ Priming people to think about dependence or aggression influences their judgments of men and women. They judge women, but not men, as more dependent while thinking about dependence and judge men, but not women, as more aggressive while thinking about aggression.¹⁹⁷ Men also automatically associate maleness with power.¹⁹⁸

Not surprisingly, these attitudes towards men and women translate directly into evaluations of potential careers. Web-based IAT studies reveal that people more closely associate men with science and women with humanities.¹⁹⁹ People more easily associate “engineer” with men and “elementary school teacher” with women than the opposite pairing.²⁰⁰ In one study, participants primed with words associated with historically male roles (like “doctor”) tended to categorize a subsequent gender-neutral pronoun as being male, while participants primed with words associated with historically female roles (like “nurse”) tended to categorize a

same).

193. Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test*, 66 SOC. PSYCHOL. Q. 83, 92 (2003).

194. See generally Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 185-86, 189, 190-91, 192-93 (1995).

195. Marianne Schmid Mast, *Men Are Hierarchical, Women Are Egalitarian: An Implicit Gender Stereotype*, 63 SWISS J. PSYCHOL. 107, 109-10 (2004).

196. Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1315, 1319-24 (2000).

197. Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272, 275-76 (1993).

198. Laurie A. Rudman et al., *Implicit Self-concept and Evaluative Implicit Gender Stereotypes: Self and Ingroup Share Desirable Traits*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1164, 1167-68 (2001).

199. Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRACTICE 101, 105, 107-08 (2002).

200. Michael J. White & Gwendolen B. White, *Implicit and Explicit Occupational Gender Stereotypes*, 55 SEX ROLES 259, 263-64 (2006).

subsequent gender-neutral pronoun as being female.²⁰¹ Like studies of racial bias, even participants who explicitly reject gender-based stereotypes concerning careers carry these implicit biases.²⁰² Web-based IAT studies also reveal that both men and women tend to link “male” with “career” and “female” with “family.”²⁰³ Among men, this connection is consistent with their explicit statements about gender stereotypes, although women explicitly reject such connections as inconsistent with their beliefs.²⁰⁴

Like implicit race biases, many of the associations involving gender cast men in a more favorable light. However, the relationship involving gender is somewhat more complicated. Women reveal a strong automatic preference for female words (e.g., “her” or “she”) over male words (e.g., “him” or “he”), whereas men harbor no preference.²⁰⁵ Moreover, women’s automatic in-group bias is much stronger than men’s in-group bias, although this tendency is most pronounced among women who have positive self-esteem.²⁰⁶ Rudman and Greenwald captured the essence of this phenomenon with two phrases characterizing women and men, respectively: “If I am good and I am female, females are good,” and “Even if I am good and I am male, men are not necessarily good.”²⁰⁷ Rudman and Greenwald also discovered, in two other studies, that individuals harbor a pro-female bias to the extent that they favor their mothers over their fathers²⁰⁸ and associate maleness with violence, all at the implicit level.²⁰⁹

B. IMPLICIT BIAS AND POLITICAL ATTITUDES/BEHAVIOR

Research has shown that implicit attitudes influence prejudice and intergroup discrimination in a variety of contexts,²¹⁰ including voting processes. Social scientists who have failed to find racial polarization in voters’ candidate preferences have readily acknowledged “covert

201. Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 *PSYCHOL. SCI.* 136, 136-139 (1996).

202. *Id.* at 138-39.

203. Nosek et al., *supra* note 199, at 105, 108-09.

204. *Id.* at 109.

205. Eugene V. Aidman & Steve M. Carroll, *Implicit Individual Differences: Relationships Between Implicit Self-Esteem, Gender Identity, and Gender Attitudes*, 17 *EUR. J. PERSONALITY* 19, 27-28 (2003).

206. Laurie A. Rudman & Stephenie A. Goodwin, *Gender Differences in Automatic In-Group Bias: Why Do Women Like Women More Than Men Like Men?*, 87 *J. PERSONALITY & SOC. PSYCHOL.* 494, 497-98 (2004).

207. *Id.* at 498.

208. *Id.* at 500-01.

209. *Id.* at 502-03.

210. John F., Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 *J. EXPERIMENTAL SOC. PSYCHOL.* 510, 510-40 (2001); Allen R. McConnell & Jill M. Leibold., *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 *J. EXPERIMENTAL SOC. PSYCHOL.*, 435, 435-42 (2001).

racism”²¹¹ or voter “misreporting”²¹² as explanations for why they failed to detect results in their studies. Research on implicit bias and political attitudes and behavior, however, seems to provide a better link between people’s racial attitudes and their voting behavior. For example, people who endorse right-of-center political views also tend to associate Black with bad and White with good on the IAT.²¹³ Similarly, political conservatism is associated with White in-group favoritism on both implicit and explicit measures.²¹⁴

Implicit attitudes affect how people vote.²¹⁵ In one study, Kam examined the impact of an implicit measure of attitudes towards an ethnic group on citizens’ willingness to support a minority candidate.²¹⁶ She either identified the candidates’ party affiliations or omitted that information.²¹⁷ Kam found that for the implicit measure, Democrats who held the most favorable views towards Hispanics were nearly four times as likely to prefer the Hispanic candidate compared with their counterparts who held the least positive implicit views towards Hispanics.²¹⁸ Implicit measures of attitudes towards Hispanics were much less relevant when party cues were available, however.²¹⁹ Even participants who expressed highly negative implicit attitudes towards Hispanics nevertheless voted for Hispanic candidates identified as being from the political party that they favor.²²⁰ This suggests that Democrats can overcome their implicit biases in an effort to vote for a Democrat regardless of race. This theory, however, may only extend to minority candidates who are not Black —assuming Whites harbor more animosity toward Blacks than other racial minorities.

Recent, unpublished research by Albertson and Greenwald links implicit attitudes with the Bradley Effect.²²¹ Their study (conducted before the 2008

211. Jack Citrin et al., *White Reactions to Black Candidates: When Does Race Matter?*, 54 PUB. OPINION Q. 74, 92 (1990).

212. Benjamin Highton, *White Voters and African American Candidates for Congress*, 26 POL. BEHAV. 1, 11-12 (2004).

213. William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1332, 1336 (2004).

214. John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 902 (2004); Brian Nosek, *The Politics of Intergroup Attitudes: Implicit Cognition and Political Orientation*, Presentation at Duke University’s The Psychology of Voting and Election Campaigns (Oct. 20-21, 2006).

215. See Inna Burdein et al., *Experiments on the Automaticity of Political Beliefs and Attitudes*, 27 POL. PSYCHOL. 359 (2006); Malte Frieze et al., *Predicting Voting Behavior with Implicit Attitude Measures: The 2002 German Parliamentary Election*, 54 EXPERIMENTAL PSYCHOL. 248, 251 (2007) (finding predictive power of the IAT in the 2002 German Parliamentary election); see generally WESTEN, *supra* note 56, at 219-48.

216. Kam, *supra* note 161, at 344.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. ScientificBlogging.com, *Implicit Association Test Creator Says Political Polls*

primaries began) measured both implicit and explicit preferences by voters for three Democratic hopefuls — Clinton, Edwards, and Obama. When voters were asked whom they supported, Obama won handily, forty-two percent to thirty-four percent and twelve percent for Clinton and Edwards, respectively.²²² But Obama came in third, with twenty-five percent on implicit measures, with Clinton and Edwards capturing forty-eight percent and twenty-seven percent of the participants' support.²²³ This study, while preliminary, provides the most direct evidence that Senator Obama faces a gap between what voters will tell pollsters and how they will vote.

Other research has explored the implicit association between the categories of White and American in the 2008 election.²²⁴ Devos and colleagues found that people more easily associated Senator Clinton and even Tony Blair with the category "American" than they did Senator Obama.²²⁵ In another study by Melissa Ferguson and colleagues, when Whites and Asians were primed with images of the American flag, their attitudes toward Democrats were not altered, but their attitudes toward Blacks generally, and Senator Obama specifically, became more negative.²²⁶ In fact, when primed with the American flag, eligible voters (i.e., college students) were less inclined to vote for Senator Obama over other candidates.²²⁷

C. IMPLICIT ATTITUDES AND EMPLOYMENT DISCRIMINATION

In recent years, implicit bias has been imported into legal scholarship. The role of implicit bias in employment discrimination was advanced by Linda Hamilton Krieger almost a decade and a half ago. In her seminal work, Krieger presented three broad ideas. First, stereotyping is not intent-driven but evolves from social cognition theory, which assumes that, quite naturally, "cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment previously attributed to motivational processes."²²⁸ Furthermore, it is not only "bad" people who stereotype; as part of "normal cognitive functioning," all

Need Better Metrics to be More Accurate, http://www.scientificblogging.com/news_releases/implicit_association_test_creator_says_political_polls_need_better_metrics_to_be_accurate (last visited November 1, 2008).

222. ScientificBlogging.com, *supra* note 221

223. *Id.*

224. Devos & Banaji, *supra* note 172.

225. Thierry Devos et al., *Is Barack Obama American Enough to be the Next President? The Role of Racial and National Identity in American Politics*, available at http://www.rohan.sdsu.edu/~tdevos/thd/Devos_spsp2008.pdf.

226. Ferguson, *supra* note 180, at 9.

227. *Id.* at 8-12.

228. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995).

people categorize and stereotype natural objects as a way “to simplify the task of perceiving, processing, and retaining information about people in memory.”²²⁹ Second, stereotypes unintentionally bias people’s judgment about members of other groups.²³⁰ Third, stereotypes are triggered and operate outside of one’s own conscious awareness.²³¹

Krieger, in turn, applied these principles to the area of Title VII jurisprudence. Her contention and critique revolved around certain assumptions that Title VII cases make about human inference and judgment. The first erroneous assumption is that discriminatory motive or intent drives intergroup discrimination.²³² Currently, under Title VII, a disparate treatment plaintiff must prove that purposeful or intentional discrimination resulted in differential treatment.²³³ In the context of race, discrimination results from the decision-maker’s racial animus toward members of plaintiff’s racial group.²³⁴ Few Title VII cases acknowledge unconscious race bias,²³⁵ whereas cases have acknowledged the role of unconscious gender stereotyping.²³⁶ Krieger

229. Krieger, *supra* note 228, at 1188.

230. Krieger, *supra* note 228, at 1188.

231. *Id.*

232. *Id.* at 1166-67.

233. *See, e.g., St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (“[The plaintiff has] the ultimate burden of persuading the court that she has been the victim of intentional discrimination.”) (*quoting* *Tex. Dep’t of Cmty Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). *Accord* *EEOC v. Flasher Co.*, 986 F.2d 1312, 1314 (10th Cir. 1992) (holding that plaintiff had to prove termination of employment was the result of intentional discrimination based on plaintiff’s national origin); *Warren v. Halstead Indus., Inc.*, 802 F.2d 746, 752-53 (4th Cir. 1986) (holding discriminatory intent means actual motive and cannot be presumed based upon a factual showing of less than actual motive); *Smith v. Honeywell, Inc.*, 735 F.2d 1067, 1068-69 (8th Cir. 1984) (holding that an individual alleging disparate treatment has the burden of showing not only a difference in treatment, but that he is a victim of intentional discrimination), *cert. denied*, 469 U.S. 1077 (1984); *Smithers v. Bailar*, 629 F.2d 892, 898 (3d Cir. 1980) (holding disparate treatment plaintiff is required to prove not only disparate treatment, but that such disparate treatment was caused by purposeful or intentional discrimination).

234. *See* *EEOC v. Flasher Co.*, 986 F.2d 1312, 1321 (10th Cir. 1992) (“Merely finding that people have been treated differently stops short of the crucial question: why people have been treated differently.”); *Minority Police Officers Ass’n v. City of S. Bend*, 617 F. Supp. 1330, 1358 (N.D. Ind. 1985) (“Mere conclusory allegations of discrimination are clearly not sufficient to prove discriminatory intent.”); *Gomez v. Med. Coll.*, No. 92-5048, 1994 U.S. Dist. LEXIS 11274, *9 (E.D. Pa. 1994) (“A plaintiff may not prevail on a mere showing that the defendant’s proffered reasons are false, but must prove a discriminatory animus.”).

235. *But see* *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1236 (9th Cir. 1984) (holding that racial discrimination occurs where subjective employment criteria embody racially discriminatory attitudes, even where intent is not established), *cert. denied sub nom.* *Inland Marine Indus. v. Houston*, 469 U.S. 855 (1984).

236. *See, e.g., Sweeney v. Bd. of Treasurers of Keene State Coll.*, 604 F.2d 106, 113 n.12 (1st Cir. 1979) (affirming judgment for plaintiff in sex discrimination case because the district court could have reasonably concluded that the decision not to promote plaintiff was “determined by a subtle, if unexpressed, bias against women.”).

argues that there is a logical connection between implicit biases and intentional discrimination in three ways. First, stereotypes bias decision making through the conscious use of race and sex as a proxy for some other characteristic stereotypically associated with group membership.²³⁷ Second, evidence of stereotyping suggests discriminatory intent if stereotypes are understood as one's expectations about how members of a particular group should behave.²³⁸ Third, statements reflecting stereotyped views represent discriminatory animus, where discrimination is seen as resulting from prejudice where prejudice consists of "a cognitive component (stereotypes), an affective component (aversion or dislike), and a behavioral component (discrimination aimed at creating or enforcing social distance)."²³⁹

The second erroneous assumption is that unless employers harbor discriminatory intent or motive, they will be rational actors.²⁴⁰ As such, proving discriminatory intent in the employment context is a high hurdle to overcome.²⁴¹ Under the analytical framework established by *Texas Dep't of Community Affairs v. Burdine* and *McDonnell Douglas Corp. v. Green*, proof of disparate treatment is evinced in three steps. First, pretext analysis begins when the plaintiff presents a prima facie case of discrimination.²⁴² In response, the defendant has the burden of producing legitimate, nondiscriminatory reasons to justify the adverse employment action against the plaintiff.²⁴³ Second, the plaintiff can prevail only by proving that the defendant's proffered reason was not the "true reason" for the decision,²⁴⁴ but merely a "pretext for discrimination."²⁴⁵ According to Krieger's research:

[T]he most common method of proving pretext is to show that the employer's proffered reason is not worthy of credence either because it appears implausible in light of data upon

237. Krieger, *supra* note 228, at 1173. Cases in which plaintiffs have prevailed under this theory are more frequently seen in the age, vis-à-vis race, context. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) ("The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.").

238. *Id.*

239. *Id.* at 1174.

240. *Id.* at 1167.

241. *See Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) (indicating that "[p]roof of such discrimination is always difficult").

242. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981); *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

243. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802.

244. *Burdine*, 450 U.S. at 253.

245. *Hicks*, 509 U.S. at 515-516; *Burdine*, 450 U.S. at 254-56; *see also McDonnell Douglas*, 411 U.S. at 804.

which such an employment decision should have been based, or because it appears inconsistent with decisions reached in

similar cases involving employees outside of plaintiff's protected class.²⁴⁶

The third erroneous assumption is that disparate treatment jurisprudence accounts for the fact that race and sex categorization "may distort perception, memory, and recall for decision-relevant events such that, at the moment of decision, an employer may be entirely unaware of the effect of an employee's group membership on the decision-making process."²⁴⁷ In essence, according to Krieger, current disparate treatment jurisprudence wrongly construes how discriminatory motivation accounts for judgmental strategies that employers use in decision making. This occurs in three ways. First, it assumes that discrimination occurs when a decision maker refuses to consider an individual for a particular position.²⁴⁸ Further, it assumes that the decision arises out of antipathy for that individual's social group or because placing the individual in the position in question violates role expectations for members of the individual's social group.²⁴⁹ Second, disparate treatment jurisprudence assumes that stereotypes can cause discrimination when group status is consciously used as a "proxy" for some other job-relevant trait.²⁵⁰ Third, it assumes that discrimination occurs at the precise moment of the employer's decision making.²⁵¹

Another assumption of disparate treatment jurisprudence is that decision-makers possess adequate access to their own thoughts as to why they will make or have made certain decisions.²⁵² As such, it assumes that decision-makers are aware of the reasons they will make, or have made, employment decisions.²⁵³ With such knowledge, well intentioned decision-makers comply with Title VII.²⁵⁴ In contrast, decision-makers

246. Krieger, *supra* note 228, at 1179. Krieger goes on to provide examples: (1) Evidence that the objective data maintained by the defendant did not support the result reached by the decision-maker; (2) Evidence that the decision-maker seemed to undervalue or ignore facts favorable to the employee; (3) Evidence that the decision-maker made a judgment about the plaintiff without being able to point to specific events which would reasonably support such a judgment; or (4) Evidence showing that similarly situated Anglo employees were on occasion treated more favorably.

Id. at 1180.

247. Krieger, *supra* note 228, at 1167.

248. *Id.* at 1181-82.

249. *Id.*

250. *Id.* at 1182.

251. *Id.* at 1183.

252. *Id.* at 1167.

253. *Id.* at 1185.

254. *Id.*

with bad intentions know when they are taking an employee's group status into account; when challenged, they design "pretexts" to cover their tracks.²⁵⁵

Though it may not be routine for courts to analyze employment discrimination through an unconscious bias lens, such analysis is not new. Courts have refused to grant defendant-employers summary judgment in Title VII cases given employers' "hidden or unconscious [discriminatory] motives."²⁵⁶ In fact, *Shaw v. Cassar* highlighted that:

Overt and blatant discrimination is a relatively rare phenomenon. . . . It is intentional discrimination in its covert hidden form that now poses the real problem. Evidence of illicit intent may be extremely difficult to obtain, whether the responsible individuals are conscious of their bias, and therefore likely to try to hide it, or whether they are expressing unconscious bias through some discretionary decision-making process.²⁵⁷

Courts have similarly found that unconscious race bias²⁵⁸ and gender stereotyping²⁵⁹ may be implicated under Title VII. Parks and Rachlinski's research suggests that unconscious race bias, and to some degree gender stereotyping, were pervasive in the 2008 presidential campaign.²⁶⁰ And such biases are analogously manifested under Title VII case law.²⁶¹

D. UNCONSCIOUS VOTER BIAS AND EVALUATION OF MICHELLE OBAMA

Given espoused societal norms of fairness and egalitarianism in the United States, explicit racism and sexism are not likely to underlie most citizens' attitudes about Mrs. Obama. Implicit bias research findings, however, suggest that voters' negative attitudes about her likely arise from

255. *Id.* at 1185.

256. *Oxman v. WLS-TV*, 609 F. Supp. 1384, 1387 (N.D. Ill. 1985).

257. *Shaw v. Cassar*, 558 F. Supp. 303, 316 (E.D. Mich. 1983) (quoting Elizabeth Bartholet, *Proof of Discriminatory Intent under Title VII: U.S. Postal Serv. Bd. of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1203 (1982)).

258. *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 931-32 (7th Cir. 1993) (holding that an employer's failure to adhere to its own set of rules invites "subjective determinations likely to reflect unconscious racial bias. . .").

259. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) (holding that gender stereotyping includes "subtle cognitive phenomena which can skew perceptions and judgments").

260. Parks & Rachlinski, *supra* note 2, at 46.

261. *Id.* at note 2, at 41-44; *See, e.g., EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1236 (holding that racial discrimination occurs where subjective employment criteria embody racially discriminatory attitudes, even where intent is not established); *See, e.g., Sweeney v. Bd. of Tr. of Keene State College*, 604 F.2d 106, 113 (sex discrimination case affirming judgment for plaintiff because the district court reasonably concluded that the decision not to promote plaintiff was "determined by a subtle, if unexpressed, bias against women").

unconscious attitudes about race and gender. Such unconscious bias is evident in two ways. First, critiques of Michelle Obama provide a glimpse into voters' attitudes toward her. Second, exit polls from the Democratic primaries, coupled with voting behavior for Senator Clinton or Senator Obama, provide additional indicia of such biases.

Critiques of Mrs. Obama on blogs and in website news story comments, for example, arguably do not reflect a systematic sampling of likely voters' attitudes about her. As a result, they are simply stray remarks, which provide little useful insight into the pervasiveness of any racially or gender-biased attitudes. In employment discrimination cases where plaintiffs produce evidence of comments made by a non-decision-maker or a decision-maker unrelated to the employment action to demonstrate pretext, courts dismiss such "stray remarks."²⁶² Some circuits, however, reject the "stray remarks" doctrine.²⁶³ Further, in *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court suggested that even where stray remarks are not made in the context of the employment decision, they are still probative in assessing discriminatory animus.²⁶⁴ Thus, stray remarks should be probative, particularly in light of people's implicit biases.²⁶⁵ In the context of elections, voters actually serve as decision-makers and the decisions they make (i.e., through voting) are ultimately related to the critique that their decisions are race-based, gender-based, or both. As such, with regards to the 2008 election primary, comments by voters fall outside of the stray remarks paradigm.

Here, in describing her physical features, one commentator on the *Huffington Post* indicated that Mrs. Obama was reminiscent of Zira — one of the characters on *Planet of the Apes*.²⁶⁶ This comment, if not a blatantly racial attack, which it did not seem to be, is explainable by Goff and colleagues' research on Whites' unconscious association of Blacks with apes.²⁶⁷ The use of the ape image in depicting Blacks has been held to be probative in employment discrimination cases.²⁶⁸

262. *McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals*, 140 F.3d 288, 300-01 (1st Cir. 1998).

263. *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 770-71 (7th Cir. 2006); *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 922-23 (8th Cir. 2000); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-29 (5th Cir. 2000).

264. *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 152-53 (2000).

265. Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 96-99 (2008).

266. Posting of mcnairbo to *Michelle Obama Predicts Ohio Victory*, HUFFINGTON POST, Feb. 15, 2008 http://www.huffingtonpost.com/2008/02/15/michelle-obama-predicts-o_n_86896.html. (Feb. 15, 2008, 15:16 EDT).

267. See *supra* notes 140-142 and 181-188 and accompanying text.

268. See *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911-12 (8th Cir. 2006) (plaintiff was called a "monkey"); *Webb v. Worldwide Flight Serv., Inc.*, 407 F.3d 1192, 1193 (11th Cir. 2005) (plaintiff was called a "monkey"); *White v. BFI Waste Servs. LLC*, 375 F.3d 288, 298 (4th Cir. 2004) (noting that "[t]o suggest that a human being's physical appearance

Whites' unconscious attitudes about Mrs. Obama, however, likely go beyond her physical appearance to her philosophical leanings. For example, the fact that she is a Black person may be less of an issue for some White voters than the fact that she has a strong racial identity. Preference for greater approximation to the majority, phenotypically speaking, happens even at the unconscious level.²⁶⁹ Analogously, it may also be the case with regards to ideology.²⁷⁰ In the employment context, defendants have been held to have discriminated against Black employees for being deemed "too ethnic" or "pro-Black."²⁷¹

Regarding gender there may also be an unconscious underpinning to voters' conscious expectations about what roles their First Lady can and should assume.²⁷² For example, voters may have an unconscious expectation that Mrs. Obama fit within a certain gendered paradigm, philosophically. Being an opinionated Ivy League graduate and lawyer may not fit these expectations. Though *Price Waterhouse v. Hopkins* did not speak in terms of unconscious gender stereotyping, it was clear that the plaintiff in that case walked a tightrope, having to be masculine enough to compete in a male-dominated environment for a promotion on the one hand and not be too masculine on the other hand.²⁷³

Additionally, even where critiques of Mrs. Obama have been more substantive — e.g., questions about her patriotism — these criticisms, too, fall within the implicit bias paradigm about race and Americanness.²⁷⁴ Under Title VII, courts have held that excluding employees beyond the bounds of patriotism, but based on race, establishes a prima facie case for employment discrimination.²⁷⁵

Finally, Democratic primary exit polling data also suggest that implicit biases (primarily race and gender) influence voters' decisions.²⁷⁶ Political

is essentially a caricature of a jungle beast goes far beyond the unflattering; it is degrading and humiliating in the extreme); *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909 (8th Cir. 2003) (plaintiff was threatened with drawings of an ape accompanied by the phrase "all niggers must die"); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001) (plaintiff was called a "monkey"); *Jeffries v. Metro-Mark, Inc.*, 45 F.3d 258, 260 (8th Cir. 1995) (plaintiff was called a "monkey"); *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906, 910 (7th Cir. 1991) (plaintiffs were called "porch monkeys" and "baboons"). The use of primates as a racial slur was used to intimidate Blacks in other contexts. *Morgan v. McDonough*, 540 F.2d 527, 531 (1st Cir. 1976) (in a school desegregation case, White students harassed Black students by chanting "assassinate the nigger apes").

269. Lane, *supra* note 166, at 62.

270. See *supra* notes 143 to 144 and accompanying text.

271. *Gordon v. JKP Enter. Inc.*, No. 01-20420, 2002 WL 753496, at *1, *8 (5th Cir. April 9, 2002).

272. See *supra* notes 129 to 136 and accompanying text.

273. See *supra* notes 43 to 55 and accompanying text.

274. See *supra* notes 172 to 180 and accompanying text.

275. *Zayed v. Apple Computers*, No. 04-01787, 2006 WL 889571, at *1, *10 (N.D. Cal. Apr. 5, 2006).

276. See app., tbls.1-2.

conservatism is associated with unconscious in-group bias.²⁷⁷ This is particularly true of race and is disambiguated from mere conservative ideology.²⁷⁸ This should be no surprise given that “[o]ne major criterion continually reappears in distinguishing left from right: attitudes toward equality. The left favors greater equality, while the right inevitably sees society as hierarchical.”²⁷⁹ Nonetheless, liberalism and conservatism should not be viewed as dichotomous categories, but rather should be viewed on a continuum. In this way, there are relative conservatives on the Left and relative liberals on the Right — those slightly left or right of center. Thus, across the political spectrum, individuals may harbor racial or gender biases. For example, despite the fact that Liberals explicitly report greater racial egalitarianism than Conservatives,²⁸⁰ at the implicit level, they both have high levels of subconscious anti-Black bias — 61.1 percent for Liberals and 73.6 percent for Conservatives.²⁸¹ To gauge political conservatism among Democratic primary voters, we used proxies. Age, education, and socio-economic status have long predicted political orientation, with those who are older,²⁸² less educated,²⁸³ and poorer²⁸⁴ being more politically conservative. As illustrated in Table 1, those who voted for Senator Clinton over Senator Obama tended to be older, poorer, and less educated than Senator Obama’s supporters. This does not suggest that gender and race were not simultaneously driving forces in how Democrats cast their ballots. As previously noted, despite the fact that racism and sexism are opposite sides of the same coin, when analyzed simultaneously, race tends to be more of a driving force.²⁸⁵

IV. THIRD-PARTY STANDING AND VOTER/EMPLOYMENT DISCRIMINATION

No empirical research has been conducted on the role of candidates’ third-party associations and individuals’ attitudes and voting behavior

277. Cf. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 958 (2006).

278. Inna Burdein, *Principled Conservatives or Covert Racists: Disentangling Racism and Ideology Through Implicit Measures*, (May 2007) (unpublished Ph.D. dissertation, State Univ. of New York, Stony Brook) (on file with *Hastings Women’s Law Journal*), available at <http://dspace.sunyconnect.suny.edu/bitstream/1951/43111/1/100402180.sbu.pdf>.

279. ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 40 (1998).

280. Greenwald & Krieger, *supra* note 277.

281. *Id.*

282. Francis D. Glamser, *The Importance of Age to Conservative Opinions: A Multivariate Analysis*, 29 J. GERONTOLOGY 549, 551 (1974).

283. *Id.*; Jaime L. Napier & John T. Jost, *The “Antidemocratic Personality” Revisited: A Cross-National Investigation of Working-Class Authoritarianism*, 64 J. SOC. ISSUES 595, 612 (2008).

284. *Id.* at 612.

285. Timberlake & Estes, *supra* note 106.

towards those candidates. However, it stands to reason that negative depictions of (potential) First Ladies reflect not only upon them but upon their spouses as well. As commentators expressly noted in discussing Michelle Obama, “in modern politics, the marriage partnership is integral to the quest for the presidency, as voters evaluate a candidate in light of the relationship with his or her spouse.”²⁸⁶ As such, in this section we seek to shed light on this position by exploring the treatment of associative discrimination under Title VII law.

A. THIRD-PARTY ASSOCIATIVE DISCRIMINATION

In *McDonnell Douglas Corp. v. Green*, the Supreme Court delineated the requirements for a prima facie case of discrimination under Title VII.²⁸⁷ This standard, requiring that the plaintiff be a member of a protected class, is not uniformly easy to plead, especially when the plaintiff’s claim of discrimination is associative.²⁸⁸ Third-party associative discrimination is discrimination against individuals due to their relationship with Title VII protected class members. This type of discrimination claim is difficult to make, because the plaintiff is not necessarily a member of a protected class.²⁸⁹ Strictly construed, none of the Title VII categories are broad enough to protect discrimination against third-party actors.²⁹⁰ In fact, the statutory language seems to limit claims under Title VII to instances that arise “because of such individual’s race, color, religion, sex, or national origin.”²⁹¹

Early cases dealing with third-party associative discrimination under Title VII held that plaintiffs lacked standing. In 1973 an Alabama district court held in *Ripp v. Dobbs House, Inc.* that a White man who was terminated from his job due to his association with Black co-workers lacked standing.²⁹² The court indicated that the plaintiff was “not a ‘person aggrieved’ within the contemplation of the Act.”²⁹³ In 1981, the Northern District of Georgia decided in *Adams v. Governor’s Committee on Postsecondary Education* that the White plaintiff, who alleged employment discrimination for having a Black

286. Christi Parsons, Bruce Japsen & Bob Sexter, *Barack’s Rock*, CHI. TRIB., Apr. 22, 2007, at 1.

287. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The court held that: The elements comprising a plaintiff’s prima facie case were initially defined as (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

288. Mark W. Honeycutt, II & Van D. Turner, Jr., *Third-party Associative Discrimination Under Title VII*, 68 TENN. L. REV. 913 (2001).

289. *Id.*

290. *Id.* at 915.

291. 42 U.S.C. § 2000e-2(a) (2000).

292. *Ripp v. Dobbs House, Inc.*, 366 F. Supp. 205, 209 (N.D. Ala. 1973).

293. *Id.*

wife, lacked standing.²⁹⁴ The court relied on the rationale propounded in *Ripp*.²⁹⁵ Two years later, in *Parr v. United Family Life Insurance Co.*, the Northern District of Georgia affirmed its decision in *Adams* when it refused to allow a White plaintiff to state a cause of action under Title VII, based on the fact that he was married to a Black woman.²⁹⁶

One of the first cases to sustain a cause of action for third-party associative discrimination was the 1975 case of *Whitney v. Greater New York Corp. of Seventh-Day Adventists*.²⁹⁷ In *Whitney*, a White plaintiff sued her employer after she was allegedly fired for having a social relationship with a Black man.²⁹⁸ Rejecting the *Ripp* analysis, the Southern District of New York held that "the plaintiff's race was as much a factor in the decision to fire her as that of her friend."²⁹⁹ In addition to other district courts,³⁰⁰ various circuit courts have also affirmed third-party associative standing. In 1998, the Fifth Circuit, in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, held that Title VII prohibits employment discrimination based on interracial relationships.³⁰¹ In *Deffenbaugh-Williams*, the plaintiff was a White female manager discriminated against because of her relationship with a Black male sales associate.³⁰² A year later in *Tetro v. Elliott Popham Pontiac, Inc.*, Tetro (a White male employee) indicated that he began to be treated differently by his employer once his employer noticed

294. *Adams v. Governor's Comm. On Postsecondary Educ., et al.*, No. 80-624A, 1981 WL 27101, at *1, *3 (N.D. Ga. Sept. 3, 1981).

295. *Adams*, No. 80-624A, 1981 WL 27101, at *1, *3

296. *Parr v. United Family Life Ins. Co.*, No. 83-26-6, 1983 WL 1774, at *1, *2 (N.D. Ga. June 15, 1983).

297. *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975).

298. *Id.* at 1365.

299. *Id.* at 1367.

300. See *Rosenblatt v. Bivona & Cohen*, 969 F. Supp. 207 (S.D.N.Y. 1997) (determining that White male plaintiff, who believed he was discriminated against because he had a Black wife and bi-racial child, had third-party standing based on racial discrimination under Title VII); *Schutt v. County of Napa*, No. C-94 2115 SC, 1995 WL 494588, at *1 (N.D. Cal. Aug. 15, 1995) (determining that White female plaintiff, who believed she was discriminated against for becoming pregnant by a Black co-worker, had third-party standing based on racial discrimination under Title VII); *Probst v. Reno*, No. 94-C-691, 1995 WL 613129, at *1 (N.D. Ill. Oct. 17, 1995) (holding for a White male plaintiff, who believed she was discriminated against for being romantically involved with a Black male co-worker); *Erwin v. Mister Omlet of Am., Inc.*, No. C-89-529-WS, 1991 WL 32248, at *1-*3 (M.D.N.C. Jan. 15, 1991) (determining that White female plaintiff, who believed she was discriminated against for being romantically involved with a Black co-worker, had third-party standing based on racial discrimination under Title VII); *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (holding for a White female plaintiff, who believed she was discriminated against because she had a Black husband); *Holiday v. Belle's Restaurant*, 409 F. Supp. 904, 905, 908-09 (W.D. Pa. 1976) (determining that White female plaintiff, who believed she was discriminated against for being married to a Black man, had third-party standing based on racial discrimination under Title VII).

301. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998).

302. *Id.* at 585.

that Tetro had a bi-racial daughter.³⁰³ The Sixth Circuit held that Tetro's discharge was within the scope of Title VII.³⁰⁴ In 1996, the Tenth Circuit, in *Zeigler v. K-mart Corp.*, held for the plaintiff, a Black woman, who married a White male employee and had a child by him.³⁰⁵ Under Title VII and the Pregnancy Discrimination Act, the court found that K-Mart discriminated against the plaintiff based upon her interracial marriage and ensuing pregnancy.³⁰⁶ When *Parr v. Woodmen of the World Life Insurance Co.* reached the appellate level, Parr (a White man) sued under Title VII, asserting that he was fired because he was married to a Black woman.³⁰⁷ The Eleventh Circuit expressly repudiated *Ripp* and held for the plaintiff.³⁰⁸

B. WHAT THIS MEANT FOR SENATOR OBAMA'S CANDIDACY

Although associative discrimination has not received specific attention in social science literature, the findings of social identity theory highlight categorization processes that motivate intergroup attitudes and behavior.³⁰⁹ Because individuals are assumed to have a desire to maintain a high level of self-esteem,³¹⁰ the theory suggests that people engage in social comparisons with others to seek a positively valued distinctiveness for the social categories to which they belong as compared to other categories.³¹¹ As individuals define themselves in terms of specific group memberships, they come to view and evaluate themselves based on the prototypical characteristics of the group.³¹² By engaging in social comparisons, people differentiate between their in-groups and relevant out-groups and are able to evaluate their social identities.³¹³ Beyond such differentiation, social identity research also demonstrates that people tend to hold differential expectancies about the behavior of in-group and out-group members. In particular, they expect in-group members to display more desirable, and

303. *Tetro v. Elliott Popham Pontiac, Inc.*, 173 F.3d 988, 990 (6th Cir. 1999).

304. *Tetro*, 173 F.3d at 995

305. *Zeigler v. K-Mart Corp.*, No. 95-3019, 1996 WL 8021, at *4-*6 (10th Cir. Jan. 10, 1996).

306. *Zeigler*, 1996 WL 8021, at *4-*6.

307. *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 889 (11th Cir. 1986).

308. *Parr*, 791 F.2d at 891-92.

309. JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY 42-67 (1987).

310. John C. Turner, *Social Categorization and the Self-concept: A Social Cognitive Theory of Group Behavior*, in 2 ADVANCES IN GROUP PROCESSES 77-121 (Edward J. Lawler ed., 1985).

311. *Id.*

312. See generally SOCIAL IDENTITY AND INTERGROUP RELATIONS (Henri Tajfel ed., 1982).

313. Henri Tajfel & John C. Turner, *An Integrative Theory of Intergroup Conflict*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33-47 (William G. Austin & Stephen Worchel eds., 1979).

fewer undesirable, behaviors than out-group members.³¹⁴ Furthermore, they are more likely to infer negative dispositions from undesirable out-group behaviors than from undesirable in-group behaviors and are less likely to infer positive dispositions from desirable out-group behaviors than from desirable in-group behaviors.³¹⁵

Such associative discrimination has been observed within political contexts. For example, during Jesse Jackson's 1984 presidential run, there was tremendous pressure on him to reject and denounce a person who ultimately became a litmus test for many Black leaders — Minister Louis Farrakhan.³¹⁶ Similarly, during the current campaign, Senator Obama had to “reject and denounce” Minister Farrakhan simply because Minister Farrakhan made some positive remarks about Senator Obama.³¹⁷ Senator Obama has also received considerable criticism for his association with his former pastor, Reverend Jeremiah Wright, whom some Whites perceive to be racist and unpatriotic.³¹⁸

In light of these occurrences, Michelle Obama may have brought a considerable amount of baggage to her husband's campaign. Given implicit attitudes based on gender and/or race, voters may hold negative perceptions of Mrs. Obama. However, ultimately, the person who bore the burden of these voters' concerns was Senator Obama, as voters' attitudes about Michelle Obama may indirectly have affected their decision to support Senator Obama's candidacy. Optimistically, the findings of research exploring the reputations of women who were associated with United States Presidents suggest that this might not be the case.³¹⁹ According to Simonton's study, the direct association between Presidents' and First Ladies' reputations can be described as a “reflected-glory effect,” as the President's reputation was found to contribute to the First Lady's reputation although there was no reciprocal effect.³²⁰ Because the study's sample only included First Ladies up to Nancy Reagan, however, we have little insight into the effects of gender roles and attitudes post-1989 on the

314. John W. Howard, & Myron Rothbart, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. OF PERSONALITY AND SOC. PSYCHOL., 301, 302, 308 (1980).

315. Miles Hewstone & Joseph Jaspars, *Social Dimensions of Attribution*, in 2 THE SOCIAL DIMENSION: EUR. DEVELOPMENTS IN SOCIAL PSYCHOLOGY 379-404 (Henri Tajfel ed., 1984).

316. See, e.g., Eric Pianin, *Jackson Declines to Denounce Farrakhan, Despite Statements*, WASH. POST, July 2, 1984, at A5.

317. Charles Hurt, *Presidential Obama The Winner of Key Debate*, N.Y. POST, Feb. 27, 2008, at 5.

318. Erin Aubry Kaplan, *Black and Mad: The Controversy Over Obama's Pastor Reflects White Fear of African-American Anger*, BALT. SUN, Mar. 20, 2008, at A13.

319. See generally D. K. Simonton, *President's Wives and First Ladies: On Achieving Eminence within a Traditional Gender Role*, 35 SEX ROLES 309, 330-32 (1996).

320. *Id.* at 330.

study's findings.³²¹ Further, the influence of race might represent an important boundary condition to the study's findings. Thus, voters' perceptions of Michelle Obama, and the subsequent influence on Barack Obama's candidacy, have important implications for understanding the associative discrimination phenomenon.

V. CONCLUSION

Americans have made remarkable gains with regard to race and gender issues. However, even as late as 2008, the reality of color and gender equality and blindness is still illusive. Moreover, despite the fact that the forty-fourth President of the United States will be a Black person and despite Senator Clinton's historic run, the candidacies of Senators Obama and Clinton highlight the realities of implicit bias in politics. This implicit bias, though, is not bound by the four corners of presidential campaigning. An appropriate corollary is the employment sphere given the analogous decision-making processes in both. Just as courts and commentators have begun to think about the role of the intersection of race and gender, implicit bias, and third-party associative discrimination in Title VII cases, it seems fitting that all three should be applicable to the 2008 presidential race with Michelle Obama being the point of analysis.

This is where we are. A more forward looking approach, in light of Michelle Obama, raises the question of how the inclusion of groups in spheres where they have typically been excluded is beneficial to society. Michelle Obama's presence during Senator Obama's run for the White House and her future role as First Lady has and will go a long way towards undermining stereotypes about Black women. For centuries, Black women have been subject to any number of stereotypical images. Under the mammy image, Black women have been stereotyped as loyal domestic servants to Whites who cared for White families more than their own.³²² Under the sexual siren image, Black women have been portrayed as sexually aggressive, uncaring whores concerned with nothing but their own sexual satisfaction.³²³ Under the welfare mother or queen image, Black women have been seen as nothing more than "breeding animals who have no desire to work, but are content to live off the state"³²⁴ Under the matriarch image, they have been stereotyped as mother within the Black home — "a controlling, emasculating Black woman who dictated to both

321. *Id.* at 313. This is significant because, quite possibly, the most controversial First Lady was Senator Hillary Clinton and the most controversial potential First Lady was Theresa Heinz-Kerry. And both of these women emerged on the national scene after Nancy Reagan.

322. Jennifer Bailey Woodard & Teresa Mastin, *Black Womanhood: Essence and its Treatment of Stereotypical Images of Black Women*, 36 J. BLACK STUDIES 264, 271 (2005).

323. *Id.* at 272.

324. *Id.* at 273.

her children and her man their place in the home.”³²⁵ A variant of the latter, the angry Black woman, is “achievement-oriented, kind of nonsense, overworked, exhausted, not particularly kind or compassionate,

but very driven.”³²⁶ Historically, positive public images of Black women have helped to undermine these stereotypes.³²⁷

Within the workplace, as well as other domains, efforts to embrace and encourage diversity are meant to overcome the thumb on the scale that implicit biases place against women and minorities in the present.³²⁸ Hiring or promoting people to prominent positions that are contrary to their stereotypes can force people to confront their implicit biases.³²⁹ Voters in the Democratic primaries and caucuses at least had to confront the prospect of voting for a woman or Black man, which is something they never have had to seriously face in years past. The same was true in the general election. Making the choice might have inspired voters who harbor implicit biases to become aware of these biases and make efforts to reduce them, or at least eliminate their influence on judgment. This may be particularly so where the First Lady is a Black woman.

Current models of prejudice and stereotype reduction support the view that the 2008 election and its result will reduce the effect of implicit biases overall. This work reveals that what helps people avoid the influence of implicit biases are: 1) awareness of their bias;³³⁰ 2) motivation to change their responses because of personal values, feelings of guilt, compunction, or self-insight;³³¹ and 3) possession of the cognitive resources necessary to develop and practice correction.³³² Regardless of the outcome, the 2008 election may have facilitated all of these factors. Exposing people to examples that run counter to stereotypes reduces the level of implicit

325. *Id.* at 271.

326. Vanessa E. Jones, *The Angry Black Woman: Tart-tongued or Driven and Nonsense, She is a Stereotype that Amuses Some and Offends Others*, BOSTON GLOBE, April 20, 2008, at F1.

327. Stevina U. Evuleocha & Steve D. Ugbah, *Stereotypes, Counter-Stereotypes, and Black Television Images in the 1990s*, 13 W. J. BLACK STUDIES 197 (1989).

328. Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1067-81 (2006).

329. Jerry Kang, Professor, UCLA School of Law, *Behavioral Realism: Future History of Implicit Bias and the Law*, (November 2006), available at <http://jerrykang.net/Engage>.

330. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 157-58 (2004).

331. *Id.*

332. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803-05 (2001); Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1145-1148 (1996).

invidious bias.³³³ For example, showing people images of esteemed Blacks reduces the anti-Black bias on the IAT.³³⁴ Much the same is true gender.³³⁵ Indeed, simply imagining people that are contrary to invidious implicit stereotypes reduces the bias.³³⁶ In light of this research, a prospective look at Michelle Obama's roles as First Lady suggests that it will work to undermine both non-Black and Black peoples' stereotypes of Black women.

333. Dasgupta & Greenwald, *supra* note 332, at 806.

334. *Id.*

335. Social environments can undermine automatic gender stereotypic beliefs expressed by women. Results revealed that when women are in social contexts that expose them to female leaders, they are less likely to express automatic stereotypic beliefs about their in-group. They also found that the frequency of exposure to women leaders (i.e., female faculty) mediates the long-term effect of social environments (women's college versus coed college) on automatic gender stereotyping. Additionally, some academic environments (e.g., classes in male-dominated disciplines like science and math) produce an increase in automatic stereotypic beliefs among students at the coed college but not at the women's college. This effect was mediated by the sex of the course instructors. See Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 647-48, 650-53 (2004).

336. See Irene v. Blair, et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 830-36 (2001).

Appendix³³⁷

Table 1. Democratic Primaries/Caucuses

Primary/ Caucus	Race		Sex		Age		Family Income		Education		Winner	
	B	L or A†	W	M	F	18 - 24	65+	<50K	>100K	Low		High
IA Caucus	16/72		27/33	23/35	30/35	11/57	45/18	32/34	19/41			O
NH Primary			39/36	29/40	46/34	22/60	48/32	47/32	36/41	61/25	31/43	C
NV Caucus	14/83		52/34	43/45	51/38	33/59	60/31	50/38	49/39			C
SC Primary‡	19/78		36/24	23/54	30/54	23/67	35/38	28/57	30/46	37/49	26/47	O
AL Primary‡	15/84		72/25	41/57	41/56	32/64	56/42	41/56	41/56	51/46	36/62	O
AZ Primary	12/79		53/38	43/48	53/40	23/67	35/38	51/44	48/44	62/35	42/50	C
AR Primary	25/74		79/16	65/31	73/23	56/43	79/16	70/27	67/31	78/21	69/25	C
CA Primary	18/78		46/45	45/48	59/36	49/49	54/34	59/35	45/52	80/17	45/51	C
CT Primary	24/74		43/53	49/48	53/45	39/58	48/50	50/44	44/55	55/41	41/58	O
DE Primary	9/86		56/40	38/58	45/51	28/66	55/40	47/49	36/62	51/44	32/66	O
GA Primary‡	11/88		53/43	27/70	33/65	20/77	46/53	33/66	30/67	36/61	33/65	O
IL Primary	5/93		49/50	41/57	29/67	29/69	44/53	34/64	29/70	34/66	34/66	O
MA Primary	29/66		56/36	58/40	62/36	49/48	63/35	60/36	54/44	67/26	47/51	C
MO Primary	15/84		57/39	47/49	48/49	30/65	61/36	46/51	34/65	55/42	32/67	O
NJ Primary	14/82		66/31	48/49	58/39	39/59	63/35	58/40	54/44	66/31	49/48	C
NM Primary			62/36	43/55	52/46	42/55	52/45	55/42	40/56	66/32	38/60	C
NY Primary	37/61		73/26	59/37	62/36	43/56	62/36	60/38	58/39	69/28	54/43	C
OK Primary			56/29	55/33	54/30	46/36	64/23	69/23	37/45	60/18	36/62	C
TN Primary	22/77		67/26	47/44	58/38	44/53	65/26	55/39	45/51	64/28	50/46	C
UT Primary			40/55	28/65	48/50	25/70	53/42	39/50	36/64	43/45	35/65	O
LA Primary‡	13/86		58/30	33/54	38/58	30/66	48/41	35/57	35/56	47/42	33/61	O
MD Primary‡	15/84		52/42	33/62	41/55	33/64	48/47	36/60	42/55	35/58	44/52	O
VA Primary‡	10/90		47/52	30/68	39/60	24/76	44/56	36/62	32/68	37/62	35/64	O
WI Primary	8/91		45/54	31/67	50/50	26/73	58/41	44/54	38/62	47/51	36/61	O
OH Primary	13/87		64/34	50/48	57/41	35/61	69/28	56/42	50/50	65/33	42/53	C
RI Primary			63/37	51/49	66/33	47/53	67/33	59/39	54/46	69/30	58/42	C

³³⁷ MSNBC.com, 2008 Primary Results: Exit Polls,

Primary/ Caucus	Race			Sex		Age		Family Income		Education		Winner
	B	L or A [†]	W	M	F	18 - 24	65+	<50K	>100K	Low	High	
TX Primary	16/84	66/32	55/44	47/51	54/45	40/59	62/35	52/47	43/56	71/29	46/54	C
VT Primary			38/60	35/64	42/56	31/64	41/58	36/60	34/65	53/47	33/65	O
MS Primary [‡]	15/84		57/39	47/49	48/49	30/65	61/36	31/66	51/49	39/61	38/62	O
PA Primary	10/90		63/37	59/41	40/60	62/38	47/53	54/46	54/46	64/36	53/47	C
IN Primary	11/89		60/40	52/48	39/61	65/35	39/61	50/50	52/48	54/46	44/56	C
NC Primary [‡]	7/91		61/37	43/55	25/74	53/44	30/69	37/60	42/56	37/60	41/59	O
WV Primary			69/23	73/22	59/35	71/24	72/23	71/23	58/35	67/22	55/40	C
KY Primary	7/90		72/23	67/29	54/41	78/18	63/36	67/29	66/30	72/24	56/39	C
OR Primary			42/57	48/52	29/71	45/54	31/69	45/54	33/66	53/46	34/66	O
MT Primary	11/89		41/56	47/50	25/74	52/45	35/64	42/54	39/59	48/49	35/63	O
SD Primary			56/44	57/43	33/67	66/34	52/48	58/42	50/50	57/43	47/53	C
Totals	0/28	9/3	28/9	11/26	17/19	10/26	25/12	19/17	11/25	25/10	8/27	

Within each category, numbers indicate percentage points won by Clinton/Obama

Race: B = Black; A = Asian; L = Latino(a); W = White

Sex: M = Male; F = Female

Age: 18-24 = youngest age group; 65+ = oldest age group

Education: Low = lowest index of education (high school graduate); High = highest index of education (postgraduate study)

Winner: O = Obama; C = Clinton

Primary/Caucus: † = Black population of 30% or more

(SC = 55, AL = 51, GA = 51, LA = 48, MD = 37, VA = 30, MS = 50, NC = 34)

Table 2. Express Gender and Race Influence in the 2008 Democratic Primary³³⁸

Primary/ Caucus	Gender Influence		Race Influence		Winner
	Yes	No	Yes	No	
AL Primary‡	35/62	45/53	41/56	42/56	O
AZ Primary	56/40	48/43	62/32	46/46	C
AR Primary	71/23	69/28	35/62	69/28	C
CA Primary*	61/38	51/42	70/27	47/47	C
CT Primary	41/56	47/50	68/29	41/57	O
DE Primary	28/59	45/52	47/41	41/56	O
GA Primary‡	24/72	34/65	42/54	29/69	O
IL Primary	27/72	36/62	42/56	31/67	O
MA Primary	51/44	57/41	76/19	51/47	C
MO Primary	46/50	43/54	53/43	42/55	O
NJ Primary	47/49	55/42	72/25	49/48	C
NM Primary	59/40	46/51	84/15	39/58	C
NY Primary	56/42	58/39	81/19	50/46	C
OK Primary	64/19	51/36	56/24	54/34	C
TN Primary	52/42	54/41	59/33	53/43	C
UT Primary	-/-	39/58	69/28	35/61	O
LA Primary‡	38/53	36/57	39/54	36/57	O
OH Primary	59/39	53/45	60/40	53/45	C
TX Primary	52/47	51/48	60/40	48/50	C
VT Primary	42/58	38/60	37/33	32/66	O
MS Primary‡	36/62	39/58	29/69	42/56	O
PA Primary	59/41	54/46	72/28	50/50	C
IN Primary	53/47	51/49	59/41	50/50	C
NC Primary‡	35/64	44/54	43/54	42/56	O
WV Primary	82/12	62/30	75/19	65/27	C
KY Primary	81/16	61/35	79/19	63/33	C
OR Primary	47/53	40/59	55/44	38/61	O
MT Primary	50/47	40/58	65/33	37/60	O
SD Primary	60/40	54/46	67/33	52/48	C

³³⁸ Voters were asked, "In deciding your vote for president today, was the race of the candidate [important]?" *Supra* note 337. Voters were also asked, "In deciding your vote for president today, was the gender of the candidate [important]?" *Supra* note 337.