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MICHELLE OBAMA
THE “DARKER SIDE” OF PRESIDENTIAL SPOUSAL INVOLVEMENT AND ACTIVISM
Quinetta M. Roberson^α & Gregory S. Parks^φ

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

INTRODUCTION

The 2008 presidential campaign is historic given the presence of a Black (Barack Obama) candidate and a woman (Hillary Clinton) candidate. 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 prospects of having the first 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 Recently, commentators have analogized the 2008 presidential election campaign to a hiring decision in the employment context.³ Underlying this analogy is 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.

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¹ Joan Vennochi, *A Delicate Line for Michelle Obama*, B. GLOBE, March 2, 2008, at 9D (quoting Ted Koppel's reference to First Lady Hillary Clinton).

² See generally Gregory S. Parks & Jeffrey J. Rachlinski, *Unconscious Bias and the 2008 Election* (under review).

³ See *id.*

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);

If voters harbor race and gender stereotypes and biases about Senator Obama and did about Senator Clinton, respectively, it is reasonable to believe that both types of preconceptions may influence voters' perceptions about Mrs. Obama. Some researchers have proposed models that suggest the role of First Ladies. Lang offered a model of status based upon a woman's relationship with her spouse.⁷ 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; and 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, which pertains specifically to first ladies and categorizes them on a continuum from non-partners to full partners based on her relationship with her spouse.⁹ He argues that because of their professionalization, integration into the political agenda, and activism, only Eleanor Roosevelt, Rosalyn Carter, and Hillary Clinton have achieved full partnership.¹⁰ While such spousal roles have earned these First Ladies 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.

DeGraffenreid v. Gen. Motors Assembly Div., 558 F.2d 480 (8th Cir. 1977); Jenkins v. Blue Cross Mutual Hosp. Ins., Inc., 538 F.2d 164 (7th Cir. 1976); Rogers v. American 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. May 26, 1981); Paulette M. Caldwell, *A Hairpiece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991).

⁵ See *infra* note 95 to 198 and accompanying text.

⁶ See *infra* notes 206 to 227 and accompanying text.

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

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

¹⁰ *Id.*

¹¹ G. D. Weckin. (2000). *Role Constraints and First Ladies*. SOC. SCI. J., 37(4), 601-10.; G. Troy. (2000). *Mr. & Mrs. President? The Rise and Fall of the Co-Presidency*. SOC. SCI. J., 37(4), 591-600.

Michelle Obama, wife of presidential candidate 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, in discussing 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 sees 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 has not been 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 kids.¹⁷ She also wrote her senior sociology thesis on “Princeton-Educated Blacks and the Black Community.”¹⁸ In it she wrote that Princeton “made me far more aware of my

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

¹³ Joan Vennochi, *A Delicate Line for Michelle Obama*, B. GLOBE, March 2, 2008, at 9D; Lisa Wangsness, *Michelle Obama's Candor Cuts 2 Ways Backers Delighted, but Her Critics Fume*, B. GLOBE, Feb. 21, 2008, at 1B.

¹⁴ Wangsness, *supra* note 13. Michelle was clear to indicate 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.” *Id.*

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

¹⁸ *Id.*

‘blackness’ than ever before.”¹⁹ She went on to write that “[r]egardless 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 At Harvard Law School, she protested that institution’s paucity of minority students and professors.²¹ On the campaign trail today, she has noted her awareness that some voters were concerned about Barack Obama’s electability due to his race. In response, she has been more than willing to draw parallels between Senator Obama’s candidacy and Black freedom fighters of the past.²² She also has been 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, Mrs. Obama called his campaign team and bluntly made her concerns clear. She indicted that she thought Senator Clinton had packed the crowd with her supporters, and that 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

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

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.

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

²⁴ Wolfe, *supra* note 17.

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 is, in her words, making sure Senator Obama is “keeping it real.”²⁶ She does this by holding him responsible for his responsibilities, even the most mundane, as a husband and father. For instance, she insists 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 that 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 that 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

Despite her outspokenness, Michelle Obama’s educational and professional background is also notable. Mrs. Obama 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

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

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

²⁹ Wolfe, *supra* note 17.

³⁰ Henneberger, *supra* note 28.

³¹ *Id.*

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 for the University of Chicago Hospitals.³³ Arguably, by all accounts, Mrs. Obama is an unconventional spouse to a presidential candidate and would likely be so as First Lady.

Part I of this Article investigates the role that explicit attitudes about race and gender play on voting decisions and the intersection that the two play in employment decisions. Scholarship from the areas of political science and law illustrate the challenges that Michelle Obama faces as a candidate's spouse and the potential First Lady. Part II investigates unconscious race and gender biases and the role they play in behavior including voting and employment discrimination. Despite the racial progress that the U.S. has made, scholarship from the areas of cognitive and social psychology as well as law illustrate deep-seated biases Michelle Obama must overcome. Part III 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 work against her husband's candidacy for the presidency of the U.S. Part IV is a conclusion.

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

³³ *Id.*

I.

RACE AND GENDER: VOTING AND INTERSECTIONALITY IN EMPLOYMENT 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. But in addition to these variables in isolation, their intersection has multiplicative predictive value.

A. Employment Discrimination

If we assume that Senator Clinton's assessment that elections are like "hiring decisions",³⁴ then voter discrimination creates an analog for employment discrimination. Thus, 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—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 *McDonnell*, a complainant establishes a prima facie case for racial discrimination where 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 from persons of complainant's qualifications.³⁸ The employer then bears the burden of articulating a legitimate, nondiscriminatory reason for rejecting the employee.³⁹ The employer cannot, however, use the employee's conduct as a pretext for the

³⁴ Jim Acosta, et al., *Clinton: Thing about This as a Hiring Decision*, CNN.COM POLITICS, May 18, 2008, <http://www.cnn.com/2008/POLITICS/05/18/campaign.wrap/index.html>.

³⁵ 42 U.S.C. §2000e-2(a)(1).

³⁶ 411 U.S. 792 (1973).

³⁷ 490 U.S. 228 (1989).

³⁸ 411 U.S. 792, 802.

³⁹ *Id.* at 802-03.

discrimination nor may it engage in racial double-standards.⁴⁰ Then, the employee must demonstrate that the reason proffered by the employer was not the true reason for the employment decision. This may be done directly by demonstrating that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.⁴¹

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.⁴² Partners described her as "macho," suggested that she "overcompensated for being a woman," advised her to take "a course at charm school."⁴³ Another representative of the company described the employee as someone who "ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate."⁴⁴ 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 that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁴⁵ Expert witness, social psychologist Dr. Susan Fiske, testified that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping.⁴⁶ Her testimony focused on the overtly sex-based comments of partners as well as on gender-neutral remarks made by partners who knew Hopkins only slightly,

⁴⁰ *Id.* at 804.

⁴¹ *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

⁴² 490 U.S. 228, 235.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

that were intensely critical of her.⁴⁷ According to Fiske, Hopkins' status as the only woman in the pool of candidates and the subjectivity of the evaluations made it likely that the sharply critical remarks were the product of sex stereotyping.⁴⁸ The Court found that in previous years, other female candidates for partnership were also evaluated in sex-based terms.⁴⁹ Those who maintained their femininity were viewed favorably while "women's lib[b]er" was used as a pejorative term for other female employees.⁵⁰

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. The employee must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can be *evidence* that gender played a part.⁵¹ It went on to hold that the premise of a case in which there is a possible legitimate as well as 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.⁵²

B. Voting Behavior

Voting is not always based on rational choice; emotions too play a significant role.⁵³ William Christ, for example, found that emotional responses to candidates accurately predict voter preferences for more than 90% of the decided voters and 80% of the undecided voters.⁵⁴

⁴⁷ *Id.*

⁴⁸ *Id.* at 235-36.

⁴⁹ *Id.* at 236

⁵⁰ *Id.*

⁵¹ *Id.* at 251.

⁵² *Id.* at 252.

⁵³ See generally DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (PublicAffairs,2007).

⁵⁴ William G. Christ, *Voter Preference and Emotion: Using Emotional Response to Classify Decided and Undecided Voters*, 15 J. APPLIED SOC. PSYCHOL. 237, 250 (1985).

Most political advertisements are designed to either inspire voter enthusiasm, thereby motivating their political engagement and loyalty, or induce fear, thereby stimulating vigilance against the risks some candidate supposedly pose.⁵⁵ Other research shows that political advertisements that provoke anxiety stimulate attention toward the campaign and discourage reliance on habitual cues for voting; in short, it can induce crossover voting.⁵⁶ Likeability also affects voting. In one study, 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.⁵⁷ 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 who to elect to public office. Black and White voters typically prefer candidates of their own race in elections where one candidate is Black and the other is White. Consequently, Black candidates rarely succeed outside of political jurisdictions in which Blacks are a majority of the voters.⁵⁸

⁵⁵ 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).

⁵⁶ George Marcus & Michael Mackuen, *Anxiety, Enthusiasm, and the Vote: The Emotional Underpinnings of Learning and Involvement During Presidential Campaigns*, 87 AM. POL. SCI. REV. 627, 677-78 (1993).

⁵⁷ Matthew A. Baum, *Talking the Vote: Why Presidential Candidates Hit the Talk Show Circuit*, 49 AM. J. POL. SCI. 213, 223-30 (2005).

⁵⁸ See LUCIUS J. BARKER ET AL., AFRICAN AMERICANS AND THE AMERICAN POLITICAL SYSTEM 246-47 (Prentice Hall, 1999); HANES WALTON, JR. & ROBERT C. SMITH, AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM 199-205 (Longman, 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 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 10% 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. In a variety of electoral contexts this relationship has been demonstrated. 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*

Experimental research supports the idea that Black candidates face significant hurdles in gaining support from White voters. In one study, Nayda Terkilsden found that given two fictitious candidates described 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.⁵⁹ Furthermore, racially prejudiced White voters express more negative attitudes about Black candidates than less prejudiced ones.⁶⁰

Experimental research by Donald Kinder and David Sears demonstrates the mechanism through which race can influence voting.⁶¹ They tested competing theories of White prejudice against Blacks—realistic group conflict theory (emphasizing tangible threats that Blacks might pose to White’s 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.⁶² They found both that more prejudiced individuals supported Yorty and that symbolic racism better predicts White voting behavior than does group conflict theory.⁶³

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, congressional elections) when the incumbent is White. They are also less likely to vote for Black candidates who run for higher-

Minority Percentages in Districts and the Election of Minority-Preferred Candidates, in RACE AND REDISTRICTING IN THE 1990S 13-38 (Bernard Grofman ed., 1998).

⁵⁹ Nayda Terkilsden, *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).

⁶⁰ *Id.* at 1043.

⁶¹ See generally 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).

⁶² *Id.* at 417, 419.

⁶³ *Id.* at 421-26.

level (i.e., top (city)) positions. Furthermore, Whites are less likely to engage in cross-over voting in general elections than in run-off elections. They are also less likely to engage in cross-over voting when the local press does not endorse the Black candidate.⁶⁴

Second, few Blacks vis-à-vis Whites at the community level have a negative impact on Whites' crossover voting.⁶⁵ That is, presumably, as close inter-racial interactions increase, "the probability that [Whites] will adopt political attitudes and behaviors similar to those [Blacks] with whom they interact increases."⁶⁶ 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. Among the factors that seem to enhance such sentiments are the size of the Black population,⁶⁷ the history of race relations in the community, and the salience of racial issues in the campaign.⁶⁸

2. Gender and Voting

Blatant and widespread discrimination among the electorate against female candidates has diminished considerably in recent years. Moreover, compared to race, gender has been less of a divisive issue among the electorate. Some studies have found that voters harbor little bias against women,⁶⁹ and in some instances, women candidates may have an advantage over their

⁶⁴ Charles S. Bullock, III, *Racial Crossover Voting and the Election of Black Officials*, 46 J. POL. 238, 247 (1984). 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).

⁶⁵ 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 Crossracial Voting on St. Louis Primary Election Results*, 33 URB. AFF. REV. 120, 125-30 (1997).

⁶⁶ Carsey, *supra* note 65, at 223.

⁶⁷ V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 5 (Alfred A. Knopf ed., 1949) (indicating that Whites fear maintenance of control over Blacks where Blacks are a large part of the population).

⁶⁸ Thomas Pettigrew, *Black Mayoral Campaigns*, in *URBAN GOVERNANCE AND MINORITIES* 5 (Herrington J. Bryce ed., 1976); RAYMOND E. WOLFINGER, *THE POLITICS OF PROGRESS* 15 (Prentice Hall 1974).

⁶⁹ See, e.g., Carol Chaney & Barbara Sinclair, *Women and the 1992 House Elections*, in *THE YEAR OF THE WOMAN* 123-39 (Elizabeth Adell Cook et al., 1994).

male counterparts.⁷⁰ Once on the ballot, women are as successful as men at gaining elected office.⁷¹

This is not to say that there are not 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.⁷² Furthermore, women voters frequently favor Democratic Party policies.⁷³ But this has not led candidates to engage in a gender analogue to race-baiting.⁷⁴ The reason for this might be that most successful women politicians are themselves people whose profile is counter-stereotypical. As such, they do not seem as vulnerable to subtle efforts to invoke stereotypes. And there is no contemporary history of an analogous Bradley Effect in elections involving women.⁷⁵

Yet scholars find that gender stereotyping, linked to traditional sex-roles, still pervades electoral politics.⁷⁶ Experimental research by Leonie Huddy and Nayda Terkildsen, for example, finds that women candidates who demonstrate stereotypically female characteristics are at a great disadvantage.⁷⁷ Similarly, voters who place priority on issues such as terrorism, homeland

⁷⁰ *See id.*

⁷¹ 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).

⁷² ELEANOR SMEAL, *WHY AND HOW WOMEN WILL ELECT THE NEXT PRESIDENT* 69-77 (1984).

⁷³ *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).

⁷⁴ *See* Parks & Rachlinski, *supra* note 2.

⁷⁵ *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.

⁷⁶ 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 (1998); Kira Sanbonmatsu, *Gender Stereotypes and Vote Choice*, 46 *AM. J. POL. SCI.* 20, 28-30 (2002).

⁷⁷ Leonie Huddy & Nayda Terkildsen., *The Consequences of Gender Stereotypes for Women Candidates at Different Levels and Types of Office*, 46 *POLI. RES. Q.* 503, 518 (1993).

security, and U.S. involvement in Iraq are more likely to believe that a man would do a better job of handling those issues as president.⁷⁸ Furthermore, party leaders primarily want to find candidates who will win, and they are as much aware of the stereotypes as researchers. Party leaders believe that there tends to be more uncertainty about a woman's electability than a man's.⁷⁹

C. Race and Gender in the 2008 Campaign

Parks and Rachlinski fairly exhaustively address the various ways in which race and gender expressly manifested themselves in the 2008 election.⁸⁰ 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. The exit polls, however, provide the clearest and most concise indication of race and gender bias.

Blatant and express racial attitudes played a significant role in the 2008 presidential race. As illustrated in Tables 1, Whites in 27 out of 37 primaries/caucuses, for which we have exit poll data, voted for Senator Clinton in higher numbers than Senator Obama. For some voters, the simple fact that Senator Obama is Black was enough for them to dislike him. There were reports of Senator Obama's campaigners having dogs sicked on them, being called "nigger", and being told by voters—in reference to Senator Obama—"Hang that darky from a tree."⁸¹ In fact, as illustrated in Table 2, in states where voters indicated that race was a deciding factor for them when casting their votes, 16 out of 28 went to Senator Clinton. This was most pronounced in

⁷⁸ 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).

⁷⁹ KIRA SANBONMATSU, *WHERE WOMEN RUN: GENDER & PARTY IN THE AMERICAN STATES* 2-3, 22, 26-30, 37-86, 97-115, 118 (Univ. of Michigan Press, 2006).

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⁸¹ Kevin Merida, *Racist Incidents Give Some Obama Campaigners Pause*, WASH. POST, May 13, 2008, A1.

West Virginia and Kentucky. Such preferencing of a White candidate over a Black candidate simply because of race implicates Title VII.

As illustrated in Tables 1, men in 27 out of 37 primaries/caucuses, for which we have exit poll data, voted for Senator Obama in higher numbers than Senator Clinton. As illustrated in Table 2, however, in states where voters indicated that gender was a deciding factor for them when casting their votes, only six out of 29 went to Senator Obama. Among these states, one state was Illinois; the other five were states with sizeable Black populations. These results suggest that though gender was a factor in the 2008 presidential campaign, it may not have been 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.

D. Intersectionality and Employment Discrimination

Race and sex are among the determining factors for a prima facie showing of employment discrimination.⁸² And though color is yet another determining factor for a prima facie showing of employment discrimination,⁸³ colorism (discrimination based upon gradations in skin color) claims are one example of the more complex race discrimination claims courts face.⁸⁴ Arguably, racism (including colorism) and sexism are interconnected systems of

⁸² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994). The statutory language expressly provides that “[it]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.” *Id.*

⁸³ *Id.*

⁸⁴ See, e.g., Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1744 (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).

discrimination and oppression.⁸⁵ And the juncture at which they intersect provides a fruitful and unique area of discrimination study.⁸⁶

A number of employment discrimination cases have wrangled with the intersection of race and gender with particular regard to 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.⁸⁷ The plaintiffs sought to represent a class of exclusively Black women who were the victims of GM's alleged discrimination.⁸⁸ The Eighth Circuit held that the plaintiffs were not allowed to create a "super-remedy" by combining both race and sex discrimination.⁸⁹ 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.⁹⁰ 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.⁹¹ In *Moore v. Hughes Helicopter, Inc.*, Moore (a Black woman) claimed that her class of Black women employees had been discriminated against in the selection of employees

⁸⁵ See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-72 (1991) (stating that "[r]acism and sexism mutually-reinforcing components of a system of dominance rooted in patriarchy").

⁸⁶ See *id.* at 372 (stating that "[n]o 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.").

⁸⁷ 558 F.2d 480, 482 (8th Cir. 1977).

⁸⁸ *Id.*

⁸⁹ *Id.* 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).

⁹⁰ 673 F.2d 475, 798, 805 (5th Cir. 1978).

⁹¹ *Id.* at 810-12.

for various labor grades and positions.⁹² The Ninth Circuit refused to allow Moore to represent White females, because she did not claim to be discriminated against because she was female, but because she was a Black woman.⁹³ Similarly, Moore was not allowed to represent Black male employees, because she did not believe Black males were discriminated against by supervisors.⁹⁴ As such, the class was not certified due to inadequate representation.⁹⁵

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 behalf and that of her class.⁹⁶ The suit alleged denial of promotions, better assignments, and ultimately termination for “race, sex, and black styles of hair and dress.”⁹⁷ After relying on *Vuyanich v. Republic National Bank*,⁹⁸ the Seventh Circuit held that the plaintiff was eligible to represent a class of Blacks and women.⁹⁹ In *Jeffries v. Harris County Community Action Assoc.*, Jeffries (a Black woman) sued her employer on the grounds that during the nearly four years she was employed, she failed to receive any promotions.¹⁰⁰ When she applied for a field representative position during her fourth year with the company, a Black man was promoted over her.¹⁰¹ In looking to the specific language of Title VII,¹⁰² the Fifth Circuit construed “or” to

⁹² 708 F.2d 475 (9th Cir. 1983).

⁹³ *Id.* at 480.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 538 F.2d 164, 165 (7th Cir. 1976).

⁹⁷ *Id.*

⁹⁸ 409 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).

⁹⁹ *Jenkins*, 538 F.2d at 169.

¹⁰⁰ 615 F.2d 1025, 1029 (5th Cir. 1980).

¹⁰¹ *Id.*

¹⁰² Title VII provides a remedy against employment discrimination based upon an employee’s “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a).

imply congressional “intent to prohibit employment discrimination based on any or all of the listed characteristics.”¹⁰³

E. The Race/Gender Nexus and Michelle Obama

Research from the realms of political science and law illustrate 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.¹⁰⁴ Historically, First Ladies have served conventional roles. Not only did they served as the official hosts to the White House,¹⁰⁵ they also reached out to women during their husbands’ campaigns,¹⁰⁶ served as a liaison between the White House and women’s organizations,¹⁰⁷ and promoted the administration’s women-oriented programs and policies.¹⁰⁸ 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.¹⁰⁹ To the extent that First Ladies fail to conform to these constrained gender roles, the more critical the media reacts to them.¹¹⁰ Put differently, the more politically active First Ladies are, the more negative press coverage they receive.¹¹¹ Being outspoken and recognized for her centrality in her husband’s campaign, voter attitudes towards Michelle Obama are likely to be influenced by gender.

¹⁰³ Jeffrey, 615 F.2d at 1032.

¹⁰⁴ Erica Scharrer & Kim Bissell, *Overcoming Traditional Boundaries: The Role of Political Activity in Media Coverage of First Ladies*, 21 *WOMEN & POL.* 55, 56 (2000).

¹⁰⁵ See generally Edith P. Mayo, *Party Politics: The Political Impact of the First Ladies’ Social Role*, 37 *SOC. SCI. J.* 577 (2000).

¹⁰⁶ 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 Proquest), 51-136.

¹⁰⁷ See *id.* at 137-218.

¹⁰⁸ See *id.* at 219-63.

¹⁰⁹ See Wekkin, *supra* note 11.

¹¹⁰ Betty Houchin Winfield, “*Madame President: Understanding a New Kind of First Lady*,” 8 *MEDIA STUD. J.* 59 (1994).

¹¹¹ Scharrer & Bissell, *supra* note 104, at 69-74.

With regard to race, Mrs. Obama may be perceived as “too Black.” 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.¹¹² For instance, light-skinned Blacks are perceived as more attractive than dark-skinned Blacks, which is largely the case for Black women.¹¹³ As such, Black women’s greater approximation to Whiteness is deemed to be a particularly feminine characteristic among Blacks,¹¹⁴ and may be so among Whites as well. 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.¹¹⁵ And those Blacks who assimilate more are, in turn, viewed as “good Blacks” by Whites.¹¹⁶ 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.”¹¹⁷ Thus, being pointed about racial issues, or at least more so than Senator Obama, race may influence voters’ attitudes about Mrs. Obama.

Much research on discrimination has focused separately on the effects of race or gender, ignoring the implication that black women must deal with the joints effects of multiple minority

¹¹² See generally Banks, *supra* note 84; see also Jones, *supra* note 84..

¹¹³ 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).

¹¹⁴ *Id.* at 80.

¹¹⁵ Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1164 (2007).

¹¹⁶ *Id.*; Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1899 (2007).

¹¹⁷ No. 01-20420, 2002 WL 753496, at *2, *8 (C.A. 5 (Tex.)).

statuses, originally termed “double jeopardy”.¹¹⁸ However, interactive models note black women’s unique social location at the intersection of different status hierarchies, which produces experiences that are distinctly different from those of white women.¹¹⁹ Such models further 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”¹²⁰ or both wondering and critiquing, “Why is she so womanish?”¹²¹

II. 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 primarily occurred at a surface-level within society. Research on implicit attitudes, which are judgments that are automatically activated without a person’s awareness or intention,¹²² suggests that negative, stereotypical attitudes about Blacks and women are still pervasive. These attitudes are, arguably, evidenced in both voting and employment decisions.

¹¹⁸ FRANCIS BEALE *Double jeopardy: To be black and female*, in *THE BLACK WOMAN: AN ANTHOLOGY* (Toni Cade, Ed.). (New York American Library 1970).

¹¹⁹ Deborah King, *Multiple Jeopardy, Multiple Consciousness: The Context of the Black Feminist Ideology*, 14 *SIGNS* 42-72 (1988).

¹²⁰ 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 http://www.huffingtonpost.com/2008/06/17/fox-news-host-discusses-a_n_107526.html.

¹²¹ 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 Proquest). 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).

¹²² A. G. Greenwalk & M. R. Banaji, *Implicit social cognition: Attitudes, self-esteem and stereotypes*. 102 *J. OF PERSONALITY AND SOC. PSYCHOL.*, A-21 (1995).

A. Implicit Attitudes

People's reports of their cognitive processes are often not consistent with their judgments.¹²³ Many influences on judgment seem to operate outside of people's awareness.¹²⁴ 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.¹²⁵ The intuitive system can often dictate choice, with the deductive system lagging behind, struggling to produce reasons for a choice that comports with the accessible parts of memory. Thus, an intuitive, gut reaction against a candidate can dictate choice. The rational account only 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.¹²⁶ Psychologists term these unconscious, emotional influences "implicit biases"—meaning attitudes or thoughts that people hold but might not explicitly endorse.¹²⁷ 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

¹²³ 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).

¹²⁴ See *id.*

¹²⁵ See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6-9 (2007) (reviewing this literature).

¹²⁶ See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).

¹²⁷ Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 5 (1995); 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 266 (John A. Bargh ed., 2007).

negative associations about minorities.¹²⁸ People might not even be aware that they hold these attitudes.¹²⁹ Even so, these implicit cognitions influence how people evaluate others.¹³⁰ The implicit cognitive processes might heavily influence the final choice of a voter who does not otherwise clearly embrace one candidate over another.¹³¹

Over the last ten years, psychologists have identified ways to measure these implicit cognitions. These measures have proven to be particularly useful for studying bias against Blacks or stereotypes about women. This is so for two key reasons. The first is that when explicit measures are used, individuals may not reveal their true attitudes or preferences because of social desirability biases, thus not elucidating the actual magnitude of the relationship that would exist between attitudes and, for example, political outcomes. The second comparative advantage of implicit measures is that individuals may not even be aware of their true preferences or attitudes.¹³²

The Implicit Association Test (“IAT”) has rapidly become the most widely used measure of implicit bias.¹³³ The IAT is a procedure that seeks to assess latent attitudes by measuring their underlying automatic evaluation.¹³⁴ Using cognitive priming procedures, it measures the relative

¹²⁸ 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 126, at 951.

¹²⁹ Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 5 (1995).

¹³⁰ See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, __ J. PERSONALITY & SOC. PSYCHOL. __ (forthcoming, 2008); Kirsten Lane et al., *supra* note 8, at 435-37 (reviewing evidence that the implicit social cognition predicts behavior).

¹³¹ See *infra* notes 163 to 171 and accompanying text.

¹³² Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 POL. BEHAV. 343, 345 (2007).

¹³³ See Lane et al., *supra* note 8, at 430 (noting that techniques that assess response times are the most widely used methods for ascertaining implicit attitudes).

¹³⁴ See Greenwald & Banaji, *supra* note 106.

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. Because 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 70% of Whites harbor anti-Black/pro-White biases.¹³⁵ 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;¹³⁶ White faces with harmless objects and Black faces with weapons.¹³⁷ The proper interpretation of these results has been a matter of some debate,¹³⁸ but most scholars conclude that the IAT can measure implicit biases.¹³⁹

A study by Leslie Ashburn-Nardo and colleagues shows just how broad based implicit biases can be. In this study, participants found it easier to associate their in-group (i.e., American names) with pleasant words and the out-group (i.e., Surinam names) with unpleasant

¹³⁵ Brian A. Nosek, et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR.REV. SOC. PSYCHOL. 36, 45 (2007).

¹³⁶ Lane et al., *supra* note 16.

¹³⁷ 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).

¹³⁸ See Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or “Would Jesse Jackson Fail the IAT?”*, 15 PSYCHOL. INQUIRY 257 (2004).

¹³⁹ See Greenwald & Kreiger, *supra* note 8; Lane et al., *supra* note 8; Lane et al., *supra* note 16.

words than they found it to make reverse pairings, even though participants lacked experience with Surinam.¹⁴⁰ 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.¹⁴¹

Thierry Devos and Mahzarin Banaji, in their study, found that individuals make no distinction between Blacks and Whites on explicit measures of "Americanness." On implicit measures, however, participants more easily paired American symbols with White faces than with Black faces.¹⁴² In a second study, Devos and Banaji used photos of eight Black and eight White U.S. track and field athletes who participated in the 2000 Olympics. The assumption was that Blacks who represented their country in the Olympics should appear more American than those who did not. For the measure of familiarity, participants reported being more familiar with Black athletes than with White athletes. 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. On the IAT, however, the reverse was found, with White athletes being more strongly associated with the category "American" than Black athletes.¹⁴³ White and Asian Americans associated Whites with the concept "American" to a greater extent than Blacks.¹⁴⁴ Furthermore, in a study by

¹⁴⁰ 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).

¹⁴¹ *Id.* at 794-95. See also Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 321-323 (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).

¹⁴² Thierry Devos & Mahzarin R. Banaji, *American = White*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 452-53 (2005).

¹⁴³ *Id.* at 455.

¹⁴⁴ *Id.* at 459.

Melissa Ferguson and colleagues, they found that when Whites and Asians are primed (where individuals are subliminally shown images) with the American flag, their attitudes toward Blacks become even more negative.¹⁴⁵

A study by Phillip Goff and colleagues investigated the relationship 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. Then they were shown fuzzy images of animals (apes and non-apes), which gradually became clearer. Individuals were instructed to indicate the point at which they could identify the image.¹⁴⁶ Goff and colleagues found that both Whites and non-Whites more quickly associated Blacks, as compared to Whites, with apes.¹⁴⁷ In a second study, individuals were first subliminally shown images of ape line drawings or jumbled line drawings. 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.¹⁴⁸ Their results indicated that priming individuals with images of apes demonstrated more attentional bias towards Black faces.¹⁴⁹ Moreover, Goff and colleagues found that implicit anti-Black biases predict this ape-Black association.¹⁵⁰

¹⁴⁵ Melissa J. Ferguson et al., Presentation entitled “On the Automaticity of Nationalist Ideologies” given at the Society for Personality and Social Psychology Conference Symposium: Priming Ideology: Demonstrating the Malleability of Political Ideology (2008).

¹⁴⁶ Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 295 (2008).

¹⁴⁷ *Id.* at 296.

¹⁴⁸ *Id.* at 297.

¹⁴⁹ *Id.* 298-99.

¹⁵⁰ *Id.* at 301.

These biases, generally, begin at an early age. Baron and Banaji assessed White American 6-year-olds, 10-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. The 10-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.¹⁵¹ 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.¹⁵² Although explicit and implicit measures of bias are related, even people who openly embrace egalitarian norms often harbor very negative associations concerning Blacks.¹⁵³ Even participants who are told that the IAT measures undesirable racist attitudes and who explicitly self-report egalitarian attitudes find it difficult to control their biased responses.¹⁵⁴ 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

¹⁵¹ Baron & Banaji, *supra* note 100.

¹⁵² See Lane et al., *supra* note 101.

¹⁵³ See generally Baron & Banaji, *supra* note 100 (indicating that whereas seemingly egalitarian views about race emerge over time, implicit racial attitudes stay the same).

¹⁵⁴ D.Y. Kim & Anthony G. Greenwald, Voluntary Controllability of Implicit Cognition: Can Implicit Attitudes Be Faked?, Paper presented at the annual meeting for the Midwestern Psychological Association (May 1998) (cited in Nilanjana Dasgupta et al., *supra* note 303, at 317 *Automatic Preference for White Americans*).

women.¹⁵⁵ They associate male with hierarchical and female with egalitarian¹⁵⁶ and evaluate male authority figures more favorably than their female counterparts.¹⁵⁷ 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.¹⁵⁸ Men also automatically associate maleness with power.¹⁵⁹

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.¹⁶⁰ People more easily associate “engineer” with men and “elementary school teacher” with female than the opposite pairing.¹⁶¹ 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 associate with historically female roles (like “nurse”).¹⁶² Like studies of racial bias, even participants who explicitly reject gender-based stereotypes concerning careers carry these implicit biases.¹⁶³ Web-based IAT studies also reveal that both men and

¹⁵⁵ 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).

¹⁵⁶ Marianne Schmid Mast, *Men Are Hierarchical, Women Are Egalitarian: An Implicit Gender Stereotype*, 63 SWISS J. PSYCHOL. 107, 109-10 (2004).

¹⁵⁷ Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1315, 1319-24 (2000).

¹⁵⁸ Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272, 275-76 (1993).

¹⁵⁹ 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).

¹⁶⁰ 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).

¹⁶¹ Michael J. White & Gwendolen B. White, *Implicit and Explicit Occupational Gender Stereotypes*, 55 SEX ROLES 259, 263-64 (2006).

¹⁶² Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 PSYCHOL. SCI. 136-139 (1996).

¹⁶³ *Id.* at 138-39.

women tend to link “male” with “career” and “female” with “family.”¹⁶⁴ Among men, this connection is consistent with their explicit statements about gender stereotypes, although women explicitly reject such connections as inconsistent with their beliefs.

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”), although men do not harbor a preference.¹⁶⁵ 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.¹⁶⁶ 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.”¹⁶⁷ 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 fathers¹⁶⁸ and associate maleness with violence,¹⁶⁹ all at the implicit level.

3. *Implicit Bias and Political Attitudes/Behavior*

Research has shown that implicit attitudes influence prejudice and intergroup discrimination in a variety of contexts¹⁷⁰ – including voting process. Social scientists who have

¹⁶⁴ Nosek et al., *supra* note 131, at 105, 108-09.

¹⁶⁵ 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).

¹⁶⁶ Laurie A. Rudman & Stephen 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).

¹⁶⁷ *Id.* at 498.

¹⁶⁸ *Id.* at 500-01.

¹⁶⁹ *Id.* at 502-03.

¹⁷⁰ J. F., Dovidio et al., *On the nature of prejudice: Automatic and controlled processes*, 33 J. OF EXPERIMENTAL SOC. PSYCHOL. ___, 510-40; Allen R. McConnell & Jill M. Leibold, 2001. *Relations among the*

failed to find racial polarization in voters' candidate preferences have readily acknowledged "covert racism"¹⁷¹ or voter "misreporting"¹⁷² as explanations for why they failed to detect results in their studies. However, research on implicit bias and political attitudes and behavior 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.¹⁷³ Similarly, political conservatism is associated with White in-group favoritism on both implicit and explicit measures.¹⁷⁴

Implicit attitudes affect how people vote.¹⁷⁵ 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.¹⁷⁶ She either identified the candidates' party affiliations, or omitted that information.¹⁷⁷ She 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. Implicit measures of attitudes towards Hispanics were much less relevant when party cues were

Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes, 37 J. OF EXPERIMENTAL SOC. PSYCHOL., __, 435-42.

¹⁷¹ Jack Citrin et al., *White Reactions to African-American Candidates: When Does Race Matter*, 54 PUB. OPINION Q. 74, 92 (1990).

¹⁷² Benjamin Highton, *White Voters and African American Candidates for Congress*, 26 POL. BEHAV. 1, 11-12 (2004).

¹⁷³ William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1332, 1336 (2004).

¹⁷⁴ John J. 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).

¹⁷⁵ See Inna Burdein et al., *Experiments on the Automaticity of Political Beliefs and Attitudes*, 27 POL. PSYCHOL. 359 (2006); Malte Friese 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); DREW WESTEN, *THE POLITICAL BRAIN THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* 219-48 (Public Affairs 2007).

¹⁷⁶ Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 POL. BEHAV. 343, 344 (2007).

¹⁷⁷ *Id.*

available, however.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰ Their study (conducted before the 2008 primaries began), measured both implicit and explicit preferences by voters for three Democratic hopefuls—Clinton, Edwards, and Obama. When voters were asked who they said they supported, Obama won handily, 42% to 34% and 12% for Clinton and Edwards, respectively. But Obama came in third, with 25% on implicit measures, with Clinton and Edwards capturing 48 and 27% of the participants' support. 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 America in the 2008 election.¹⁸¹ Devos and colleagues found that people more easily associated Senator Clinton and even Tony Blair with the category “American” than they did Senator

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Implicit Association Test Creator Says Political Polls Need Better Metrics to be More Accurate. *See* www.scientificblogging.com/news_release/imliict_association_test.

¹⁸¹ Devos & Banaji, *supra* note 113.

Obama.¹⁸² 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, become more negative.¹⁸³

B. 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 Kreiger almost a decade and a half ago. In her seminal work, Kreiger presented three broad ideas: First, stereotyping is not intent-driven but evolves from social cognition theory. Social cognition 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.”¹⁸⁴ Furthermore, it is not only “bad” people who stereotype; as part of “normal cognitive functioning,” all people categorize and stereotype natural objects as a way “to simplify the task of perceiving, processing, and retaining information about people in memory.”¹⁸⁵ Second, stereotypes unintentionally bias people’s judgment about members of other groups.¹⁸⁶ Third, stereotypes are triggered and operate outside of one’s own conscious awareness.¹⁸⁷

¹⁸² 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.

¹⁸³ Melissa J. Ferguson et al., Presentation entitled “On the Automaticity of Nationalist Ideologies” given at the Society for Personality and Social Psychology Conference Symposium: Priming Ideology: Demonstrating the Malleability of Political Ideology (2008).

¹⁸⁴ Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995).

¹⁸⁵ *Id.* at 1188.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

Kreiger, 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. First, discriminatory motive or intent drives intergroup discrimination.¹⁸⁸ Currently under Title VII, a disparate treatment plaintiff must prove that purposeful or intentional discrimination resulted in differential treatment.¹⁸⁹ In the context of race, discrimination results from the decision-maker's racial animus towards members of the plaintiff's racial group.¹⁹⁰ Few Title VII cases acknowledge unconscious race bias,¹⁹¹ whereas cases have acknowledged the role of unconscious gender stereotyping.¹⁹² Kreiger 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.¹⁹³ Second,

¹⁸⁸ *Id.* at 1166-67.

¹⁸⁹ *See, e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (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, 1312 (10th Cir. 1992) (holding that plaintiff had to prove termination of employment was 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.) (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 (3rd 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).

¹⁹⁰ *See 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.”); *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.”).

¹⁹¹ *See, e.g.*, *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1236 (9th Cir.) (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).

¹⁹² *See, e.g.*, *Sweeney v. Bd. of Trs. 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 reasonably concluded that the decision not to promote plaintiff was “determined by a subtle, if unexpressed, bias against women”).

¹⁹³ Kreiger, *supra* note 172, 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*, 113 S. Ct. 1701, 1706 (1993) (“[A]n 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”).

evidence of stereotyping suggests discriminatory intent if stereotypes are understood as one's expectations about how members of a particular group should behave.¹⁹⁴ 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)."¹⁹⁵

The second erroneous assumption is that unless employers harbor discriminatory intent or motive, they will be rational actors.¹⁹⁶ As such, proving discriminatory intent in the employment context is a high hurdle to overcome.¹⁹⁷ 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 by three steps: First, pretext analysis begins when the plaintiff presents a prima facie case of discrimination.¹⁹⁸ In response, the defendant to articulate has the burden of producing legitimate, nondiscriminatory reasons for its decision to engage in the action at issue as it pertains to the plaintiff.¹⁹⁹ Second, the plaintiff can prevail only by proving that the defendant's proffered reason was not the "true reason" for the decision,²⁰⁰ but merely a "pretext for discrimination."²⁰¹ 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

¹⁹⁴ Kreiger, *supra* note 172, at 1173.

¹⁹⁵ *Id.* at 1174.

¹⁹⁶ *Id.* at 1167.

¹⁹⁷ See *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) (indicating that "[p]roof of such discrimination is always difficult").

¹⁹⁸ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁹⁹ 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.

²⁰⁰ *Burdine*, 450 U.S. at 253.

²⁰¹ *Hicks*, 113 S. Ct. at 2752; *Burdine*, 450 U.S. at 254 -56; see also *McDonnell Douglas*, 411 U.S. at 804.

it appears implausible in light of data upon 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."²⁰²

The third assumption is that disparate treatment jurisprudence does not account 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."²⁰³ In essence, according to Kreiger, 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. 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.²⁰⁴ 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.²⁰⁵ Third, it assumes that discrimination occurs at the precise moment of the employer's decision-making.²⁰⁶

²⁰² Kreiger, *supra* note 172, at 1179. Kreiger goes on to provide examples such as "(1) Evidence that the objective data maintained by the defendant did not support the result reached by the decisionmaker; (2) Evidence that the decisionmaker seemed to undervalue or ignore facts favorable to the employee; (3) Evidence that the decisionmaker 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.

²⁰³ Kreiger, *supra* note 172, at 1167.

²⁰⁴ *Id.* at 1181-82.

²⁰⁵ *Id.* at 1182.

²⁰⁶ *Id.* at 1183.

The final 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.²⁰⁷ As such, it assumes that decision-makers are aware of the reasons why they will make, or have made, employment decisions.²⁰⁸ With such knowledge, well-intentioned decision-makers comply with Title VII.²⁰⁹ In contrast, decision-makers with bad intentions know when they are taking an employee's group status into account; when challenged, they design "pretexts" to cover their tracks.²¹⁰

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."²¹¹ 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 decisionmaking process."²¹²

²⁰⁷ *Id.* at 1167.

²⁰⁸ *Id.* at 1185.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Oxman v. WLS-TV*, 609 F.Supp. 1384, 1387 (N.D. Ill. May 10, 1985).

²¹² 558 F.Supp. 303, 316 (E.D. Mich. Jan. 7, 1983) (quoting Elizabeth Bartholet, *Proof of Discriminatory Intent under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1203 (1982)).

Courts have similarly found that unconscious race bias²¹³ and gender stereotyping²¹⁴ may be implicated under Title VII. Parks and Rachlinski’s research suggests that unconscious race bias, and to some degree gender stereotyping, have been pervasive in the 2008 presidential campaign. And such biases are analogously manifested in Title VII case law.²¹⁵

C. Unconscious Voter Bias and Their Evaluation of Michelle Obama

Given espoused societal norms of fairness and egalitarianism within the U.S., explicit racism and sexism do not likely underlie most citizens’ attitudes about Mrs. Obama. However, the findings of implicit bias research suggest that voters’ negative attitudes about her likely arise from unconscious attitudes about race and gender. Such unconscious bias is evident in critiques of Michelle Obama, as her detractors have mostly analyzed her and her actions in ways that indirectly allude to her gender and/or race.

For instance, 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*.²¹⁶ 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.²¹⁷ The use of the ape image in depicting Blacks has been held to be probative in employment discrimination cases.²¹⁸

²¹³ *Bush v. Commonwealth Edison Co.*, 99- F.2d 928, 931-32 (7th Cir 1993) (holding that an employers failure to adhere to its own set of rules invites “subjective determinations likely to reflect unconscious racial bias...”).

²¹⁴ *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”).

²¹⁵ (support needed)

²¹⁶ Mcnairbo, *Michelle Obama Predicts Ohio Victory*, HUFFINGTON POST, February 15, 2008, at http://www.huffingtonpost.com/2008/02/15/michelle-obama-predicts-o_n_86896.html.

²¹⁷ See *supra* notes 117 to 121 and 153 to 155 and accompanying text.

²¹⁸ *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909 (8th Cir. 2003).

Whites' unconscious attitudes about Mrs. Obama, however, likely go beyond her physical appearance and go 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 ideology. Preference for greater approximation to the majority, phenotypically speaking, happens even at the unconscious level.²¹⁹ Analogously, it may also be the case with regards to ideology.²²⁰ In the employment context, plaintiffs have been held to have discriminated against Black employees for being deemed “too ethnic” or “pro-Black.”²²¹

With regards to gender, just as voters have expectations about what roles their First Lady can and should assume,²²² there may also be an unconscious underpinning to this as well. For example, voters may have the unconscious expectation that Mrs. Obama fit within a certain gendered paradigm, philosophically. Being an opinionated Ivy League graduate and lawyer may not fit with 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 had to walk a tightrope with having to be masculine enough to compete in a male-dominated environment for a promotion on one hand and not be too masculine on the other hand.²²³

Finally, even where critiques of Mrs. Obama have been more substantive—e.g., comments about being proud of her country—these criticisms too fall within the implicit bias

²¹⁹ See *supra* note 107 and accompanying text.

²²⁰ See *supra* notes 82 to 83 and accompanying text.

²²¹ *Gordon v. JKP Enterprises, Inc.*, No. 01-20420, 2002 WL 753496, at *2, *8 (C.A. 5 (Tex.)).

²²² See *supra* notes 84 to 92 and accompanying text.

²²³ See *supra* notes 42 to 52 and accompanying text.

paradigm about race and Americanness.²²⁴ Under Title VII, courts have held that excluding employees beyond the bounds of patriotism based on race establishes a prima facie case for employment discrimination.²²⁵

III. 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 towards those candidates. But it stands to reason that negative depictions reflect not only upon (potential) First Ladies 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."²²⁶ 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.²²⁷ 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.²²⁸ Third-party associative discrimination is

²²⁴ See *supra* notes 113 and 116 and accompanying text.

²²⁵ *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at *1, *10 (N.D. Cal. Apr. 5, 2006).

²²⁶ Christi Parsons, Bruce Japsen & Bob Sexter, *Barack's Rock*, CHI. TRIB., Apr. 22, 2007, at 1.

²²⁷ 411 U.S. 792, 802-04 (1973). "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." *Id.*

²²⁸ Mark W. Honeycutt, II & Van D. Turner, Jr., *Third-party Associative Discrimination Under Title VII*, 68 TENN. L. REV. 913, 913 (2001).

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.²²⁹ Strictly construed, none of the Title VII categories are broad enough to protect a discriminated against third-party.²³⁰ 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.”²³¹

Early cases dealing with third-party associative discrimination under Title VII held that plaintiffs lacked standing. In 1973, the 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.²³² The court indicated that the plaintiff was “not a ‘person aggrieved’ within the contemplation of the Act.”²³³ In 1981, the Northern District of Georgia decided in *Adam’s v. Governor’s Committee on Postsecondary Education* that the plaintiff (White), who alleged employment discrimination for having a Black wife, lacked standing.²³⁴ The court relied on the rationale propounded in *Ripp*.²³⁵ Two years later, in *Parr v. United Family Life Insurance Co.*, the Northern District of Georgia affirmed its decision in *Adam’s* 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.²³⁶

²²⁹ *Id.*

²³⁰ *Id.* at 915.

²³¹ *See supra* note 57.

²³² 366 F. Supp. 205, 209 (N.D. Ala. 1973).

²³³ *Id.*

²³⁴ No. C80-624A, 1981 WL 27101, at *1 (N.D. Ga. Sept. 3, 1981).

²³⁵ *Id.* at *3.

²³⁶ No. C-83-26-6, 1983 WL 1774, at *1-2 (N.D. Ga. June 15, 1983).

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*.²³⁷ In *Whitney*, a White plaintiff sued her employer after she was allegedly fired for having a social relationship with a Black man.²³⁸ In rejection of 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.”²³⁹ In addition to other district courts,²⁴⁰ 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.²⁴¹ In *Deffenbaugh-Williams*, the plaintiff was a White female manager discriminated against because of her relationship with a Black male sales associate.²⁴² A year later in *Tetro v. Elliot Popham Pontiac, Inc.*, Tetro (a White male employee) indicated that he began to be treated differently by his employer once he noticed that Tetro had a bi-racial daughter.²⁴³ The Sixth Circuit held that Tetro’s discharge was within the scope of Title VII.²⁴⁴ In 1996, the Tenth Circuit, in *Zeigler v. K-mart Corp.*, held for the plaintiff, a Black woman, who

²³⁷ 401 F. Supp. 1363 (S.D.N.Y. 1975).

²³⁸ *Id.* at 1365.

²³⁹ *Id.* at 1366.

²⁴⁰ 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 Nappa*, 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).

²⁴¹ 156 F.3d 581, 589 (5th Cir. 1998).

²⁴² *Id.* at 585.

²⁴³ 173 F.3d 988, 990 (6th Cir. 1999).

²⁴⁴ *Id.* at 995.

married a White male employee and had a child by him.²⁴⁵ Under Title VII and the Pregnancy Discrimination Act, the court found that Wal-Mart discriminated against the plaintiff based upon her interracial marriage and ensuing pregnancy.²⁴⁶ In *Parr v. Woodmen of the World Life Insurance Co.*, Parr (a White man) sued under Title VII, asserting that he was fired because he was married to a Black woman.²⁴⁷ The Eleventh Circuit expressly repudiated *Ripp* and held for the plaintiff.²⁴⁸

B. What This Means for the Senator Obama's Candidacy

Although associative discrimination has not received specific attention in social science literature, the findings of social identity theory highlights categorization processes that motivate intergroup attitudes and behavior.²⁴⁹ Because individuals are assumed to have a desire to maintain a high level of self-esteem,²⁵⁰ 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.²⁵¹ 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.²⁵² By engaging in social comparisons, people differentiate between their in-groups and relevant out-groups, and are able to evaluate their social identities.²⁵³ Beyond such differentiation, social identity research also demonstrates that people

²⁴⁵ No. 95-3019, 1996 WL 8021, at *1, *2 (10th Cir. Jan. 10, 1996).

²⁴⁶ *Id.*

²⁴⁷ 791 F.2d 888, 888-89 (11th Cir. 1986).

²⁴⁸ *Id.* at 891-92.

²⁴⁹ J.C. TURNER ET AL. REDISCOVERING THE SOCIALGROUP: A SELF-CATEGORIZATION THEORY 42-67 (Blackwell 1989).

²⁵⁰ J.C. Turner, *Social Categorization and the Self-concept: A Social Cognitive Theory of Group Behavior*, in *ADVANCES IN GROUP PROCESSES* 77-121 (JAI Press 1986).

²⁵¹ (support needed)

²⁵² H. TAJFEL. SOCIAL IDENTITY AND INTERGROUP RELATIONS. (Cambridge Univ. Press, 1982)

²⁵³ H. Tajfel & J. C. Turner, *An integrative theory of intergroup conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 33-47 (S. Worchel & W.G. Austin, eds., Brooks/Cole, 1979).

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 fewer undesirable behaviors than out-group members.²⁵⁴ 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.²⁵⁵

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.²⁵⁶ 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.²⁵⁷ More recently, Senator Obama has received considerable criticism for his association with his former pastor, Reverend Jeremiah Wright, who some Whites perceive to be racist and unpatriotic.²⁵⁸

In light of these occurrences, Michelle Obama may bring 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. But ultimately, the person who bears the burden

²⁵⁴ J. Howard, & M. Rothbart, *Social Categorization and Memory for In-group and Out-group Behavior*. 38 J. OF PERSONALITY AND SOC. PSYCHOL., ___, 301–310 (1980).

²⁵⁵ M. Hewstone & J. Jaspars, *Social Dimensions of Attribution*, in THE SOCIAL DIMENSION: EUROPEAN DEVELOPMENTS IN SOCIAL PSYCHOLOGY 379-404(H. Tajfel, ed., Cambridge Univ. Press 1984).

²⁵⁶ See, e.g., Eric Pianin, *Jackson Declines to Denounce Farrakhan, Despite Statements*, WASH. POST, July 2, 1984, at A5.

²⁵⁷ Charles Hurt, *Presidential Obama Winner of Key Debate*, N.Y. POST, Feb. 27, 2008, at 005.

²⁵⁸ 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 13A.

of these voters concerns is Senator Obama, as voters' attitudes about Michelle Obama may indirectly affect their decision to support Senator Obama's candidacy. Optimistically, the findings of research exploring the reputations of women who were associated with U.S. Presidents suggest that this might not be the case.²⁵⁹ 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.²⁶⁰ However, because the study's sample only included first ladies up to Nancy Reagan, we have little insight into the effects of gender roles and attitudes post-1989 on the study's findings.²⁶¹ Further, the influence of race might represent an important boundary condition to the study's findings.²⁶² Thus, voters' perceptions of Michelle Obama, and the subsequent influence on Barack Obama's candidacy, have important implications for understanding the associative discrimination phenomenon.

IV. CONCLUSION

Americans have made remarkable gains with regards to race and gender issues. But even as late as 2008, the reality of color and gender equality and blindness is still illusive. Moreover, despite the significant possibility that the forty-fourth President of the United States will be a Black person or a woman, 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. And just as courts and commentators have begun

²⁵⁹ See generally D. K. Simonton, *President's Wives and First Ladies: On Achieving Eminence within a Traditional Gender Role*, 35 *SEX ROLES*, 309 (1996).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

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.