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# “ASSASSINATE THE NIGGER APE[]”<sup>1</sup>: OBAMA, IMPLICIT IMAGERY, AND THE DIRE CONSEQUENCES OF RACIST JOKES

Gregory S. Parks<sup>‡</sup> & Danielle C. Heard<sup>†</sup>

**ABSTRACT:** In 1994, Congress passed legislation stating that Presidents elected to office after January 1, 1997 would no longer receive lifetime Secret Service protection. Such legislation was unremarkable until the first Black President—Barack Obama—was elected. From the outset of his campaign until today, and likely beyond, President Obama has received unprecedented death threats. These threats, we argue, are at least in part tied to critics’ and commentators’ use of symbols, pictures, and words to characterize Obama as a primate in various forms. As a point of departure, we refer specifically to the racist humor in Sean Delonas’ controversial *New York Post* cartoon of February 2009. Against this backdrop while looking to history, cultural studies, theories of humor, federal case law, as well as cognitive and social psychology, we explore how the use of seemingly harmless imagery may still be racially-laden and evoke violence against its object. By employing this rigorously interdisciplinary approach to the topic, we bridge the theoretical with the empirical in order to make a compelling case for the direct link between jokes—and cultural symbolism more broadly—and assassination threat to the United States’ first Black President.

**WORD COUNT:** 23,900 (approximately)

## Introduction

In 1994, Congress passed legislation stating that presidents elected to office after January 1, 1997, will receive Secret Service protection for 10 years after leaving office as opposed to lifetime protection.<sup>2</sup> To date, this legislation has gone unnoticed in legal scholarship. One might venture to guess that concerns about the safety of post-1997 elected Presidents have been, and maybe should be, negligible—that is, until the election of Barack Obama. It is plausible that legislators in 1994, and President Bill Clinton—who signed the legislation into law—did not imagine that despite the United States’ racial legacy, a Black man would be elected to the highest office in the land so soon. But despite the milestone of President Obama’s election, race still

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<sup>1</sup> *Morgan v. McDonough*, 540 F.2d 527, 531 (1st Cir.1976) (holding in a school desegregation case, that White students harassed Black students by chanting “assassinate the nigger apes”); *see also infra* notes 99 to 103 and accompanying text.

<sup>2</sup> Treasury, Postal Service and General Government Appropriations Act, 1995, sec. 530(a), Pub. L. No. 103-329, 108 Stat. 2382, 2413 (codified at 18 U.S.C. § 3056).

matters in America.<sup>3</sup> As such, President Obama does, and likely will for many years, face threats to his life.

The issue of President Obama's possible assassination originated with his candidacy. The Secret Service placed him under its protection earlier than any other presidential candidate—in May 2007, eighteen months before the 2008 presidential election. The Department of Homeland Security authorized his protection after consulting with a bipartisan congressional advisory committee. The security detail was not prompted by direct threats, but by general concerns about the safety of then-Senator Obama, as a prominent Black candidate. These concerns arose, in part, from the racist chatter found on White supremacist websites early in Obama's candidacy.<sup>4</sup>

Senator Obama did not initiate the request for Secret Service protection; his colleague, Illinois Senator Dick Durbin did. Senator Durbin openly acknowledged that his request “had a lot to do with race.”<sup>5</sup> At the outset of Obama's presidential campaign, many supporters, including his wife, expressed fears that he would be placed in harm's way.<sup>6</sup> Some Black supporters went so far as to state their fear that he would be assassinated and that not voting for him was a way to protect him.<sup>7</sup> These concerns became so pervasive and widely discussed that even candidate Obama acknowledged them.<sup>8</sup>

During the campaign, several arrests underscored the nature and extent of the threats that candidate Obama faced. In early August 2008, the Secret Service arrested Raymond Hunter Geisel in Miami for threatening to assassinate Obama. In Geisel's hotel room and car, agents found a nine-millimeter handgun, knives, ammunition (including armor-piercing types), body armor, a machete, and military-style fatigues. Geisel had allegedly referred to Obama with a racial epithet during a bail-bondsman training class and said, “If he gets elected, I'll assassinate him myself.”<sup>9</sup> In late August, the Secret Service, FBI, and other law-enforcement agencies investigated a possible assassination plot against Obama by White supremacists. They arrested Nathan Johnson, Tharin Gartell, and Shawn Robert Adolf, recovering two rifles. The men told the arresting officers that they planned to use rifles to shoot Obama from a distance at Invesco Field in Denver during Obama's Democratic National Convention speech.<sup>10</sup> In September, law-enforcement agents arrested Omhari L. Sengstacke, who was in possession of a gun and a

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<sup>3</sup> See e.g., Gregory S. Parks et al., Debate, *Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210 (2009); Gregory S. Parks & Jeffrey J. Rachlinski, Title VII's Lessons: Obama, the '08 Campaign, and the Myth of a Post-Racial America (Mar. 19, 2009) (unpublished manuscript, on file with authors).

<sup>4</sup> Nedra Pickler, *Racial Slur Triggers Early Protection for Obama: He Called on Secret Service to Monitor Big Crowds*, GRAND RAPIDS PR., May 4, 2007.

<sup>5</sup> *Id.*; Shamus Toomey, 'A Lot to Do with Race': Durbin Says Obama Needs Secret Service in Part Because He's Black, CHICAGO SUN-TIMES, May 5, 2007.

<sup>6</sup> Lynn Sweet, *Michelle Obama to Play Bigger Role in Campaign*, CHICAGO SUN-TIMES, March 12, 2007.

<sup>7</sup> Jim Galloway & Bob Kemper, *Blog: Political Insider: 'America Is Readier to Elect a White Woman Than It Is an African-American Man'*, ATLANTA J-CONST., Oct. 15, 2007.

<sup>8</sup> Katherine Q. Seelye, *Obama, Civil Rights and South Carolina*, N.Y. TIMES, Nov. 3, 2007.

<sup>9</sup> Curt Anderson, *Fla. Man Held on Charge of Threatening Obama*, PITTSBURGH POST-GAZETTE, Aug. 8, 2008.

<sup>10</sup> Dave McKinney et al., *A Plot Targeting Obama? 3 in Custody May Be Tied to Supremacists, Said to Talk of Stadium Shooting*, CHICAGO SUN-TIMES, Aug. 26, 2008.

bulletproof vest, near Obama's Chicago home.<sup>11</sup> In October, federal officers undermined an alleged plot against Obama by White supremacists Daniel Cowart and Paul Sclesselman. The two men had planned to go on a killing spree, targeting a predominantly black school and beheading fourteen blacks. They intended for their rampage to conclude by assassinating Obama.<sup>12</sup>

The threats did not end with the election. Obama's victory produced a spate of racial animosity against him. In Maine, the day after the election, citizens rallied against a backdrop of Black figures hung by nooses from trees. In a Maine convenience store, an Associated Press reporter noted a sign inviting customers to join a betting pool on when Obama would be assassinated. The sign read, "Let's hope we have a winner." In Mastic, New York, a woman reported that someone spray-painted a message threatening to kill Obama on her son's car. In Hardwick, New Jersey, someone burned crosses in the yards of Obama supporters. In Apolacon, Pennsylvania, someone burned a cross on the lawn of a biracial couple. At North Carolina State University, "Kill that nigger" and "Shoot Obama" were spray-painted in the university's free expression tunnel. At Appalachian State University, a T-shirt was reportedly seen around campus that read "Obama '08, Biden '09."<sup>13</sup>

The threats were not simply an East Coast phenomenon. In Midland, Michigan, a man was observed walking around wearing a Ku Klux Klan robe, carrying a handgun, and waving the American flag. He later admitted to the police that the display was in response to Obama's win. In a Milwaukee, Wisconsin, police station, police found a poster of Obama with a bullet going toward his head. At the University of Texas in Austin, Buck Burnette lost his place on the football team for posting on his Facebook page, "All the hunters gather up, we have a nigger in the White House." In Vay, Idaho, a sign on a tree offered a "free public hanging" of Obama. Parents in Rexburg, Idaho, complained to school officials after second- and third-graders chanted "Assassinate Obama!" on a school bus. A popular White supremacist website got more than two thousand new members the day after the election, compared with ninety-one new members on Election Day.<sup>14</sup> And federal agents arrested Mark M. Miyashiro in December 2008 for threatening to attack and kill Obama during Obama's scheduled vacation in Hawaii. The Secret Service confiscated a Russian SKS rifle, a collapsible bayonet, and several boxes of ammunition from him.<sup>15</sup>

Against this backdrop, we explore how the use of seemingly harmless racially-loaded imagery—whether intended or unintended—serves to increase the risk to President Obama's life. We focus our analysis specifically on one exemplary iconographic representation. On February

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<sup>11</sup> Angela Rozas & John McCormick, *Man Arrested a Block from Obama's Home: Bulletproof Vest, Gun Found in Car, Police Say*, CHICAGO TRIBUNE, Sept. 24, 2008.

<sup>12</sup> Kevin Johnson, *2 Men Accused of Planning Massacre, Targeting Obama*, USA TODAY, Oct. 28, 2008.

<sup>13</sup> Gregory Mitchell, *Racial Incidents and Threats against Obama Soar: Here is a Chronicle*, HUFFINGTON POST, Nov. 15, 2008, [http://www.huffingtonpost.com/greg-mitchell/racial-incidents-and-thre\\_b\\_144061.html](http://www.huffingtonpost.com/greg-mitchell/racial-incidents-and-thre_b_144061.html).

<sup>14</sup> *Obama Election Spurs Race Threats, Crimes: From California to Maine, 'Hundreds' of Incidents reveal Racism in America*, ASSOC. PRESS, Nov. 15, 2008; Patrik Johnsson, *After Obama's Win, White Backlash Festers in US: The Election of a Black President Triggered at Least 200 Hate-related Incidents, a Watchdog Group Finds*, CHRISTIAN SCI. MONITOR, Nov. 17, 2008; Mitchell, *supra* note \_\_; Eileen Sullivan, *Obama Faces More Personal Threats than Other Presidents-Elect*, HUFFINGTON POST, Nov. 14, 2008, [http://www.huffingtonpost.com/2008/11/14/obama-faces-more-personal\\_n\\_144005.html](http://www.huffingtonpost.com/2008/11/14/obama-faces-more-personal_n_144005.html).

<sup>15</sup> Peter Boylan, *Man Held in Obama Threats*, HONOLULU ADVERTISER, Dec. 10, 2008.

18, 2009, a political cartoon appeared in the *New York Post* that generated considerable controversy.<sup>16</sup> Bringing together two recent front page headlines—one about a brutal mauling of a woman in Stamford, Connecticut by a pet chimpanzee<sup>17</sup> and the other about the passing of the economic stimulus package by Congress<sup>18</sup>—the cartoon shows two policemen facing a chimpanzee shot dead by one of the officers. Three bullet holes are visible on the chimpanzee’s chest, whose blood stains the grass beneath his sprawled and mangled corpse. Above the head of the other officer hangs a bubble which reads, “They’ll have to find someone else to write the next stimulus bill.”<sup>19</sup>

This cartoon sketched by the regular *New York Post* contributor Sean Delonas immediately drew reactions from the blogosphere that complained about its rehashing of a longstanding racist stereotype comparing Blacks to primates.<sup>20</sup> This controversy, which over the subsequent several days drew the attention of the news media all over the U.S., engendered a public discussion about how to interpret the cartoon, whether racism is a fair accusation to level at the image, and what the effects of such an image have on those who harbor antipathy toward Blacks, generally, and the President, specifically. Those incensed by the cartoon saw a direct comparison between the chimpanzee in the image and President Obama, the primary author of the stimulus bill, and echoed a theme which pervaded the landscape of the 2008 Presidential election.<sup>21</sup> Many local and national Black leaders and media outlets organized demonstrations and called for the mass boycotting of the *New York Post*.<sup>22</sup> The *Post*’s editor-in-chief, Col Allen, defended the cartoon as “a clear parody of a current news event, to wit the shooting of a violent chimpanzee in Connecticut. It broadly mocks Washington’s efforts to revive the economy,”<sup>23</sup> denying evidence that the image was racially-laden. Upon closer examination of the source of humor in this cartoon, however, Allen’s denial fell flat. Moreover, the cartoon and other instances of depicting President Obama as a primate and referring to him as such are also consequential.

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<sup>16</sup> Sean Delonas, N.Y. POST, Feb. 18, 2009, at 12.

<sup>17</sup> See Brigitte Williams-James & Rich Calder, *Havoc as Chimpanzee Goes Ape—200-Pound ‘Pet’ Shot Dead after Mauling Woman, Charging Cops at Conn. Home*, N.Y. POST, Feb. 17, 2009, at 4.

<sup>18</sup> See Michael A. Fletcher, *Leaves D.C. to Sign Stimulus Bill; Renewable Energy a Focal Point in Denver as \$787 Billion Effort Is Made Law*, WASH. POST, Feb. 18, 2009, at A05.

<sup>19</sup> Delonas, *supra* note \_\_.

<sup>20</sup> See Karen Matthews, *Cartoon of Shot Chimpanzee Seen as Swipe at Obama*, SEATTLE TIMES, Feb. 19, 2009. See Sam Stein, *New York Post Chimpanzee Cartoon Compares Stimulus Author to Dead Primate*, HUFFINGTON POST, Feb. 18, 2009, [http://www.huffingtonpost.com/2009/02/18/new-york-post-chimp-carto\\_n\\_167841.html](http://www.huffingtonpost.com/2009/02/18/new-york-post-chimp-carto_n_167841.html) (indicating that “[a]t its most benign, the cartoon suggests that the stimulus bill was so bad, monkeys may as well have written it. Most provocatively, it compares the President to a rabid chimp”).

<sup>21</sup> See *Monkey Cartoon Draws Fire from Black Leader*, AGENCE FRANCE-PRESSE, Feb. 18, 2009. Al Sharpton called the cartoon “troubling at best given the historic racist attacks of Blacks as being synonymous with monkeys.” Karen Matthews, *Cartoon Linking Chimpanzee, Stimulus Stirs Outrage*, VIRGINIA-PILOT, Feb. 19, 2009. Barbara Ciara, president of the National Association of Black Journalists, said, “To compare the nation’s first Black commander in chief to a dead chimpanzee is nothing short of racist drivel.” *Id.* Virginia State Senator Eric Adams referred to the cartoon as “a throwback to the days when black men were lynched.” *Id.*

<sup>22</sup> See Pamela Gentry, *Costly Cartoon for the New York Post*, PAMELA ON POLITICS, Feb. 20, 2009, <http://blogs.bet.com/news/pamela/2009/02/20/costly-cartoon-for-the-new-york-post/>; Caitlin Millat & Tracy Connor, *Spike Lee Wants Boycott of New York Post over Chimpanzee Cartoon*, DAILY NEWS, Feb. 20, 2009; Verena Dobnik, *NAACP Wants NY Post Editor and Cartoonist Fired*, ASSOCIATED PRESS, Feb. 22, 2009.

<sup>23</sup> See *New York Post in Racism Row over Chimpanzee Cartoon*, GUARDIAN UNLIMITED (ENGLAND), Feb. 18, 2009; Mark Anthony Neal, *Opinion: Hit Cartoon Publisher in the Wallet*, NEWS ONE FOR BLACK AMERICA, Feb. 19, 2009, <http://newsone.blackplanet.com/obama/opinion-hit-cartoon-publisher-in-the-wallet/>.

In this article we analyze primate descriptors and imagery directed at President Obama. Specifically, we seek to ascertain whether they are indicia of racial animus and if so, whether their existence contributes to a milieu where racial violence against President Obama is encouraged or tolerated. In Part I, we present the historical development of the stereotype that casts Blacks as subhuman primates and the stereotype's contemporary appearance. Part II closely analyses Delonas' political cartoon *vis á vis* the cultural repertoire of ape imagery and theories of humor in order to show how racial bias and violent sentiments are expressed at the explicit (conscious) and implicit (unconscious) levels. Part III examines how courts have addressed this association between Blacks and primates. Considering this complex cultural and legal history, Part IV explores how we understand this association in light of research on implicit racial attitudes. In conclusion, we argue that the *New York Post* cartoon causes damaging effects because it works to implicitly dehumanize Blacks, generally, and President Obama, specifically. Such dehumanization coupled with violent imagery, in turn, works to increase the threats against President Obama's life.

## I. The Negro, a Beast: A History of the Stereotype

The association of Blacks with primates dates back to the sixteenth century, when European explorers first encountered sub-Saharan Africa.<sup>24</sup> Having come across Africans and anthropoid (or man-like) apes at the same time, these explorers thus began associating the two, describing in their travelogues the likeness between African and ape. From the start, this fascination over the perceived similarity of Africans and apes included references to the venereal potency of both. Edward Topsell, in his 1607 *Histoire of Foure-Footed Beastes*, drew from explorers' and naturalists' accounts in order to stress the sexual appetite and virility of apes, whose "genital member was greater than might match the quantity of his other parts."<sup>25</sup> Topsell claimed that "[m]en that have low, flat nostrils," or Africans, "are Libidinous as Apes that attempt women, and having thicke lippes the upper hanging over the neather, they are deemed fooles, like the lips of Asses and Apes."<sup>26</sup> European zoological writings showed a fascination with stories of oversexed apes capturing women and taking liberties with them. Collectively, these stories mythologize a preference of the hulking primates for fair-haired White women.<sup>27</sup>

These associations predated the advent of natural history in the mid-eighteenth century as well as efforts to chart out the "Great Chain of Being" in taxonomic terms most notably by Carl Linnaeus and Georges-Louis Leclerc, Comte de Buffon.<sup>28</sup> These first attempts at using natural history to map out hierarchies among the different biological species included taxonomic

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<sup>24</sup> See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* at 3-43 (The University of North Carolina Press 1968) (insert year of original publication); GUSTAV JAHODA, *IMAGES OF SAVAGES: ANCIENT ROOTS OF MODERN PREJUDICE IN WESTERN CULTURE* 36-38 (Routledge 1999).

<sup>25</sup> JORDAN *supra* note 24, at 30.

<sup>26</sup> *Id.*

<sup>27</sup> ELIZABETH EWEN AND STUART EWEN, *TYPECASTING: ON THE ARTS & SCIENCES OF HUMAN INEQUALITY: A HISTORY OF DOMINANT IDEAS* 433-4 (rev.ed. Seven Stories Press 2008) (insert date of original publication).

<sup>28</sup> *Cf.* ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING* 183-207, 227-241 (Harvard University Press 1964).

distinctions among types of men, thereby inventing the modern concept of race;<sup>29</sup> always, Africans were figured as the closest relative to the “orang outhan,” or what today would be called the chimpanzee.

Europeans have long held an interest in Africans as missing links in the evolution of ape to man,<sup>30</sup> which led the Dutch South African colonist, Hendrick Cezar, to bring his brother’s African slave Saartjie Baartman with him to London in the early nineteenth century in order to display her in a cage at the Picadilly side show.<sup>31</sup> Known as the Hottentot Venus, Baartman drew curiosity due to the distinctive features of her body, and especially her large buttocks. She was displayed totally nude but for a small cloth covering her genitalia, which were also a source of wonder.<sup>32</sup> The African Association, a benevolent abolitionist organization interested in the “humanization” of Africans, protested and brought suit against the Piccadilly sideshow,<sup>33</sup> but to no avail. After Piccadilly, she went on to be displayed at the London Museum and the *Jardin du Roi* in Paris by the animal trainer Réaux.<sup>34</sup> In 1815, Baartman died at the young age of 26, and was soon displayed at the *Muséum d’Histoire Naturelle* in Paris for scientists to observe.<sup>35</sup> One of those scientists, the French naturalist and zoologist Georges Cuvier, was put in charge of dissecting the body of the deceased Hottentot Venus. Reporting on Baartman’s body he remarked, “I have never seen a human head more similar to that of monkeys.”<sup>36</sup> Continuing to stress her simian-like physiognomy he described that “her movements had something brusque and capricious about them, which recall those of monkeys. She had, above all, a way of pouting her lips, in the same manner as we have observed in orang utans [chimpanzees].”<sup>37</sup>

Into the nineteenth century, the modern western imagination increasingly privileged science over religion as a source for explaining the universe. The hierarchization of racial difference took on new intensity starting in the late nineteenth century with the advent of modern science and knowledge of evolutionary theory.<sup>38</sup> Darwin’s publication in 1859 of *On the Origin of Species*, which put forth the theory of evolution, influenced natural historians, biologists, and philosophers alike to speculate further into the question of human difference, deepening the academic and cultural belief in the biological basis of race. This belief reached its peak during the eugenics movement, founded in Britain by Sir Francis Galton (Darwin’s half-cousin) in the

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<sup>29</sup> See JORDAN *supra* note 24 at 29, 229; JAHODA, *supra* note 24, at 40.

<sup>30</sup> EWEN AND EWEN, *supra* note 27, at 129.

<sup>31</sup> Baartman was part of the Khoikoi of South Africa, an ethnic group which in the 19<sup>th</sup> century was referred to by Europeans as the Hottentots. This term is now considered derogatory; see RACHEL HOLMES, *AFRICAN QUEEN: THE REAL LIFE OF THE HOTTENTOT VENUS* 8-16 (Random House, Inc., 2007).

<sup>32</sup> Rumors of Baartman’s enlarged labia, or her “tablia” (a French word meaning “apron”) fascinated spectators, and only upon her death did scientists who examined and dissected her corpse declare that the rumors were true.

<sup>33</sup> EWEN AND EWEN, *supra* note 27, at 126.

<sup>34</sup> HOLMES, *supra* note 31, at 80-81.

<sup>35</sup> *Id.* at 91-102.

<sup>36</sup> Stephen JAY GOULD, *THE FLAMINGO’S SMILE: REFLECTIONS IN NATURAL HISTORY* 296 (W. W. Norton & Company 1984).

<sup>37</sup> *Id.*

<sup>38</sup> See THOMAS L. DUMM, “The New Enclosures: Racism in the Normalized Community” in RODNEY KING, *READING URBAN UPRISING 178-195* (Routledge 1993).

1860s, honed in the United States in the first half of the twentieth century, and borrowed by the Nazi program in the 1930s.<sup>39</sup>

Eugenics literature around the turn of the century elaborated ad nauseam “the results of comparative anatomy, which indicates that the negro is an ape.”<sup>40</sup> Anatomist Alexander Winchell, a proponent of Preadamism,<sup>41</sup> noted that “the convolutions [of a Negro’s brain] are fewer and more simple, and [...] approximate those of the quadrumana.”<sup>42</sup> Charles Carroll, author of *The Negro a Beast*, rattled off the anatomical and physiognomic similarities of Blacks and apes: “the long, broad jaw of the Negro . . . exaggerated by the thickness of the lips;” “the retreating chin” approximating “the chimpanzee and lower mammals;” “the front teeth [. . .] which set slanting in the jaw;” “the thick, puffed lips” and “the flat nose of the Negro, which has the appearance of having been crushed in;” “the greater length and slenderness of the pelvis;” the “slenderness of the Negro’s [sic] calves;” the “long, broad heel” and “long, flat Foot;” and like, apes, he argues, “Negroes are void of sensibility to a surprising degree.”<sup>43</sup> Robert Hartmann, a professor of anatomy at the University of Berlin, offered as evidence “The shortness of the neck, as well as the relatively small size of the brain-pan, and the large size of the face [of the Negro], may the more readily be taken as an approximation to the Simian type, since all apes are short-necked.”<sup>44</sup> Elsewhere, Hartmann made the comparison, “In the case of an adult male gorilla the first glance at this member reminds us of the knotty fist of a black laborer or lighterman, like those who, at Rio de Janeiro, Bahia, or La Guayra, lift the heavy bags of coffee and place them on their heads or on their herculean shoulders.”<sup>45</sup> About the Negro’s long arms, French anthropologist Paul Topinard noted similarly that frequently “the extremity of the middle finger touched the patella; once it was twelve millimeters below its upper border, as in the gorilla.”<sup>46</sup>

At the very time when scientific literature was proposing arguments such as the above, the notion that “the Negro is an ape” found regular expression in mass culture by way of the sideshow, an increasingly popular form of entertainment.<sup>47</sup> As with the case of the Hottentot Venus, Ota Benga, a Batwa Pigmy from the Congo, was captured from his home in order to be displayed in a cage at the St. Louis World’s Fair in 1904 and afterward at traveling sideshow exhibitions.<sup>48</sup> In 1906, Benga was bought by the Bronx Zoo, an acquisition which the *New York Times* advertised with the headline, “BUSHMAN SHARES A CAGE WITH BRONX PARK

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<sup>39</sup> See NICHOLAS W. GILLHAM, *A LIFE OF SIR FRANCIS GALTON: FROM AFRICAN EXPLORATION TO THE BIRTH OF EUGENICS 1* (Oxford University Press 2001); EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE xv-xxviii* (Thunder’s Mouth Press 2004).

<sup>40</sup> See CHARLES CARROLL, *THE NEGRO A BEAST, OR IN THE IMAGE OF GOD 35* (American Book and Bible House 1900).

<sup>41</sup> Preadamism is the religion-based theory that humans, specifically the non-white races, existed before Adam, the first human named in the Bible.

<sup>42</sup> See ALEXANDER WINCHELL, *PREADAMITES, OR A DEMONSTRATION OF THE EXISTENCE OF MEN BEFORE ADAM 249-52* (Trübner & Co. 1888). The term “quadrumana” refers to a primate with four hands as opposed to bimana, a primate with two hands and two feet.

<sup>43</sup> See CARROLL, *supra* note 40, at 22-29.

<sup>44</sup> See ROBERT HARTMANN, *ANTHROPOID APES 100-101* (Kegan Paul, Trench & Co. 1998).

<sup>45</sup> *Id.* at 102.

<sup>46</sup> See PAUL TOPINARD, *ANTHROPOLOGY 335* (Chapman & Hall 1890).

<sup>47</sup> See RACHEL ADAMS, *SIDESHOW U.S.A.: FREAKS AND THE AMERICAN CULTURAL IMAGINATION 10-21* (University of Chicago Press 2001).

<sup>48</sup> *Id.* at 25.



APES.”<sup>49</sup> Benga’s humiliating enslavement was met by protests by the NAACP which called for his release. Like Saartijie Baartman, Benga’s life ended prematurely when he committed suicide with a stolen pistol in 1916.<sup>50</sup>

The development of the cultural myth of Black subhumanity served as the justification for Jim Crow segregation and acts of vigilante justice against Blacks in the form of lynching in the U.S. South. Specifically, Jim Crow was fueled by the paranoid fear of miscegenation based upon the premise that Africans were primates.<sup>51</sup> It was thought that the mixture of subhumanity Black genes with pure White genes would result in the adulteration of the human gene pool and the denigration of the race. Moreover, the fear over miscegenation was deeply linked to ideas about sex and sexuality, particularly with regard to myths of Black male hypersexuality and their desire for fair-haired White women. Stories in the travel narratives of colonial explorers of apes in the jungles of Africa kidnapping and raping White women made their way into the public consciousness especially in the era of Hollywood cinema between the World Wars. In both the North and the South, pseudo-scientific claims of Black bestiality permeated mass culture by way of stereotype, providing the material for a host of Hollywood blockbusters, starting with D.W. Griffith’s 1917 epic *The Birth of a Nation*. The film featured two notorious villains, Gus, a slave played by an actor in blackface, and Silas Lynch, the mulatto leader of the South’s reconstruction, both of whose attempted rapes of fair White maidens prompted and justified the establishment of the Ku Klux Klan. The film’s central rape narrative, thus, invokes natural history’s longstanding ascription of hypersexuality and the tendency toward committing rape (especially against White women) to apes, and by extension, Blacks.<sup>52</sup>

Compounding this was the manner in which apes and monkeys were commonly featured in films as unmistakable stand-ins for the Black brute. Joseph von Sternburg’s 1932 *Blonde Venus*, starring Marlene Dietrich and Cary Grant, features Helen Faraday (played by the blonde-haired Dietrich) performing stage numbers in an ape suit while surrounded by African “natives” on stage and Black waiters on the club floor.<sup>53</sup> The most notable appearance of an ape standing in for the Black brute in Hollywood cinema is in Merian C. Cooper and Ernest B. Schoedsack’s *King Kong*, released just a year after *Blonde Venus* in 1933, toward the end of the eugenics movement in the United States. Accordingly, since Blacks were seen as a species of African ape, these films can be understood as not only expressing the fear over sex between Black men and White women and the resulting mixture of the gene pool, but also as cementing the popular image of Blacks as subhuman, brutal, and dangerous.

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<sup>49</sup> See EWEN AND EWEN, *supra* note 27, at 136.

<sup>50</sup> See KARLA HOLLOWAY, *PASSING ON: AFRICAN-AMERICAN MOURNING STORIES, A MEMORIAL* 100-102 (Duke University Press 2003).

<sup>51</sup> See DANIELLE C. HEARD, “MISCEGENATION,” *THE JIM CROW ENCYCLOPEDIA* 326-353 (Nikki L. M. Brown and Barry M. Stentiford, eds., Greenwood Press 2008).

<sup>52</sup> See EARL OFARI HUTCHINSON, *THE ASSASSINATION OF THE BLACK MALE IMAGE* 71-72 (Simon and Schuster 1996).

<sup>53</sup> See SIANE NGAI, “Black Venus, *Blonde Venus*,” *BAD MODERNISMS* 145-178 (Douglas Mao and Rebecca L. Walkowitz, eds., Duke University Press 2006).

In the North the same anxieties over the “dark brute”<sup>54</sup> found expression in the mainstream criminal justice system and the news media’s reaction to black crime. In 1938, during the highly-publicized murder case of Robert Nixon, upon which Richard Wright based his novel *Native Son*,<sup>55</sup> the media linked the 18 year-old Black man’s brutal beating of a White woman to his subhuman nature. In a *Chicago Tribune* article on the case with the headline “Brick Slayer Likened to Jungle Beast,” Nixon is described by a policeman as “just like an ape.”<sup>56</sup> The article goes on to say that he had “hunched shoulders and long, sinewy arms that dangle almost to his knees,” a description that echoes Topinard’s from four decades earlier. As well, the article goes on to say that “he is very black—almost pure Negro. His physical characteristics suggest an earlier link in the species.”<sup>57</sup>

The stereotype associating Blacks with apes and monkeys has been deeply ingrained in the political unconscious by the confluence of pseudo-science, popular culture, and mass media such that even after the end of the eugenics movement, advances in civil rights, and an increasingly pervasive understanding of racial equality, such associations continue to manifest in the later portion of the twentieth and early twenty-first centuries. For example, during the trial of the officers accused of beating Rodney King in 1992, the language of Black subhumanity helped to frame King as a big, Black, brute who victimized the White police officers, despite the video evidence of the four officers beating King with clubs. Tapping into this stereotype, the defense was able to portray King as having bestial strength and also that Blacks, like apes, have a higher threshold of pain tolerance, a justification for the use of undue force on King’s supine body. Even before trial, the Black-ape association apparently informed the officers’ use of excessive force, as they were heard on their radios calling Blacks “gorillas in the mist.” The police officers later partially explained away these remarks in terms of irony and Black humor.<sup>58</sup>

One of the most recent incarnations of this association was last year, when *Vogue* magazine featured an image of LeBron James, a Black National Basketball Association star, and Giselle Bündchen, a White model, that strikingly resembled a World War I recruitment poster of a large gorilla with a club in his hand carrying away a terrified “White beauty.”<sup>59</sup> Coming full circle, during the 2008 Presidential race, there were numerous instances of associating both Barack and Michele Obama with monkeys and apes.<sup>60</sup> In the week just after the *Post* cartoon controversy, a branch of Barnes & Nobles booksellers in Coral Gables, Florida placed a monkey

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<sup>54</sup> See “The Brute Caricature,” David Pilgrm, Curator, *The Jim Crow Museum of Racist Memorabilia*, Ferris State University, <http://www.ferris.edu/jimcrow/brute/>

<sup>55</sup> See RICHARD WRIGHT, *NATIVE SON* 278-80 (Harper & Bros. 1940).

<sup>56</sup> See Charles Leavelle, “Brick Slayer Likened to Jungle Beast,” *Chicago Tribune*, 5 June, 1938, Section 1, Pg. 6.; Cf. WRIGHT, *supra* note 55, at 238 – 40.

<sup>57</sup> *Id.*

<sup>58</sup> See DUMM, *supra* note 38, at 178-195.

<sup>59</sup> See H. R. Hopps 1917, <http://www.dhm.de/lemo/objekte/pict/pl003967/index.html>

<sup>60</sup> See Bo Emerson, *Politically Correct?: Not This Bar Owner*, ATLANTA-J. CONST., May 15, 2008, at B1 (indicating that “[i]n Georgia, a restaurant owner sold mock ‘Obama ‘08’ T-shirts featuring an image of Curious George, a cartoon monkey, and a Utah company made sock monkey dolls of the presidential candidate.”). See also Mcnairbo, *Michelle Obama Predicts Ohio Victory*, HUFFINGTON POST, February 15, 2008, [http://www.huffingtonpost.com/2008/02/15/michelle-obama-predicts-o\\_n\\_86896.html](http://www.huffingtonpost.com/2008/02/15/michelle-obama-predicts-o_n_86896.html) (comparing Michele Obama’s appearance to that of Zira from *Planet of the Apes*).

book prominently in the center of an Obama-themed front window display.<sup>61</sup> Stereotypes based on Black-ape association evolved with the advent of modernity, but have taken on a life of their own within mass culture.<sup>62</sup> As Ewen and Ewen note, stereotypes “served the requirements of media formulas that sought to avoid the burdens of complex character developments in favor of trouble-free indicators of good and evil. In the process, they were, and are, routinely separated from their moorings in history, becoming floating signifiers that can easily be applied to serve any given objective.”<sup>63</sup> For the *New York Post*, the image of the ape, “unmoored” from its historical underpinnings, could easily be explained away as a mere joke or wholly unrelated to the President. Cast against its historical backdrop, the cartoon served to lampoon the President not only for his ideas, but also for his Blackness.

## II. Laughing Matters: A Cultural Analysis of the *Post* Cartoon

In this section, we analyze the *New York Post* cartoon in light of the cultural repertoire of stereotypical images and dominant narratives of Black bestiality presented in Part I, paying particular attention to how humor functions in the explicit and implicit expressions of racism and aggression toward President Obama. One of the basic definitions of humor is that which sets up expectations in order to disrupt them.<sup>64</sup> Delonas’ cartoon sets up our expectations by showing two policemen who have just shot a chimp. At first, it appears to be a literal representation of the news story about a pet chimpanzee that attacked a woman and was shot by the responding police. The bubble above one officer’s head disrupts our expectations, however, by referring to another news story, the recent passing of a stimulus bill headed largely by President Obama and characterized by some conservatives as being too liberal. Noting this secondary level of signification, the image changes from a literal representation of a news story to a figurative joke, which derides the bill’s authors by comparing them to primates. More specifically, however, since the cartoon deals in the singular, citing one chimp and one author, the figurative joke can be understood as aiming its ridicule at one person in particular—the primary author of the bill, President Obama. Many have argued that a generous interpretation of this cartoon would link

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<sup>61</sup> See Zayda Rivera, *Monkey Book on Display in an Obama-Themed B&N Window*, DIVERSITY INC., <http://www.diversityinc.com/public/5419.cfm>.

<sup>62</sup> See EWEN AND EWEN, *supra* note 27, at 424.

<sup>63</sup> *Id.*

<sup>64</sup> See IMMANUEL KANT, *KRITIK OF JUDGEMENT* 223 (John Henry Bernard, trans., Macmillan and Co. 1892) (“In everything that is to excite a lively laugh there must be something absurd (in which the understanding, therefore, can find no satisfaction). *Laughter is an affection arising from the sudden transformation of a strained expectation into nothing.*”) (emphasis in original); ARTHUR SCHOPENHAUER, Chapter VIII, “On the Theory of the Ludicrous,” *THE WORLD AS WILL AND IDEA* 270-284 (3d ed, Richard Burdon Haldane and John Kemp, trans., Ticknor and Co. 1888). Schopenhauer states, “the source of the ludicrous is always paradoxical, and therefore unexpected, subsumption of an object under a conception which in other respects is different from it, and accordingly the phenomenon of laughter always signifies the sudden apprehension of an incongruity between such a conception and the real object thought under it, thus between the abstract and the concrete object of perception. The greater and more unexpected, in the apprehension of the laughter, this incongruity is, the more violent will be his laughter. . . . Indeed if we wish to understand this perfectly explicitly, it is possible to trace everything to ludicrous to a syllogism in the first figure, with an undisputed *major* and an unexpected *minor*, which to a certain extent is only sophistically valid, in consequence of which connection the conclusion partakes of the quality of the ludicrous.” *Id.* at 271. See also SIGMUND FREUD, *JOKES AND THEIR RELATION TO THE UNCONSCIOUS* 244-256 (James Strachey, trans., W. W. Norton and Company, 1989).

the chimp to all of the bill's authors.<sup>65</sup> In light of the pervasive stereotype of Black and simian likeness, however, it is fair to surmise that many readers will recognize that the chimp is being jokingly compared to the President, whose race is of historical significance.

A well-known function of humor is to suppress anger, violence, and aggression and transform them into a mode of expression that is more socially acceptable than outright scorn or physical violence.<sup>66</sup> Ridicule, as a comic attack on another, is a common form of humor, and it jokes by way of disrupting our sympathy and opening a momentary space for outward antipathy. In this way, aggressive jokes are an emotional process whereby unconscious feelings of antipathy are revealed and expressed. Derisive humor, then, is a weapon which fits within the constraints of cultural propriety. Hobbesian theorists of humor, those ascribing to the "superiority theory,"<sup>67</sup> explain that the comedy of ridicule manages to temporarily, at least, grant the joker a feeling of superiority over the object of ridicule, a hierarchy also perceived and enjoyed by the joke's audience. Indeed, such ridicule is said to produce a "sudden glory" for the joker.<sup>68</sup> Scorn alone does not necessarily disarm one's opponent, and physical violence, while effective, does not regularly fit within the bounds of cultural propriety. Ridicule, on the other hand, accomplishes sudden glory over the joke's object without engaging perilously in physical violence. As Max Eastman notes, the debasement of the ridiculed becomes "the source of a dear and infectious pleasure to the whole company, who are at play, and he will have a hard time making them let go of it." It is this process which explains "the superior power of ridicule and satire over scorn."<sup>69</sup>

The aggression in this cartoon, however, does not stop at the socially acceptable level of ridicule, as at the textual level of the image we observe a representation of two policemen exacting violence against the chimp who stands in for President Obama—indeed the assassination of a United States President. Moreover, while ridicule is generally understood as a socially acceptable form of rendering one's opponent inferior, it can only be understood as acceptable in the case of this cartoon before considering the terrain of racism upon which it treads. Divorced of its racial and violent context, the cartoon presents just another political caricature which momentarily brings a powerful man low, itself a form of pleasure for many, regardless of one's political affiliations or leanings.<sup>70</sup> The levels of racial allusion in the cartoon,

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<sup>65</sup> See Stein, *supra* note 20; Saul Relative, *Chimp Attack Cartoon by Sean Delonas Draws Condemnation, Sparks Outrage*, ASSOCIATED CONTENT, [http://www.associatedcontent.com/article/1489784/chimp\\_attack\\_cartoon\\_by\\_sean\\_delonas.htm](http://www.associatedcontent.com/article/1489784/chimp_attack_cartoon_by_sean_delonas.htm) (February 18, 2009).

<sup>66</sup> All of the major theories of comedy, incongruity theory, superiority theory, and repression theory (Freud and psychoanalysis), touch upon the aggressive nature of comedy. See MAX EASTMAN, *THE SENSE OF HUMOR* 32-37 (Octagon Books 1972).

<sup>67</sup> See HEARD, *supra* note 51, at \_\_\_\_.

<sup>68</sup> *Id.* at \_\_\_\_.

<sup>69</sup> See EASTMAN, *supra* note 66, at 36.

<sup>70</sup> The comic strategy of bringing a powerful man low through ridicule can be understood not just in terms of superiority theory, but also in light of Mikhail Bakhtin's notion of "grotesque realism" whereby the abstract nature of social power is degraded when confronted with the universal functions of the "grotesque body," the need to eat, sleep, defecate, and have sex. He says, "the essential principle of grotesque realism is degradation, that is, the lowering of all that is high, spiritual, ideal, abstract; it is a transfer to the material level, to the sphere of earth and body in their indissoluble unity." See MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* 19-20 (Hélène Iswolsky, trans. Indiana University Press 1984) (insert original publication date). The comedy of grotesque realism also compares to the comic formula described by Henri Bergson in his study of humor, that jokes can be found in "something

however, provide an additional register of humor for those who, explicitly or implicitly, find pleasure in racial stereotypes of Black people, and especially Black men, as beasts. This level of signification connotes the long and fraught history of racist discourse associating Blacks with primates delineated in Part I, as well as the historical reality of police brutality against Blacks—a reality linked to the stereotype. Indeed, the image of the bullet-ridden chimp connotes the stories of Sean Bell, Amadou Diallo, and other recent victims of police shootings.<sup>71</sup>

What Col Allen described as parody, or satire more broadly, ostensibly fails at this literal level of signification. Col Allen's whose rhetorical structure compares to the direct and literal scorn of right-wing radio hosts such as Rush Limbaugh, or arguably even unabashed White supremacist propagandists. Both deride President Obama for being an inept and dangerous President and advocate—whether subtly or specifically—for his assassination within the discourses of White supremacy and conservative criminology, which supports police brutality against Black and Brown peoples.<sup>72</sup> The cartoon does not mask this level of aggressive and violent meaning with the ridiculous, and in this way fails at the level of satire on this point.

In the case of the *New York Post* cartoon, the stereotype that links Black people with primates shows itself in unadulterated form. However, the pernicious discourse of Black sub-humanity that casts Africans as a species of ape separate from the human race as established by pseudo-scientists such as Carroll, Hartmann, Topinard and others, the same discourse which justified Jim Crow, eugenics, and a history of violence enacted against Blacks—dissipates into the “political unconscious,” as Fredrick Jameson would put it,<sup>73</sup> of White supremacy. These discourses largely remain in the past, but their effect on the imagination and cognitive processes persist in the form of stereotype. Ewen and Ewen argue that the challenge to deeply ingrained stereotypes is experienced as a traumatic disruption of one's epistemological foundations.<sup>74</sup> Moreover, they argue, “If stereotyping endures . . . the overarching worldview that shaped these mental categories is rarely visible.”<sup>75</sup> In other words, the more stereotypes persist over time in a culture, the more they become ingrained into the political unconscious, and the less their originating logic becomes consciously known. In this way, the cartoonist, the *New York Post* editors, and conservative apologists can, in one sense, get away with claiming ignorance of the

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mechanical encrusted upon the living,” i.e. the mechanical nature of social status upon the reality of our biological commonness. See INSERT AUTHOR'S NAME, *LAUGHTER: AN ESSAY ON THE MEANING OF THE COMIC* 37 (Cloudesley Brereton and Fred Rothwell, trans., MacMillan Co. 1914). In this way, the cartoon brings a powerful man, the President, low by foregrounding his grotesque relation to corporeality and death.

<sup>71</sup> See Sarah Kerkshaw, *Police Shooting Reunites Circle of Common Loss*, *NEW YORK TIMES*, December 2, 2006, at A1. This article also mentions Black shooting victims Patrick M. Dorismond, Gidone Busch, Malcolm Ferguson, Timothy Stansbury Jr., and 13-year-old Nicholas Heyward, Jr., as well as Abner Louima, a Haitian immigrant who was brutalized and sodomized with a toilet plunger by New York City police officers outside a Brooklyn nightclub in 1997.

<sup>72</sup> For an example of racist criminology see JAMES Q. WILSON, RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE: THE DEFINITIVE STUDY OF THE CAUSES OF CRIME* (New York: Simon and Schuster 1998); for an study of racist criminology see COLIN WEBSTER, *UNDERSTANDING RACE AND CRIME* (New York and Berkshire, England: McGraw-Hill International 2007).

<sup>73</sup> FREDERICK JAMESON, *POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 17 (Ithaca, New York: Cornell University Press 1982). Jameson's project of theorizing the political unconscious “conceives of the political perspective not as some supplementary method, not as an optional auxiliary to other interpretive methods current today . . . but rather as the absolute horizon of all reading and all interpretations.” *Id.*

<sup>74</sup> EWEN AND EWEN, *supra* note 27, at 423.

<sup>75</sup> *Id.*

historical weight of primate imagery in association with Blacks. For while stereotypes tied to White supremacist logic prove to be deeply embedded in culture, the discourse and its implications are not *necessarily* consciously known.

Here, Freud's theory of jokes and their relation to the unconscious becomes useful for interpreting what gets expressed in the cartoon, regardless of the conscious will of the artist. According to Freud's theory of humor, jokes serve the function of expressing repressed thoughts, motives, and feelings relegated to the unconscious through figurative substitution and word play which, like humor in general, momentarily disrupts expectations and dominant narratives.<sup>76</sup> He called this kind of humor "tendentious."<sup>77</sup> It was Freud's work on dreams that led him to recognize the structural similarity they had with jokes in terms of their masking of unconscious thoughts.<sup>78</sup> As Eastman explains, jokes, like dreams, show "the same tendency to express two or more things by one, to express a thing by its opposite, by something similar to it, by using ambiguous words, or words that have both a literal and figurative meaning, by twisting words, or making up new ones, or changing their order in a sentence. Indeed a dream has all the attributes of a joke except its humor."<sup>79</sup> Dreams mask forbidden thoughts in order to keep them from the consciousness, while jokes disguise taboo thoughts in order to let them into consciousness. In the case of dreams, the masked thoughts are most likely pain-inducing, while in jokes the thoughts are pleasure-inducing. Tendency wit, or "tendentious jokes," are nonsensical and pleasurable but "so constructed as to furnish a disguise under which a man hearing it can bear to admit into his own society his own suppressed impulses."<sup>80</sup> These tendentious jokes provide for an economy of feeling in that the energies of the passions are conserved through the expression of laughter. Regarding the cartoon, it is arguable that the joker/artist is conscious *and* unconscious to varying degrees over the repressed racist feelings which are liberated in this cartoon. Audiences who laugh at and find no objection to this cartoon reveal their unconscious racism in that they take pleasure in impulses which are ordinarily repressed.<sup>81</sup>

In order to test this theory of wit as a censor for taboo thoughts, we might compare Delonas' cartoon with unabashedly racist cartoons produced by White supremacist organizations. In his useful study of humor, Elliot Oring describes how the White Aryan Resistance (WAR), led by father and son duo Tom and John Metzger, publishes hateful racist cartoons, yet they do so alongside overt hate speech.<sup>82</sup> Oring also shows how many of their cartoons advocate for violence against racial minorities, gays, and lesbians. With this example, the Freudian notion that jokes provide the technologies of expressing repressed thoughts and desires does not appear to apply, since racist thoughts are conscious and accepted among WAR's audience. If the Freudian model applies at all to this limit case example, however, it does so at the level of advocating violence. Figurative and humorous representations of violence against hated groups take the place of literal declarations of war, which could land the propagandists into legal trouble. In 1990, WAR was sued by the Anti-Defamation League and the Southern Poverty Law Center for inciting or encouraging a gang of skinheads who read WAR's publications to kill

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<sup>76</sup> See FREUD, *supra* note 64, at \_\_\_\_.

<sup>77</sup> *Id.* at 106-170.

<sup>78</sup> *Id.* at 197-223.

<sup>79</sup> EASTMAN, *supra* note 66, at 197.

<sup>80</sup> *Id.* at 195.

<sup>81</sup> See *supra* notes \_\_ and accompanying text.

<sup>82</sup> See ELLIOT ORING, *ENGAGING HUMOR* 41-57 (University of Illinois Press 2003).

Mulugeta Seraw, an Ethiopian student living in Portland, Oregon.<sup>83</sup> Oring describes how WAR, aware of the legal allowances for plotting violence, uses these strategies of humor to mask the literal meaning, which must be repressed in order to avoid prosecution. Indeed, Tom and John Metzger defended themselves on the ground that the cartoons did not express imminent calls to violence; rather, they argued, the cartoons were comic exaggerations, satirical, or abstract enough to be a form of speech protected under the constitution. The Metzgers lost the lawsuit, but their defense shows how the humor of their political cartoons was in fact a mask for forbidden declarations of violence.

The *Berhanu v. Metzger* case suggests that the humor of the *Post* cartoon masks and abstracts imminent calls—intended or unintended—to violence against whomever the chimp is meant to represent—namely, President Barack Obama. As in the case of the skinheads killing Seraw, however, the call to violence obfuscated by humor in the cartoon is consciously or unconsciously—explicitly or implicitly—understood in its literal form by those who harbor extreme racial bias and antipathy toward the President, such that this cartoon can actually be said to pose a threat to the President’s safety.

### III.

#### Order in the Courts:

#### How the Judicial System Has Made Sense of the Black-Primate Association

Courts have also provided some guidance on how language may be interpreted as representing racial animus and discrimination or not. During and immediately following the 2008 presidential election campaign, several incidents that could be construed as racially insensitive occurred. It could be argued that, like the Obama-primate association, these incidents were merely jokes, misunderstandings, and the like. Courts have provided clarity, however, when such incidents happen within a legal context.

In October 2008, the president of a Republican women’s club sent out a newsletter to 200 club members with a photo of Barack Obama on a ten dollar bill surrounded by fried chicken, watermelon, and barbecued ribs.<sup>84</sup> Inscribed on this bill, referred to as “Obama Bucks,” are the words “United States Food Stamps.”<sup>85</sup> Just four months later, in February 2009, a similar association between the President and stereotypical Black food was seen when the mayor of Los Alamitos, California, resigned after an email he sent sparked national outrage.<sup>86</sup> The email depicted the White House lawn planted with watermelons under the title “No Easter egg hunt this year.”<sup>87</sup> Associations between Blacks and certain foods, specifically watermelon and fried chicken, gained cultural currency since before the Civil War as they appeared regularly as props

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<sup>83</sup> *Berhanu v. Metzger*, No. A8911-07007, slip op. at \_\_\_\_ (Cir. Ct. Multnomah County October 25, 1990), [http://www.splcenter.org/pdf/dynamic/legal/berhanuvmetzger\\_judgment.pdf](http://www.splcenter.org/pdf/dynamic/legal/berhanuvmetzger_judgment.pdf)

<sup>84</sup> Michelle DeArmond, *Inland GOP Mailing Depicts Obama’s Face on Food Stamp*, PRESS ENTERPRISE, October 16, 2008, [http://www.pe.com/localnews/inland/stories/PE\\_News\\_Local\\_S\\_buck16.3d67d4a.html](http://www.pe.com/localnews/inland/stories/PE_News_Local_S_buck16.3d67d4a.html).

<sup>85</sup> *Id.*

<sup>86</sup> Rebecca Cathcart, *Mayor Resigns Over ‘Watermelon’ Email Message*, NEW YORK TIMES, February 27, 2009, <http://www.nytimes.com/2009/02/28/us/28resign.html>.

<sup>87</sup> *Id.*

in blackface minstrel shows, a form of popular entertainment based on racist humor.<sup>88</sup> Generally, courts encountering such associations recognize them as racially derogatory. For example, in *Robinson v. Conagra Poultry Corporation*, the plaintiff alleged that, throughout his twenty-five year career with the defendant-employer, he was subjected to a hostile work environment because of a co-worker's abusive language in violation of 42 U.S.C. § 1981 and the Arkansas Civil Rights Act of 1993.<sup>89</sup> Among the abusive language cited by the plaintiff was the statement, "You boys like collard greens and watermelons."<sup>90</sup> Although the court granted the defendant's motion for summary judgment, the court acknowledged the "watermelon" comment as "offensive" and a "racial slur."<sup>91</sup>

In December 2008, Chip Saltman—candidate for chairman of the Republican National Committee—sent a compact disc to committee members featuring the song, "Barack the Magic Negro."<sup>92</sup> While, at one time, the term "negro" was considered a neutral and acceptable appellation for Blacks, it is now generally considered a racial slur. In the 2008 Sixth Circuit case, *Lindsey v. Whirlpool Corporation*, the plaintiff appealed from a district court order granting defendant-employer's motion for summary judgment.<sup>93</sup> The plaintiff alleged that she was subjected to a hostile work environment in violation of Title VII where, *inter alia*, an exam proctor instructed her to identify herself as "negro" on an examination.<sup>94</sup> The court concluded that the exam proctor's comment constituted a basis for alleging racial harassment and was "unacceptable."<sup>95</sup>

In May 2009, an aide to a Republican Tennessee State Senator came under fire after circulating an email that contained an image composed of portraits or photos of each U.S. president except Obama, who is depicted only as "a pair of cartoon spook eyes against a black backdrop."<sup>96</sup> The term "spook," a well-known racial slur used to insult blacks, is usually acknowledged by courts encountering it as racially offensive. For example, in *Taylor v. Jones*,

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<sup>88</sup> Minstrelsy, a burlesque of impersonated Black performance and caricature performed originally by White actors in blackface makeup, began appearing as early as the 1820s. The humor of the minstrel stage consisted primarily of one-liners, riddles, quips, gibes, malapropisms, parodic and nonsensical stump-speeches, as well as slapstick comedy and antic humor and centered on the popular myth of the happy slave and a romanticization of the plantation. The minstrel show generally had an established format featuring the interlocutor, a straight man, and the comic "endmen," Mr. Bones and Mr. Tambo, so named for the instruments they played. The form consisted of a "walkaround" and opening song, followed by the "circle" or comic exchange between the interlocutor and endmen, the olio, and finally a plantation skit or farce of well known play; Harriet Beecher Stowe's abolitionist novel *Uncle Tom's Cabin*, for example, was frequently parodied. For more blackface minstrelsy see also DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING-CLASS* 115-132 (Verso 2000); ERIC LOTT, *LOVE AND THEFT: BLACKFACE MINSTRELSY AND THE AMERICAN WORKING-CLASS* (OUP 1995); ALEXANDER SXTON, *THE RISE AND FALL OF THE WHITE REPUBLIC* 165-182 (Verso 2003).

<sup>89</sup> 07-CV-1094, \*21, 2008 U.S. Dist. LEXIS 76547 (W.D. Ark. Sept. 30, 2008).

<sup>90</sup> *Id.* at \*22

<sup>91</sup> *Id.* See also, *Smith v. Fairview Ridges Hosp.*, 550 F. Supp. 2d 1050, 1057 (E.D. MN. 2008) ("courts have held that statements implying that 'all black people love fried chicken' are offensive" (quoting *Copeland v. Hussman Corp.*, Civ. No. 4:06-839, 2007 U.S. Dist. LEXIS 79631, at \*21 (E.D. Mo. Oct. 26, 2007)).

<sup>92</sup> Clarence Page, *No Magic in 'Magic Negro'*, CHICAGO TRIBUNE, December 31, 2008, <http://archives.chicagotribune.com/2008/dec/31/entertainment/chi-oped1231pagedec31>.

<sup>93</sup> 295 Fed. Appx. 758, 760 (6th Cir. 2008).

<sup>94</sup> *Id.* at 762.

<sup>95</sup> *Id.* at 766.

<sup>96</sup> Leonard Pitts, Jr., *Race and the President – Some Republicans Think it's the 19<sup>th</sup> Century*, PITTSBURGH POST-GAZETTE, June 23, 2009, <http://www.post-gazette.com/pg/09174/979159-109.stm>.



the Eight Circuit affirmed the district court's holding that the plaintiff had been discriminated against on the basis of her race, in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act.<sup>97</sup> After considering the testimony of employees that were, *inter alia*, frequently subjected to the use of the term "spook," the court concluded that "the plaintiff was subjected to an atmosphere heavily charged with racial discrimination which she endured as long as could be expected."<sup>98</sup>

Just as federal courts have interpreted various conduct and incidences as racially insensitive, if not racist, they have also weighed evidence of Black-primate association in determining whether such an association was indeed made, and where so whether it provided an indicia of racial bias. It is not our contention that every case that has grappled with this issue has held that racial bias was evident, largely due to procedural or technical issues. However, these cases at the very least illustrate that the Black-primate association creates an association rooted in race bias.

### A. First Circuit

In *Morgan v. McDonough*, the plaintiffs, a class representing all Black Boston public school children and parents, moved to close the South Boston High School ("SBHS"), a school serving a racially mixed enrollment under a desegregation plan.<sup>99</sup> The plaintiffs alleged that Black students were being denied a "peaceful, integrated and nondiscriminatory education" and sought to close the school.<sup>100</sup> The district court agreed with the plaintiffs' allegation, but instead of closing the school, it designated a temporary receiver whose duty it was to desegregate the school according to the desegregation plan announced for SBHS (and other Boston schools not relevant to this matter). The plaintiffs appealed that ruling. On appeal, the First Circuit held that there was nothing impermissible about the order designating a temporary receiver for SBHS where it was clear from findings, supported by evidence, that Black students attending the school were not receiving a peaceful, desegregated education, but were being subjected to insults, intimidation and continued segregation. In affirming the district court's opinion that the temporary receiver was a permissible solution to the desegregation problem at SBHS, the First Circuit noted findings made by the district court regarding the impediments to desegregation including: (1) evidence that Black students had been physically attacked without provocation by larger groups of White students (2) evidence that Black students had been disciplined for defending themselves while White attackers went unpunished; (3) evidence that Black students were found to have been subjected to continuing verbal abuse, and school officials did little to intervene despite a court-ordered ban on racial epithets; (4) evidence of "familiar racial slurs,"

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<sup>97</sup> 653 F.2d 1193, 1196 (8th Cir. 1981).

<sup>98</sup> *Id.* at 1198-99. The Second Circuit also encountered the term in *Richardson v. New York State Dept. of Correctional Service*, 180 F.3d 426 (2d Cir. 1999), where the court reversed the district court's order granting of summary judgment on plaintiff's claim that she was subjected to a racially hostile work environment under Title VII. *Id.* at 432. In reaching its decision, the court noted that a reasonable juror could infer that plaintiff's co-worker's use of the word "spooks," *inter alia*, was racially hostile. *Id.* at 440. See also *Home Repair, Inc. v. Paul W. Davis Systems, Inc.*, 98 C 4074, 2000 U.S. Dist. LEXIS 929, at \*20 (N.D.Ill. January 31, 2000) (denying summary judgment because the plaintiff proffered sufficient circumstantial evidence of intentional discrimination where a company representative declared that the company owner "didn't want these spooks to get a monopoly of his business").

<sup>99</sup> See *supra* note 1, 540 F.2d at 529.

<sup>100</sup> *Id.*

including White students employing the chant “2, 4, 6, 8 assassinate the nigger apes,” and, while changing classes, groups of White students often sing “bye, bye blackbird and jump down, turn around, pick a bale of cotton”; (5) evidence that the White student caucus at SBHS, in a list of demands, requested that music be played over SBHS’s public address system during the changing of classes, since “music soothes the savage beasts”; and (6) evidence that, on numerous occasions, SBHS’s staff and police stationed inside the building had heard these remarks and chants and failed to take any corrective or disciplinary action.<sup>101</sup> According to the First Circuit, the foregoing findings, among others, made the district court’s desegregation decree reasonable and permissible under the circumstances.<sup>102</sup> The court also noted that the temporary receivership should “last no longer than the conditions which justify it make necessary.”<sup>103</sup>

## B. Second Circuit

In *Piesco v. Koch*, a former public employee/deputy director of examinations sued New York City, its Department of Personnel (“DOP”), and two of her DOP superiors under § 1983, alleging that her termination violated her free speech rights.<sup>104</sup> DOP was in the business of developing and administering tests for various city jobs.<sup>105</sup> The plaintiff was deputy director of examinations for DOP and, along with the two superiors she sued, was responsible for developing and administering tests for NYC jobs.<sup>106</sup> The plaintiff complained that a test devised by her superiors had an easily vaulted pass rate that a “functional illiterate” could pass and unsuccessfully lobbied her superiors to increase the pass score for the test.<sup>107</sup> The plaintiff shared with the NYC Department of Investigations (“DOI”) that she believed a moron could pass the test devised by her superiors.<sup>108</sup> Though the plaintiff had received favorable job performance reviews prior to speaking with DOI, she subsequently received unfavorable reviews from her superiors because she became vociferous and confrontational and was

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<sup>101</sup> *Id.* at 530-31.

<sup>102</sup> *Id.* at 533-34 (internal quotations omitted).

<sup>103</sup> *Id.* at 535. A single district court within the First Circuit also referenced, but did not consider, the primate-Black association in making its ruling. In *Horne v. City of Boston*, 509 F.Supp.2d 97 (D. Mass. 2007), Black police officers Brown and Horne were chosen to be part of the Youth Violence Strike Force (YVSF). *Id.* at 98. Officers Horne and Brown alleged that the YVSF squads were, for the most part, segregated by race. *Id.* at 99. After being involuntary transferred from YVSF to patrol duties, Brown and Horne brought suit against supervisors and city, alleging discrimination and retaliation in violation of the Civil Rights Act and the Massachusetts Civil Rights Act (MCRA). The issue before the court was whether Brown and Horne’s constitutional rights were violated when they complained on several occasions about being mistreated by their superiors and being retaliated against for exercising their constitutional right to complain. *Id.* at 110. Evidence offered in support of their discrimination claim included: (1) racially insensitive statements made by one officer about the “criminal” student body at Dorchester High School, and the wearing of a T-shirt by another officer mocking the death of Abner Diallo; (2) Brown and Horne also alleged that unidentified officers used racially abusive epithets, however, the court refused to consider the evidence because it was attributed to anonymous hearsay sources; and (3) Brown and Horne also alleged that one of the same officers referred to Black suspects as “monkeys.” *Id.* at 111 n. 20. Because plaintiffs’ supervisors’ statements were protected speech and because plaintiffs failed to demonstrate how they suffered harm from the alleged discriminatory statements, the court found that plaintiffs failed to satisfy their legal burden under the relevant laws. *See id.* at 116.

<sup>104</sup> 12 F.3d 332 (2d Cir. 1993).

<sup>105</sup> *Id.* at 336.

<sup>106</sup> *Id.* at 336.

<sup>107</sup> *Id.* at 337.

<sup>108</sup> *Id.* at 335.

eventually terminated.<sup>109</sup> The plaintiff had alleged that she was terminated because she expressed her views on the test and her superiors and the other defendants retaliated against her in violation of § 1983.<sup>110</sup> A jury returned a verdict in her favor and the district court denied the defendant's motion for judgment as a matter of law and refused to grant a new trial. On appeal, the court remanded for a new trial. Among the factual findings made by the district court and affirmed by the Second Circuit was a finding that the plaintiff referred to the then police commissioner, a Black, as a "baboon."<sup>111</sup> The primate-Black reference was not critical to the Second Circuit's disposition, which affirmed the district court's denial of defendants' motion seeking a new trial but remanded the case because the district court applied the wrong legal standard in denying defendants' motion.<sup>112</sup>

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<sup>109</sup> *Id.* at 336.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 338.

<sup>112</sup> *Id.* at 339. Seventeen district courts within the Second Circuit have considered or referenced the primate-Black analogy in resolving disputes. *See*, *Brown v. New York State Dep't. of Corr. Servs.*, 583 F.Supp.2d 404, 417 (W.D.N.Y. 2008) (reasoning that a Black correctional officer had sufficiently vaulted defendants' summary judgment motion by alleging evidence of violations of Title VII, § 1981, § 1983, and New York State Human Rights Law, by his White co-workers who, inter alia, described plaintiff as a "black ass nigger brother," "fuck monkey," and a "bitch ass nigger"); *Buster v. City of Wallingford*, 557 F.Supp.2d 294, 298-99 (D. Conn. 2008) (finding that, despite a Black plaintiff's allegations of Title VII, § 1983, and relevant state law violation, including being referred to as "chunky monkey," and "nigga," among other derogatory characterizations he had not satisfied the elements of the relevant discrimination laws in establishing a *prima facie* case of discrimination); *Holt v. Roadway Package Sys. Inc.*, 506 F.Supp.2d 194, 204-05 (W.D.N.Y. 2007) (finding that a Black plaintiff of Jamaican descent, did not satisfy his burden of proving discrimination based on race or national origin despite allegations that he was referred to as "porch monkey," "nigger-rigged," and "boy," among other derogatory remarks); *Mislin v. City of Tonawanda Sch. Dist.*, No. 02-CV-273S, 2007 WL 952048, at \*4 (W.D.N.Y. Mar. 29, 2007) (finding that derogatory statements such as "N-Bomb," "nigger," "monkey," "fag," and "faggot" were used to describe Blacks at a high school, but reasoning that class plaintiffs had not adduced sufficient evidence to withstand defendants' summary judgment motion on § 1983, Title VII, and related state law claims); *Everson v. New York City Transit Auth.*, No.1:02-cv-1121, 2007 WL 539159, at \*6 (E.D.N.Y. Feb. 16, 2007) (affirming factual findings by a magistrate judge that Black employee had alleged sufficient facts, including allegations that his supervisor referred to Blacks as "gorilla[s]," to establish a *prima facie* case of discrimination but failed to establish sufficient evidence that defendants' reason for not promoting plaintiff was pretextual); *Gray v. Lutheran Soc. Servs. of Metro. N.Y., Inc.*, No. 04-CV-2843, 2006 WL 1982859, at \*8 (E.D.N.Y. July 13, 2006) (finding that plaintiff's isolated evidence of racial discrimination in violation of Title VII and analogous state law, including plaintiff's superior describing another Black employee as a "monkey," was insufficient to withstand defendants' motion for summary judgment); *During v. City Univ. of N.Y.*, No. 01 Civ. 9584, 2005 WL 2276875, at \*15 (S.D.N.Y. Sept. 19, 2005) (finding that there was insufficient evidence to sustain a hostile work environment claim despite evidence that plaintiff, a Black custodian, was called 'monkey chaser' and 'black a-' by his superiors, because the persons who made those remarks died the comments were not "repeated and continuous"); *Kemp v. A & J Produce Corp.*, No. 00-CV-06050, 2005 WL 5421296, at \*19 (E.D.N.Y. June 7, 2005) (finding that isolated incident of racial slurs used by a supervisor referring to Blacks as "monkeys" or "Kunta" was insufficient to withstand defendants' summary judgment motion as to plaintiff's failure to promote, Title VII retaliation, and analogous state law claims); *Morgan v. Metro. Dist. Comm'n*, 222 F.R.D. 220, 225 (D. Conn. 2004) (denying Title VII class certification to a class of former and current Black city employees of defendant despite evidence that White supervisors and co-workers described Blacks as "monkey[s]" or "gorilla[s]" because the plaintiff class failed to satisfy the elements of class certification); *Lumhoo v. Home Depot USA, Inc.*, 229 F.Supp.2d 121, 154 (E.D.N.Y. 2002) (finding that racial epithets such as "nigger" and "porch monkeys," among other evidence, was sufficient to sustain a triable issue of whether plaintiffs experienced a hostile work environment in contravention of Title VII and other laws); *Marvelli v. Chaps Community Health Ctr.*, 193 F.Supp.2d 636, 646 (E.D.N.Y. 2002) (finding that though plaintiffs, two former Black female employees of defendant, did not allege sufficient facts to sustain a hostile work environment and other Title VII claims, because plaintiffs did allege facts to permit them to amend their complaint and add Title VII sex discrimination claims based on epithets such "ape," "monkey," and "gorilla" being used to describe Black women and conduct such as pictures of women with dogs

### C. Third Circuit

In *Wilson v. Blockbuster, Inc.*, three former Black employees of the defendant video store chain brought suit under § 1981 alleging racial discrimination.<sup>113</sup> The defendant moved for summary judgment. The district court held that the plaintiffs' co-worker's racist comments, of which the employer was unaware, did not result in constructive discharge of a Black employee. In addition, one of the employees failed to establish a *prima facie* case that the failure to promote her was based on race. Also, the court found one of the employees' refusal of a request to accept transfer did not give rise to an inference of discrimination. As part of its factual findings, the district court found that a White employee at one of the defendant's stores made racist comments in the named plaintiff's presence. The named plaintiff testified at a deposition that the White employee had commented on the appearance of Black employees and customers, and made jokes comparing Blacks to "monkeys."<sup>114</sup>

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painted on their bare breasts); *Rabel v. Am. Bldg. Maintenance*, No. 00 CIV.1940, 2002 WL 389156, at \*3 (S.D.N.Y. Mar. 12, 2002) (finding that one unspecified comparison of Black men to monkeys was insufficient to sustain Black plaintiff's Title VII discrimination claims); *Curtis v. Airborne Freight Corp.*, 87 F.Supp.2d 234, 248 (S.D.N.Y. 2000) (finding that Hispanic and Black plaintiffs did not put supervisors on notice of racial epithets such as "apes or baboons," "spooks," and "Buckwheats," among others, being used to describe plaintiffs and their race); *Graaf v. North Shore Univ. Hosp.*, 1 F.Supp.2d 318, 320-21 (S.D.N.Y. 1998) (finding evidence that plaintiff, a West Indian American, was called a "black hairy monkey in a cage in need of a banana" by his superiors but that his claim for Title VII relief was time barred); *Cooper v. Xerox Corp.*, 994 F. Supp. 429, 433 (W.D.N.Y. 1998) ( finding that Black employee alleged sufficient facts to sustain a hostile work environment claim, including fact that co-worker called him a "black monkey" and that racial epithets were inscribed on bathroom wall and that nothing was done by plaintiff's supervisor after she was told about the acts); *Wills v. Key Food Stores Coop. Inc.*, No. 95 CV 5333, 1997 WL 168590, at \*4 (E.D.N.Y. Apr. 9, 1997) (rejecting defendants' 12(b)(6) motion on grounds that plaintiff, a Black employee of defendant, proffered sufficient proof of a hostile work environment, including fact that he was referred to by co-workers as a "nigger," "mooley," and "monkey" over an extended period); *Cox v. Nat'l Football League*, 889 F. Supp. 118, 119 (S.D.N.Y. 1995) (finding that Black football player was called racial obscenities, including "nigger" and "monkey," by fans when his team visited an opponent's field. Though the player's Title VII lawsuit was dismissed by stipulation, the NFL made changes following the stipulation and plaintiff was deemed the "prevailing party" for purposes of collecting attorney's fees.).

<sup>113</sup> 571 F. Supp. 2d 641 (E.D. Pa. 2008).

<sup>114</sup> *Id.* at 649. Seven district courts within the Third Circuit have referenced the primate-Black analogy. *See, e.g., Spencer v. Zimmerman*, No. 3:CV-07-101, 2008 WL 2994227, at \*9 (M.D. Pa. July 31, 2008) (accepting a magistrate judge's factual findings that plaintiff, a Black former inmate, who brought a *pro se* § 1983 claims against defendant correctional facility and three of its principals had valid claims based, in part, on being called "retarded nigger" and "monkey boy" by individual defendants); *Wilson v. Primus Tech. Inc.*, No. 4:04-CV-2784, 2005 WL 2562296, at \*5 (M.D. Pa. Oct. 12, 2005) (finding that plaintiff did not satisfy his legal burden of demonstrating a colorable claim of Title VII hostile work environment existed, irrespective of fact that plaintiff was called "nigger" and "monkey" on several occasions); *Emri v. Evesham Tp. Bd. of Educ.*, 327 F.Supp.2d 463, 467 (D.N.J. 2004) (finding evidence that dismissal of White teacher who made racially insensitive remarks about Blacks, including saying that Black students "seemed fascinated with the texture of [her] hair" and acted like "little monkeys picking their heads," among other complaints, did not deprive plaintiff of her procedural due process rights); *McCleave v. R.R. Donnelley & Sons Co.*, 226 F. Supp.2d 695, 698 & n.5 (E.D. Pa. 2002) (finding that plaintiff, a Black temporary employee of defendant, has pleaded sufficient facts to sustain a Title VII hostile work environment, among other claims, by alleging that his supervisor at defendant referred to Blacks and Hispanics as "fucking monkeys" "basketball team" and stated "I'm going to fire all these fucking monkeys and get a bunch of Orientals."); *Jackson v. Delaware River and Bay Auth.*, No. 99-3185, 2001 WL 1689880, at \*2 (D.N.J. Nov. 26, 2001) (finding that plaintiffs, Blacks, had pled sufficient facts to sustain a hostile work environment claim, including that defendant

#### D. Fourth Circuit

In denying a petition for rehearing en banc, in *Jordan v. Alternative Res. Corp.*, the Fourth Circuit dismissed the case, holding that while a single racist remark by the plaintiff's fellow employee was an ugly one, not even plaintiff alleged that it had created a hostile work environment as defined by Title VII cases.<sup>115</sup> The gravamen of the plaintiff's complaint was that, while in the network room of his employer's office, the plaintiff heard a coworker, who was watching television, exclaim – not directly to Jordan but in his presence – “They should put those two black monkeys in a cage with a bunch of black apes and let the apes f-k them.”<sup>116</sup> The co-worker was speaking to the television set in response to a report that John Allen Muhammad and Lee Boyd Malvo, the Washington-area terrorists, had been captured.<sup>117</sup>

In *White v. BFI Waste Servs., LLC*, the Fourth Circuit reversed grants of summary judgment in two Title VII cases, consolidated for appeal.<sup>118</sup> The plaintiff-appellants, were Black “roll off” drivers for the defendant. They alleged racial discrimination by defendant in violation of Title VII, including a hostile work environment and failure to compensate them adequately for similar work.<sup>119</sup> The court noted that its *de novo* review of the record led it to the conclusion that a reasonable jury could find that both plaintiff-appellants suffered harassment that was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere. In particular, one plaintiff-appellant had testified in his deposition, which was included as part of the record in both cases below, that throughout his employment, supervisors repeatedly called him and other Black employees “boy, jigaboo, nigger, porch monkey, Mighty Joe Young,” and “Zulu warrior.”<sup>120</sup>

In *Spriggs v. Diamond Auto Glass*, a former employee brought racial harassment and retaliation action against his former employer, its president, and his supervisor under § 1981.<sup>121</sup> The action was dismissed by the district court, but the Fourth Circuit reversed, finding that issues of fact remained as to whether the plaintiff's immediate supervisor created hostile work environment during the plaintiff's two terms of employment, whether the employer had an affirmative defense to liability based on its anti-harassment policy, and whether the employee was retaliated against for asserting his rights. At his deposition, the plaintiff testified that he left his employer the first time because of his supervisor's incessant racial slurs, insults, and epithets.

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supervisors and co-workers used racial epithets and that an employee at defendant displayed a photograph of two baby gorillas with one of the plaintiffs' likeness and another Black's name written near each of the animals above the employee time clock); *Johnson v. Strick Corp.*, No. CIV. A. 95-7152, 1996 WL 437049, at \*2 (E.D. Pa. Aug. 2, 1996) (denying cross-motions for summary judgment despite evidence that plaintiff was called and harassed with the written words “nigger,” “porch monkey” and “mouley” by his co-workers); *Goode v. Police Officer Hall*, Civ. A. No. 85-5079, 1986 WL 2465, at \*2 (E.D. Pa. Feb. 19, 1986) (permitting claim against White officer to vault summary judgment because plaintiff, a Black suspect in a burglary, exercised his right to counsel and was told by defendant officer that even if he was not the proper suspect “all niggers and monkey look alike to him”).

<sup>115</sup> 467 F.3d 378 (4th Cir. 2006).

<sup>116</sup> *Id.* at 379.

<sup>117</sup> *See id.* at 379.

<sup>118</sup> 375 F.3d 288 (4th Cir. 2004).

<sup>119</sup> *Id.* at 291.

<sup>120</sup> *Id.* at 297.

<sup>121</sup> 242 F.3d 179 (4th Cir. 2001).

Indeed, the plaintiff's supervisor rarely hesitated to vilify anyone of African descent, including the company's employees, whom he proclaimed "niggers" or "monkeys," and customers of the business.<sup>122</sup>

In *Carter v. Ball*, a Black employee brought an employment discrimination action against the Secretary of the Navy for both failure to promote and harassment in violation of Title VII.<sup>123</sup> The district court dismissed the plaintiff's claims after his case-in-chief. The plaintiff appealed that decision and the Fourth Circuit affirmed, holding that the plaintiff failed to establish relevant discrimination with respect to promotion, was not constructively discharged, failed to establish retaliatory discharge, and failed to establish a hostile environment claim. Among the allegations the plaintiff made to support his Title VII hostile work environment claim was that his supervisor pasted a poster of a gorilla with an inscription under it that read, "I wouldn't mind being a NOBODY if I could only get A LITTLE RECOGNITION once in awhile."<sup>124</sup>

## E. Fifth Circuit

In *Thomas v. Atmos Energy Corp.*, a *per curiam*, unpublished disposition, a Black former employee of the defendant Company, brought an action under Title VII based on a claim that he was constructively discharged by not being promoted, in retaliation for having previously filed a race discrimination complaint.<sup>125</sup> The district court found that the plaintiff had been called "Mighty Joe Young . . . the big black gorilla" on more than one occasion by his White supervisor and that the plaintiff had reported the same to human resources. Human resources then addressed the issue by meeting with the relevant parties, reviewing the company's code of conduct, and instructing all employees to not engage in harassing or intimidating conduct.<sup>126</sup> The plaintiff appealed the decision of the district court that granted the defendants' summary judgment motion and refused to consider hearsay evidence in the form of an affidavit of a co-worker proffered to support the plaintiff's claim that he was constructively discharged. On appeal, the Fifth Circuit affirmed the district court's opinion.<sup>127</sup>

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<sup>122</sup> *Id.* at 182.

<sup>123</sup> 33 F.3d 450 (4th Cir. 1994).

<sup>124</sup> *Id.* at 461. Four district courts within the Fourth Circuit have referenced the primate-Black analogy. *See, e.g.*, *Alexander v. Delta Star, Inc.*, No. 6:08cv00011, 2008 WL 3887654, at \*1 (W.D. Va. Aug. 21, 2008) (finding that, despite racially charged comments such as "Black Bitch," "Mother Fucker," and "Monkey Ass, plaintiff did not establish link between those comments and her Title VII claims for sex and race discrimination); *U.S. v. Henry*, 519 F. Supp. 2d 618, 622 & n.7 (E.D. Va. 2007) (granting intervenors' residents' of defendant apartment complex, motion to intervene in a case in which government alleged defendants violated Fair Housing Act by referring to Black residents as "monkeys" and "niggers," imposing "quiet time" on Black residents, among other wrongs); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 475 n. 18 (D. Md. 2002) (denying class certification to class of Black plaintiffs alleging Title VII discrimination but certifying named plaintiff's claim against defendant based on finding that plaintiff's supervisors would show him graffiti with Blacks with big lips and noses and his co-workers "would throw bananas at him and make ape noises on the warehouse microphone" when plaintiff was present); *Collier v. Ram Partners, Inc.*, 159 F. Supp. 2d 889, 894-95 (D. Md. 2001) (finding genuine factual issue existed as to whether plaintiff's White co-worker created hostile work environment by referring to Blacks as "gorillas" and "nigger" on a frequent basis).

<sup>125</sup> 223 Fed. Appx. 369 (5th Cir. 2007).

<sup>126</sup> *Id.* at 375.

<sup>127</sup> *Id.* at 378-79.

In *Farpella-Crosby v. Horizon Health Care*, a woman brought an action against her former employer for hostile work environment sexual harassment in violation of Title VII.<sup>128</sup> The plaintiff claimed she endured continuous sexual harassment and a hostile work environment from her superiors and co-workers, in part because she had seven children. The district court entered judgment for the plaintiff but granted the employer a judgment notwithstanding the verdict as to her punitive damage award. The plaintiff appealed the latter determination. The Fifth Circuit held that (1) substantial evidence supported the finding that the supervisor's comments and questions were sufficiently severe and pervasive as to alter the conditions of employment and create an abusive working environment; (2) the woman's the complaints to human resource director were sufficient evidence to support the finding that the employer knew or should have known of the harassment; (3) the evidence supported an award of compensatory damages in amount of \$7,500; but (4) the woman failed to show that her former employer acted with malice or with reckless indifference that would justify the imposition of punitive damages. As part of its analysis, the Fifth Circuit analogized to another Fifth Circuit, *Patterson v. P.H.P. Healthcare Corp.*, in which one of the plaintiffs gave deposition testimony that he was "frustrated" because his supervisor judged him by the color of his skin.<sup>129</sup> He described his work environment as "unbearable" and said that it was "tearing [his] self-esteem down." He also stated that it "hurt" and made him "angry" and "paranoid" to know that his supervisor referred to him as a "porch monkey" or a "nigger."<sup>130</sup>

## F. Sixth Circuit

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<sup>128</sup> 97 F.3d 803 (5th Cir. 1996).

<sup>129</sup> 90 F.3d 927, 937-41 (5th Cir. 1996).

<sup>130</sup> *Id.* at 809 (quoting *Patterson*, 90 F.3d at 937-41). Seven district courts within the Fifth Circuit have referenced the primate-Black analogy. See, e.g., *Matthews v. Int'l House of Pancakes, Inc.*, No. 07-2869, 2009 WL 211788, at \*1 (E.D. La. Jan. 23, 2009) (dismissing employee of franchisee's suit against franchisor alleging racial discrimination by supervisor at franchisee, including referring to plaintiff as a monkey and describing Blacks as "flies ... always in some shit"); *Swanier v. Home Depot U.S.A. Inc.*, No. 2:05CV2071, 2007 WL 4292579, at \*4 (S.D. Miss. Dec. 05, 2007) (finding that isolated nature of plaintiff's allegations of racial discrimination against Defendant was insufficient to withstand Defendant's summary judgment motion, despite plaintiff's allegation that defendant's store manager referred to Blacks as "y'all" and "y'all are just like a bunch of monkeys."); *Jones v. Delta Towing LLC*, 512 F. Supp. 2d 479, 487 (E.D. La. 2007) (finding defendants' motion for Title VII summary judgment improvident because plaintiff, a former deckhand who worked on various of defendant's vessels, proffered facts which created a triable issue as to a hostile work environment claim, including allegations that whenever he was in the room [the relief Captain and fellow employee] would use the word 'nigger,' and Blacks being referred to as "porch monkeys"); *Lee v. Mostyn Law Firm*, No. Civ.A. H-04-3473, 2006 WL 571859, at \*1 (S.D. Tex. Mar. 06, 2006) (finding that plaintiff's claims of retaliatory discharge and hostile work environment were unsupported by the evidence because they were isolated and not pervasive and continuous - plaintiff's allegations included allegations that her supervisor used racial epithets, including describing Blacks as "descendants of monkeys" and calling plaintiff and her children "monkeys"); *Richardson v. Stadtman*, No. 3-98-CV-0151-BD, 1998 WL 792542, at \*1 (N.D. Tex. Nov. 09, 1998) (finding that plaintiff had alleged sufficient facts to support Title VII race discrimination and retaliatory discharge claims, including fact that defendant, owner of company where plaintiff worked, called Blacks, including plaintiff, "nigger," "damn nigger," "boy," "militant," "monkey," "gorilla," and "ape," among other slurs); *Demele v. Belle of Orleans*, No. CIV. A. 96-0237, 1997 WL 411558, at \*2 (E.D. La. July 21, 1997) (finding in this class action that named plaintiff and the class she represented alleged sufficient facts of race and gender discrimination by defendants to withstand the latter's summary judgment motion; among plaintiffs' allegations were that there were 11 incidents where racially offensive remarks were made by White superiors, including referring to Blacks as "monkeys," among other slurs); *Reown v. Int'l Paper Co.*, No. 3:95-CV-3182, 1997 WL 53118, at \*9 (N.D. Tex. Jan. 28, 1997) (finding that plaintiff failed to proffer sufficient facts of Title VII discrimination based on race by offering only a single episode of racial animus by defendant - a party invitation issued to workers of defendant depicting four Black monkeys).

In *Jordan v. City of Cleveland*, a Black former city employee brought action against his city employer, alleging racial discrimination, retaliation, and racial and retaliatory harassment in violation of Title VII.<sup>131</sup> The plaintiff worked as a firefighter for defendant and was one of a few minorities in a district with an overwhelming Black population.<sup>132</sup> The district court granted defendants' summary judgment motion on the plaintiff's racial discrimination claims but entered judgment, upon jury verdict, in favor of the plaintiff, on the plaintiff's retaliatory discharge claims. On appeal, the Sixth Circuit held that the plaintiff suffered harassment that was severe and pervasive because of his race, as required to support a Title VII claim. Among the findings made by the district court and affirmed by the Sixth Circuit were that during the plaintiff's tenure, he was subjected to many offensive racial remarks by his White co-workers, including being called "Sambo" "Welfare Fighter." In addition, most Black firefighters were stationed in a battalion pejoratively referred to by White colleagues as "Monkey Island."<sup>133</sup>

In *Ford v. General Motors Corp.*, a retired employee and his wife sued his former employer, alleging intentional infliction of emotional distress or outrageous conduct, loss of consortium, wrongful discharge, and violations of Title VII, the Kentucky Civil Rights Act (KCRA), and § 1981.<sup>134</sup> The retiree had worked as an inspector with the defendant for over thirty years and was the only Black inspector in his department when the alleged offensive conduct occurred. According to the retiree, two of his White co-workers were racist and were upset that he had more seniority than they did; he stated that they called him "nigger" more than once and that one of his White co-workers called another Black employee "monkey."<sup>135</sup> The retiree complained about his mistreatment on numerous occasions.<sup>136</sup> Subsequently, he filed suit against the defendant.<sup>137</sup> The district court granted summary judgment for the defendant and, but the Sixth Circuit reversed and held that the retiree had produced evidence supporting his claim of constructive discharge. Among the findings made by the district court and affirmed by the Sixth Circuit was the retiree's allegation that his White co-workers called him "a nigger" and "a monkey."<sup>138</sup>

In *Smith v. Leggett Wire Co.*, the plaintiff was a Black man who had worked as a wire drawing machine operator for the defendant for twenty years.<sup>139</sup> In his last year of employment with the defendant, the plaintiff saw his incentive production numbers inexplicably reduced, which, in turn, resulted in a reduction of his salary.<sup>140</sup> The plaintiff then made threatening remarks that he was going to "kill a bunch" of people, which were overheard by his supervisor. Subsequently, the plaintiff was terminated by defendant.<sup>141</sup> The plaintiff then filed suit, alleging that he suffered racial discrimination and a hostile work environment since he had begun working for the defendant, including being called "nigger ass" and overhearing a White foreman

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<sup>131</sup> 464 F.3d 584 (6th Cir. 2006).

<sup>132</sup> *Id.* at 589.

<sup>133</sup> *Id.* at 596-97.

<sup>134</sup> 305 F.3d 545 (6th Cir. 2002).

<sup>135</sup> *Id.* at 549.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 550.

<sup>138</sup> *Id.* at \_\_\_\_.

<sup>139</sup> 220 F.3d 752, 756 (6th Cir. 2000).

<sup>140</sup> *Id.* at 757.

<sup>141</sup> *Id.*



calling a Black employee “gorilla.”<sup>142</sup> The district court ruled in the plaintiff’s favor, but the Sixth Circuit reversed, reasoning that the comments were isolated and insufficient to support a hostile environment claim.<sup>143</sup>

In *U.S. v. Jones*, the defendant was convicted of various criminal charges and challenged his criminal conviction, alleging race-based selective prosecution, among other claims.<sup>144</sup> The district court sided with the government and denied all of the defendant’s claims, but the Sixth Circuit held that defendant had set forth “some evidence” tending to show the existence of discriminatory effect that warranted discovery on his selective prosecution claim and remanded the case to the district court to compel discovery on the selective prosecution claim.<sup>145</sup> Among the evidence considered by the Sixth Circuit in support of its ruling was evidence that White police officers sent a postcard, depicting a Black woman with bananas on her head, to the defendant while he was awaiting trial. The defendant testified that he interpreted the postcard to mean “nigger, you’re a monkey with bananas.”<sup>146</sup> In addition, the Sixth Circuit reasoned that “[g]iven the history of racial stereotypes against Blacks and the prevalent one of Blacks as animals or monkeys, it is a reasonable—perhaps even an obvious—conclusion that [the White officer] intended the racial insult that [defendant] perceived in receiving the postcard.”<sup>147</sup>

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<sup>142</sup> *Id.* at 757.

<sup>143</sup> *Id.* at 763.

<sup>144</sup> 159 F.3d 969, 973 (6th Cir. 1998).

<sup>145</sup> *Id.* at 977.

<sup>146</sup> *Id.* at 977.

<sup>147</sup> *Id.* Ten district courts within the Sixth Circuit have referenced the primate-Black analogy. *See, e.g.,* Curry v. SBC Comm’n, Inc., 250 F.R.D. 301, 303-04 (E.D. Mich. 2008) (denying class certification based on lack of commonality and typicality under the federal procedural rules, but noting that named plaintiff, and Black was called “porch monkey” by White co-worker); Jackson v. Flowers Bakery of Cleveland, L.L.C., No. 1:07-cv-112, 2008 WL 2002459, at \*1 (E.D. Tenn. May 07, 2008) (denying defendants’ summary judgment motion based on finding that plaintiff alleged sufficient facts to support a hostile work environment claim, including fact that Blacks were referred to as “ape[s]” and the “N-word” by White supervisors and co-workers); Robinson v. Coca-Cola Enter. Inc., No. 1:06-CV-371, 2007 WL 2948869, at \*8 (S.D. Ohio, Oct. 9, 2007) (finding that factual issues prevented summary judgment in case in which plaintiffs, Blacks, allege racially hostile work environment, including slurs made by co-workers at defendant such as “niggers,” “monkeys,” and “gorillas”); Clark v. Lockheed Martin Energy Sys. Inc., No. 3:06-cv-046, 2007 WL 2043882, at \* 14 (E.D. Tenn., July 12, 2007) (finding that plaintiffs, Blacks, did not allege sufficient evidence to sustain their Title VII race and retaliatory discrimination claims, including claims that the men’s restroom at defendant company was covered in slurs such as “nigger,” “black monkey,” and “black ass.”); Barnes v. Federal Exp. Corp., No. 03-CV-72229, 2007 WL 405686, at \* 2 (E.D. Mich. Feb. 01, 2007) (dismissing plaintiff’s suit for Title VII discrimination because of untimeliness of claim and insufficient evidence that plaintiff’s discharge was retaliatory. Plaintiff alleged, *inter alia*, that a co-worker and manager frequently used racial slurs and, on one occasion, called Blacks “monkeys”); Blackwell v. Product Action Int’l. Inc., No. 04-231, 2006 WL 3747519, at \*7 (E.D. Ky. Dec. 18, 2006) (finding that plaintiffs, racial minorities, failed to proffer sufficient evidence of a hostile work environment, despite allegation that several offensive remarks were made by plaintiffs’ superiors, including referring to Blacks as “monkeys”); Smith v. National Coll. of Bus. & Tech., No. 03:04-0038, 2006 WL 889495, at \* 2 (M.D. Tenn., Mar. 29, 2006) (finding that defendant’s reason for terminating plaintiff was nondiscriminatory, despite plaintiff’s claim that she was subjected to a hostile work environment, including once overhearing a co-worker refer to racially mixed children as “little apes”); Cole v. CTI Molecular Imaging, Inc., No. 3:04-CV-329, 2005 WL 3534382, at \*1, \*7 (E.D. Tenn. Dec. 21, 2005) (finding sufficient evidence of Title VII racial and hostile work environment discrimination to withstand defendant’s motion for summary judgment, including evidence that plaintiff’s co-worker had a “stuffed black monkey with the word Nigger” posted on it and was not reprimanded for the same); Williams v. United Dairy, Inc., No. 2:03CV868, 2005 WL 1077596, at \*2 (S.D. Ohio Apr. 18, 2005) (finding that plaintiff failed to proffer sufficient evidence of Title VII race and retaliatory discrimination based on unspecified allegations that plaintiff was called “nigger” and “monkey”

## G. Seventh Circuit

In *Mendenhall v. Mueller Streamline Co.*, the plaintiff sued his former employer under Title VII, alleging claims for race discrimination, hostile work environment, and retaliation.<sup>148</sup> The district court granted summary judgment in the employer's favor on the race discrimination claim, but denied the motion as to the hostile work environment and retaliation claims. The case was then transferred to different judge for trial. The new judge granted judgment for the employer as a matter of law, and the plaintiff appealed to resolve the dispositive ruling by the district court that a hostile work environment claim cannot exist independent of a race discrimination claim.<sup>149</sup> The Seventh Circuit vacated and remanded finding that a hostile work environment claim under Title VII can exist independent of a valid race discrimination claim, that the plaintiff had not rested his retaliation case. Among the factual findings made by the district court and affirmed on appeal by the Seventh Circuit was a finding that the plaintiff was called "black monkey" and "dog" in Spanish, by his co-workers.<sup>150</sup>

In *Walker v. Mueller Industries, Inc.*, a White warehouse worker sued his employer alleging that he was subjected to a hostile work environment because his Black co-workers were made to endure racial animus, in violation of Title VII and § 1981.<sup>151</sup> The district court granted the employer's motion for summary judgment, and plaintiff appealed. The Seventh Circuit found that allegations by the plaintiff that his White co-workers directed racially-animated harassment at his Black co-workers were insufficient to establish that the conduct rendered the workplace hostile for plaintiff.<sup>152</sup> Among the factual findings, however, made by the district court and affirmed by the Seventh Circuit were that Blacks were referred to as "monkeys" by Whites and the graffiti "N-I-G-A" was inscribed throughout the warehouse.<sup>153</sup>

In *Oates v. Discovery Zone*, a Black technical support representative with defendant alleged that defendant discriminated against him on the basis of race.<sup>154</sup> The record, however, demonstrated that the plaintiff was chronically late or absent from his position.<sup>155</sup> Subsequently, the employee was terminated and filed a lawsuit. The district court granted summary judgment in favor of the employer. The employee appealed and the Seventh Circuit affirmed, noting that

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by co-workers); *Keaton v. State*, No. C2-00-1248, 2002 WL 1580567, at \*2 (S.D. Ohio June 3, 2002) (finding that a plaintiff, a food service coordinator at defendant's correctional facility, could not sustain a Title VII discrimination claim, among other claims, based on sporadic incidents of alleged discrimination, including plaintiff's supervisor's daughter bringing a "black beanie baby gorilla," and the supervisor referring to the beanie baby as plaintiff); *Allen-Cuffee v. Franklin County Juvenile Detention Ctr.*, No. 99CV00344, 2001 WL 242590, at \*8 (S.D. Ohio Feb. 7, 2001) (finding that legitimate nondiscriminatory reasons existed for defendant's termination of plaintiff who alleged Title VII discrimination and retaliatory based on her White superiors' reference to Blacks as "monkey girls" "apes" and "nasty hoes," among other characterizations).

<sup>148</sup> 419 F.3d 686 (7th Cir. 2005).

<sup>149</sup> *Id.* at 688.

<sup>150</sup> *Id.*

<sup>151</sup> 408 F.3d 328, 330 (7th Cir. 2005).

<sup>152</sup> *Id.* at 334.

<sup>153</sup> *Id.* at 330-31.

<sup>154</sup> 116 F.3d 1161 (7th Cir. 1997).

<sup>155</sup> *Id.* at 1162.

the employee had failed to establish a *prima facie* case of race discrimination based on his allegation that a “monkey picture” displayed in his work environment had his name over it.<sup>156</sup>

In *Daniels v. Pipefitters’ Association Local Union No. 597*, a Black member of the defendant union alleged that the union racially discriminated against Blacks in its operations and membership and discriminated against him when it expelled him from the union.<sup>157</sup> After being expelled, the plaintiff filed suit alleging Title VII violations, among other violations.<sup>158</sup> After a jury and bench trial on all the issues, the district court found for the plaintiff. The Seventh Circuit affirmed the district court’s ruling, noting that White union members routinely referred to Blacks as “baboon[s],” “porch monkeys,” “spear-chuckers,” “ghetto assholes,” “nigger,” “super nigger,” “melanzanni (Italian for eggplant),” and “tutsune” (Italian for nigger) by White union members.<sup>159</sup>

## H. Eighth Circuit

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<sup>156</sup> *Id.* at 1164.

<sup>157</sup> 945 F.2d 906 (7th Cir. 1991).

<sup>158</sup> *Id.* at 910.

<sup>159</sup> *Id.* at 910-11. Nine district courts within the Seventh Circuit have referenced the primate-Black analogy. *See, e.g.,* *Swann v. William Rainey Harper Coll.*, No. 05 C 5919, 2008 WL 4681950, at \*10 (N.D. Ill. May 20, 2008) (finding that plaintiff failed to show severe and pervasive racial animus to sustain a Title VII hostile work environment claim, despite fact that plaintiff’s co-worker used the word “monkey” to describe Black students); *Jordan v. Chicago Transit Auth.*, No. 01 C 8203, 2004 WL 1375405, at \*2 (N.D. Ill. May 25, 2004) (granting defendant’s motion for summary judgment on ground that plaintiffs Title VII discrimination claims was unsustainable based on evidence submitted by plaintiff, including allegations that a White co-worker called Blacks “monkeys”); *Hawkins v. Groot Indus. Inc.*, No. 01 C 1731, 2003 WL 22078382, at \*6 (N.D. Ill., Sept. 5, 2003) (granting for lack of evidence summary judgment against plaintiffs, Hispanic Americans, who claimed that they were present when their supervisor described Blacks as “monkeys,” among other derogatory terms); *Riley v. UOP LLC.*, 244 F. Supp. 2d 928, 937-38 (N.D. Ill. 2003) (finding that plaintiff’s claim of race discrimination was unsustainable when she was terminated as part of a reduction in force by defendant; plaintiff alleged that her co-worker called her a “monkey” and used the phrase “monkey-see-monkey-do” in reference to plaintiff’s skills); *Walls v. Turano Baking Co.*, 221 F. Supp. 2d 924, 930 (N.D. Ill. 2002) (finding that plaintiff did not submit sufficient evidence to support a hostile environment claim, despite allegations that slurs such as “nigger,” “sand-nigger,” “dot-head,” and “porch monkey” were used by his co-workers to describe Blacks, though not directed at plaintiff); *Carter v. Chicago Transit Auth.*, No. 99 C 7738, 2001 WL 1035712, at \*4 (N.D. Ill. Sept. 07, 2001) (finding that plaintiff had proffered sufficient evidence to sustain a jury’s verdict that plaintiff was subjected to a hostile work environment over a five to six year period; among plaintiff’s allegations were that a supervisor referred to Blacks as “monkeys”; and that Mexicans were “wet backs,” among other derogatory remarks); *Adkins v. Kelly-Springfield Tire Co.*, No. 97 C 50381, 2001 WL 219636, at \*3 (N.D. Ill. Mar. 6, 2001) (concluding that plaintiff’s hostile work environment claim based on gender was insufficient despite evidence that she was called or heard the following phrases being used to describe her: “mud shark” “spank the monkey” and “monkey face”); *Scurto v. Commonwealth Edison Co.*, No. 97 C 7508, 2000 WL 1624827, at \*3 (N.D. Ill. Sept. 28, 2000) (granting plaintiff’s motion for summary judgment as to her Title VII hostile work environment claim based on allegation that plaintiff’s supervisor described Blacks as “lazy niggers” and “porch monkeys,” among other expletives, throughout plaintiff’s tenure at defendant company); *Harper v. Mega*, No. 96 C 1892, 1998 WL 473427, at \*1 (N.D. Ill. Aug. 7, 1998) (dismissing plaintiff’s claims of section 1983 violations by defendant police officers, who admittedly called plaintiff “monkey” and “Nigger,” and the City of Chicago, based on qualified immunity and statute of limitations defenses).

In *Green v. Franklin National Bank of Minneapolis*, a Black woman worked as a bank teller until her termination, ostensibly for poor work performance.<sup>160</sup> During her tenure with defendant bank, the woman alleged that she had endured racial slurs uttered by one of her fellow tellers and had complained to her superiors to no avail. Among the slurs she had endured being called were “monkey,” “black monkey,” and “chimpanzee.”<sup>161</sup> The woman then filed a lawsuit against her former employer, alleging Title VII hostile work environment and discriminatory discharge. The district court granted the former employer’s motion for summary judgment, and the woman appealed. The Eighth Circuit held that the co-worker’s alleged actions, if proven, were severe and pervasive enough to create a hostile work environment, but that the woman had failed to show an inference of race discrimination, as required for a *prima facie* case of discriminatory discharge and that she failed to rebut the employer’s proffered legitimate, non-discriminatory reason for terminating her.<sup>162</sup>

In *Bainbridge v. Loffredo Gardens, Inc.*, the plaintiff claimed he was subjected to a hostile work environment based on racial comments made by the owners of the defendant company about Asians, Blacks, and other minorities.<sup>163</sup> The plaintiff was discharged after he complained about insensitive remarks made by his co-workers. The plaintiff’s wife is Japanese and he claimed that offensive remarks were made by defendants about Asians, Blacks and other minorities. He also asserted that he was discharged in retaliation for complaints of discrimination and harassment in violation of Title VII, 42 U.S.C. § 1981, and Iowa Code § 216. The district court granted summary judgment to the defendant. The Eighth Circuit affirmed the district court ruling on all counts except the retaliatory discharge count, which the court reversed based on circumstantial evidence that plaintiff might have been able to sustain a claim that the defendant’s proffered reason for his termination was pretextual and not a legitimate non-discriminatory reason.<sup>164</sup> Among the slurs the plaintiff alleged were used by the defendant owners to describe minorities were “spic,” “wetback,” “monkey,” and “nigger.”<sup>165</sup>

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<sup>160</sup> 459 F.3d 903 (8th Cir. 2006).

<sup>161</sup> *Id.* at 906.

<sup>162</sup> *Id.* at 913-17.

<sup>163</sup> 378 F.3d 756 (8th Cir. 2004).

<sup>164</sup> *Id.* at 761.

<sup>165</sup> *Id.* at 759. Eight district courts within the Eighth Circuit have referenced the primate-Black analogy. *See, e.g.*, *Jones v. Forrest City Grocery Inc.*, No. 4:06cv00944, 2008 WL 2539851, at \*5 (E.D. Ark. June 23, 2008) (finding sufficient evidence of a hostile work environment based on plaintiffs’, Blacks’, factual allegations that supervisors and co-workers used the following phrases or words over a period of time to refer directly to one of the plaintiffs: “climb monkey, climb,” “monkey.” The court also noted that “[p]rimate rhetoric has been used to intimidate Blacks and monkey imagery has been significant in racial harassment in other context[s]”) (internal citations omitted); *Holly v. Anderson*, No. 04-CV-1489, 2008 WL 1773093 (D. Minn. Apr. 15, 2008) (finding that plaintiff, a committed patient at the Minnesota Sex Offender Program, failed to support his claim that while at the Program a staff member stated he “smells like a porch monkey nigger”); *Perrotta v. White Oak Manor, LLC*, No. 05-0394-CV-W-REL, 2007 WL 3312164, at \*2 (W.D. Mo. Nov. 05, 2007) (finding that plaintiff, a Black nursing assistant at defendant, proffered sufficient evidence of a hostile work environment such that summary judgment to defendant was improper; among plaintiff’s four nuggets of evidence was a joke by an administrator at defendant saying “monkeys in a tree or something” and three references that intimidated at plaintiff’s race in an offensive way); *Owens v. Paragon Life Ins. Co.*, No. 4:04-CV-875, 2006 WL 2571542, at \*2 (E.D. Mo. Sept. 05, 2006) (finding that plaintiff’s several allegations of racial slurs by her supervisor at defendant company, including referring to a temporary employee as “you monkey,” was insufficient to support a finding of a hostile work environment claim); *Griffith v. City of Des Moines*, No. 4:01-CV-10537, 2003 WL 21976027, at \*2 (S.D. Iowa July 03, 2003) (finding that plaintiff, a Black firefighter, did not proffer sufficient proof of discriminatory animus by defendant for his termination by alleging that when an orangutan appeared on a movie he watched with White

## I. Ninth Circuit

In *Kortan v. California Youth Authority*, a White employee brought claims alleging Title VII racial and sexual harassment after being terminated by defendant for work performance issues.<sup>166</sup> Noting that the employee did not proffer evidence that her supervisor's alleged harassment changed the conditions of her work environment—a necessary component of a Title VII sexual discrimination claim—the district court ruled in favor of the employer. Moreover, the district court ruled that the employee had failed to link any alleged harassment with her termination. The Ninth Circuit affirmed the district court's grant of summary judgment in all respects. Among the facts considered by the Ninth Circuit, though not dispositive to its ruling, was the district court's finding that the employee's supervisor made racist comments about Blacks, referring to one employee as "black ape," and another as "black goon."<sup>167</sup>

## J. Tenth Circuit:

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colleagues, a White colleague stated: "If that ain't the fucking link between the Blacks and the apes, I'll kiss your ass."); *Canady v. John Morrell & Co.*, 247 F. Supp. 2d 1107, 1110 (N.D. Iowa 2003) (finding that genuine issues of material fact precluded summary judgment to defendant based on plaintiff's allegations that she was subjected to a hostile work environment, including being called, on various occasions over a three year period, "nigger," "monkey," "bitch," and "fat ass," by White and Hispanic male co-workers); *Golleher v. Aerospace Dist. Lodge 837, I.A.M.A.W.*, 122 F. Supp. 2d 1053, 1063 (E.D. Mo. 2000) (finding that, though plaintiff was White, she could maintain hostile work environment based on race discrimination based on, *inter alia*, comments made by a union official of defendant about Blacks, including referring to Black union members as "niggers", "stupid niggers", "nigger bitches", and "porch monkeys"); *Gold Star Taxi and Transp. Serv. v. Mall of Am. Co.*, 987 F. Supp. 741, 746 (D. Minn. 1997) (reasoning that plaintiffs, minority-owned taxicabs companies and drivers, were subject to "repugnant" and "inappropriate" slurs by security guards of defendant, including being called "monkey face" and "nigger," and taunted about "riding camels" and told to "go back to Africa," but those acts were sporadic and infrequent and did not support plaintiff Title VII racial discrimination claims).

<sup>166</sup> 217 F.3d 1104 (9th Cir. 2000).

<sup>167</sup> *Id.* at 1115 n. 3 (Fisher, J., dissenting). Five district courts within the Ninth Circuit have references the primate-Black analogy. *See, e.g., Atkins v. Todd Pacific Shipyards, Inc.*, No. C06-0883-JCC, 2008 WL 1781062, at \*4 (W.D. Wash. Apr. 16, 2008) (denying plaintiff's claims of race and retaliatory discrimination because plaintiff failed to file within the statute of limitation period – including claim that plaintiff was exposed to "hangman noose" as well as a "black stuffed gorilla hanging in an old rigging loft" at defendant company); *Gahano v. Sundial Marine & Paper*, No. 05-CV-1946-BR, 2008 WL 185793, at \*1 (D. Or. Jan. 17, 2008) (affirming, on a motion to reconsider, summary judgment against plaintiff who alleged he was discriminated against by defendant based on his race and retaliated against because he complained about comments made by a Hispanic co-worker who allegedly called plaintiff "African monkey nigger" "fucking beaner" and "fucking Porch monkey."); *Jackson v. ABC Nissan, Inc.*, No. CV-03-0563, 2006 WL 2256908 (D. Ariz. Aug. 04, 2006) (reasoning that plaintiff could demonstrate a hostile work environment based on race on facts that include plaintiff's supervisor and co-workers referring to Blacks as "niggers" "porch monkeys" "sugar babies" and "coons"); *Guidry v. Dalton*, No. C99-1073, 2000 WL 1482907, at \*3 (N.D. Cal. Sept. 27, 2000) (concluding that plaintiff, a Black, cannot sustain discrimination and retaliatory discharge claims because his claim was time barred and evidence exists that plaintiff called a fellow shipmate "Black Gorilla" or "Guerilla."); *Anthony v. County of Sacramento*, 898 F. Supp. 1435, 1441 (E.D. Cal. 1995) (concluding that genuine issues of material fact existed as to whether plaintiff, a Black Sheriff's Deputy, was discriminated against on the basis of race and gender based on, among other evidence, a flyer in defendant's jail referring to Blacks as "niggers" and "baboons" evidence that defendant).

In *Young v. Dillon Co. Inc.*, a Black man who worked as a retail store investigator, sought damages from his former employer, alleging that his discharge violated Title VII, was inconsistent with the parties' implied contract terms, and ran afoul of the doctrine of promissory estoppel.<sup>168</sup> The investigator worked for his employer from August 2001 to January 2003 and investigated various stores the employer owned throughout Colorado.<sup>169</sup> The employer terminated the investigator on the ground of "theft of time," meaning that the investigator claimed time he did not work.<sup>170</sup> The district court held that the investigator had failed to identify a triable issue and granted summary judgment to the employer.<sup>171</sup> On appeal, the Tenth Circuit affirmed the district court's decision. In its narrative affirming the district court, the Tenth Circuit noted that the investigator was only able to proffer a single episode of racial animus to support his claim: an incident in which his supervisor referred to a Black store manager as a "monkey."<sup>172</sup> The Tenth Circuit affirmed the district court's rationale that the investigator was unable to demonstrate how the foregoing racial animus affected his review and termination.<sup>173</sup>

## K. Eleventh Circuit

In *Webb v. Worldwide Flight Service Inc.*, a Black man sued his employer, alleging a racially hostile work environment in violation of the Florida Civil Rights Act.<sup>174</sup> He alleged that, from January 2001 to December 2001, his supervisor's supervisor referred to him as a "nigger," a "monkey," and being "from the tribe." After a jury trial, the district court entered judgment in

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<sup>168</sup> 468 F.3d 1243 (10th Cir. 2006).

<sup>169</sup> *Id.* at 1246.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1252.

<sup>173</sup> *Id.* at 1252-53. Five district courts within the Tenth Circuit have referenced the primate-Black analogy. *See, e.g.*, *Harris v. LMI Finishing, Inc.*, No. 05-CV-570, 2007 WL 129002, at \*6 (N.D. Okla. Jan 12, 2007) (concluding that plaintiff, a Black, alleged sufficient evidence of race-based animus but insufficient evidence that such animus was pervasive or severe based on co-worker describing plaintiff as a "baby monkey" over a two month period with accompanying "oo, oo, oo" sounds (citing *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir.2001) for the proposition that ding use of word "monkey" to describe Blacks is, on its face, racially derogatory)); *Cooper v. Am. Airlines, Inc.*, No. 05-CV-236, 2006 WL 1141852, at \*3 (N.D. Okla. April 27, 2006) (concluding that, because defendant acted to stop the harassment, plaintiff failed to set forth a *prima facie* case of discrimination based on fact that, while distributing fliers to fellow mechanics about union membership, a White mechanic made "African gibberish" noises and others made "monkey motions"); *Dockery v. Unified Sch. Dist. No. 231*, 406 F. Supp. 2d 1219, 1222 (D. Kan. 2006) (concluding that sufficient factual proof existed in the record that supports plaintiff's Title VII claim, among other claims, that he was terminated from his job as a custodian at defendant school after he complained that his minor child, who attended defendant school, was called slurs, including: "nigger," "monkey," "brownie," and "coco puff"); *Rowland v. Franklin Career Servs. LLC*, 272 F. Supp. 2d 1188, 1198-99 (D. Kan. 2003) (concluding that Black instructor at defendant truck driving school set forth sufficient facts to withstand defendant's motion for summary judgment; among plaintiff's evidence were comments made by defendant's employees likening Blacks to "monkeys" and telling jokes about the physical features of Black folks); *Watson v. City of Topeka*, 241 F. Supp. 2d 1223, 1231 (D. Kan. 2002) (concluding that a reasonable jury could find that plaintiff, a Black, endured a racially hostile work environment when his co-workers and supervisors used slurs such as "nigger-rigged" and "porch monkey" to describe other Black co-workers under his supervision).

<sup>174</sup> 407 F.3d 1192 (11th Cir. 2005).

employee's favor. The employer appealed, and the Eleventh Circuit affirmed the district court's decision.<sup>175</sup>

In *Harrington v. Disney Regional Ent. Inc.*, Black former employees of defendant, filed § 1981 action alleging racial discrimination based on disparate treatment and hostile work environment discrimination.<sup>176</sup> The district court entered summary judgment in defendant's favor and entered sanctions against the employees' attorney. The Eleventh Circuit affirmed, stating that much of the conduct of which plaintiffs complained was not connected to their race, and the only conduct that was racially offensive, being called "ghetto" and once or twice overhearing co-workers being described as monkeys, was not pervasive enough to alter their conditions of employment. In particular, one of the plaintiffs did not establish how often she was described as "ghetto" or overheard racial epithets directed towards co-workers—although it appears such incidents were infrequent. Thus, the court held that she did not carry her burden of demonstrating a triable issue concerning the severity and pervasiveness of the racially offensive conduct. Ultimately, all of the plaintiffs either were terminated or voluntarily quit because they were called offensive racial slurs.<sup>177</sup>

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<sup>175</sup> *Id.* at 1195. The only substantive issue that the appellate court considered in this case was whether the district court had subject matter jurisdiction – which the Eleventh Circuit decided it had. *Id.*

<sup>176</sup> 276 Fed. Appx. 863 (11th Cir. 2007).

<sup>177</sup> *Id.* at 876. Thirteen district courts within the Eleventh Circuit have referenced the primate-Black analogy. See, e.g., *Baker v. City of Safe Harbor, Fla.*, No. 8:07-cv-1120-T-23TGW, 2008 WL 4200147, at \*4 (M.D. Fla. Sept. 12, 2008) (finding sufficient facts for plaintiff, a utility employee of defendant public works department, to have his race and retaliation claims to move forward against defendant, including facts such as a "black and yellow stuffed monkey" being at the front of the truck that plaintiff drove and "monkey" and "ape" noises made by co-workers); *Cowan v. Jackson Hosp. & Clinic, Inc.*, 572 F. Supp. 2d 1286, 1288 (M.D. Ala. 2008) (finding that Black plaintiff's allegations that 18-inch toy monkeys and one 12-inch gorillas, which were yellow, green, and purple, used by plaintiff's supervisor as a demonstrative tool at a meeting did not create an actionable hostile work environment claim); *Perez v. Pavex Corp.*, No. 8:01-CV-69-T-27MSS, 2008 WL 348803, at \*3 (M.D. Fla. Feb. 07, 2008) (dismissing plaintiff's, an Hispanic American's, claim that he was discriminated against on the basis of race and national origin, which in turn resulted in harassment, based on comments made by his co-workers, including comments by a co-worker who called a fellow Black co-worker a "Baboon" and "nigger"); *Quitto v. Bay Colony Golf Club, Inc.*, No. 2:06-cv-286-FtM-29DNF, 2007 WL 2002537, at \*4 (M.D. Fla. July 5, 2007) (finding insufficient evidence of Title VII race and hostile work environment discrimination based only on statement by executive chef to plaintiff, a line cook, that Blacks were "dirty monkeys."); *Davis v. City of Panama City, Fla.*, 510 F. Supp. 2d 671, 681 (N.D. Fla. 2007) (concluding that plaintiff, a police officer, proffered insufficient proof that defendant discriminated against him on the basis of race and created a hostile work environment based on allegations that plaintiff's training officer referred to Black men as "apes" and Black women as "chimps" and added that Blacks "fuck like apes and chimps"); *HomeLife Communities of Henry, Inc. v. City of McDonough, Georgia*, No. 1:05-CV-2085, 2006 WL 2539492, at \*4 (N.D. Ga. Aug. 31, 2006) (granting defendant's motion for summary judgment based on insufficient proof that plaintiff's employee suffered equal protection violation when she endured racial slurs by a White co-worker who called Black men "monkeys"); *Garrison v. Montgomery County Bd. of Educ.*, Civ.A.2:05CV549-WHA, 2006 WL 625876, at \*3 (M.D. Ala. Mar. 10, 2006) (concluding that plaintiff's supervisor's reference to a Black employee as a "monkey" was isolated and insufficient proof that plaintiff suffered Title VII hostile work environment); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 675 (N.D. Ga. 2001) (denying class certification to plaintiffs, a proposed class of former and current employees at defendant, based on allegations that White co-workers and supervisors referred to Blacks as "niggers," "monkeys," or "apes."); *Baaqee v. Brock & Bleving Constr. Co.*, No. Civ.99-588-AH-C, 2000 WL 821469, at \*6 (S.D. Ala. June 19, 2000) (finding that plaintiff failed to show hostile work environment based on allegations that White employee of defendant called a Black employee's mother a "monkey," among other slurs Blacks were called by White co-workers of defendant); *Holiness v. Moore-Handley, Inc.*, 114 F. Supp. 2d 1176, 1187 (N.D. Ala. 1999) (finding insufficient evidence of hostile work environment to support plaintiff's, an inventory order's, claim – among the claims plaintiff made was that a fellow co-worker called him "black monkey"); *Mitchell v. Carrier Corp.*, 954 F.

## L. D.C. Circuit

In *Family Service Agency San Francisco v. National Labor Relations Board*, plaintiff day care agency petitioned for review of defendant's order requiring the plaintiff to bargain with the defendant union following a representation election to unionize plaintiff's employees.<sup>178</sup> On appeal, the D.C. Circuit enforced the order, because even assuming defendant was responsible for racial turmoil at the agency, the defendant's behavior did not justify setting aside election.<sup>179</sup> The facts that underlaid that conclusion involved plaintiff, whose Black supervisor testified that at some point before the defendant arrived, a Latina co-worker told Storey that she could not socialize with her Black co-workers anymore because she had been harassed by another Latina for such socialization. In addition, the agency's employees took racially segregated lunch periods, with Latina workers eating from 12:30 to 1:30 and Blacks from 1:30 to 2:30 p.m. The union's leader arranged an interview between himself and two Latina employees at a Spanish-language radio station in San Francisco. A tape of the interview was played during the Latina workers' lunch hour and an employee testified that she heard someone utter the words, in English, "black monkey," but she did not know whether the words came from the tape or from someone who was in the room. The transcript from the interview did not contain those words in English or Spanish.<sup>180</sup>

In *Caldwell v. ServiceMaster Corp.*, the plaintiffs brought a sex and race discrimination action against their former employer and the employment agency that had placed them with employer.<sup>181</sup> The plaintiffs alleged that while working at various sites for the employer, they experienced racial animus from various other employees.<sup>182</sup> Among the allegations made by the plaintiffs included an incident in which an employee of the employer had referred to Blacks as "a bunch of monkeys."<sup>183</sup> The district court held that the plaintiffs had not provided sufficient notice of alleged discrimination by the employer or the agency for them to be held liable for racial and sexual discrimination. The D.C. Circuit affirmed this ruling.<sup>184</sup>

## IV.

### Contemporary Measures of "Racism," Elucidating the Black-Primate Association

In addition to history, cultural critique, humor theory, and the law, social science adds to our understanding of the Black-primate association and its implications for President Obama's security. A burgeoning body of social scientific literature, largely from the areas of cognitive

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Supp. 1568, 1573 (M.D. Ga. 1995) (finding as insufficient evidence of a hostile work environment graffiti on defendant's bathroom wall with the inscription "Woody Wilson-Nigger Ape," "Nigger," and "Niggers go home to Africa" that was reported by plaintiff, a Black, as offensive); *Sims v. Montgomery County Commission.*, 766 F. Supp. 1052, 1093 (M.D. Ala. 1990) (finding evidence of racially hostile work environment and sex discrimination toward plaintiffs, a group of Black male and female officers, based on frequent use of the words "nigger" "black nigger" "red nigger" and "apes" by fellow officers, including the Sheriff of defendant).

<sup>178</sup> 163 F.3d 1369 (D.C. Cir. 1999).

<sup>179</sup> *Id.* at 1377.

<sup>180</sup> *Id.* at 1376.

<sup>181</sup> 966 F. Supp. 33 (D.C. Cir. 1997).

<sup>182</sup> *Id.* at 37.

<sup>183</sup> *Id.* at 33 n. 20 (The opinion does not contain page numbers).

<sup>184</sup> *Id.* at 33 n. 20 (The opinion does not contain page numbers).



and social psychology, suggests that long-standing modes of thinking about racial attitudes are largely outdated. This research highlights the fact that rare is the individual who is an express racist who takes ownership of his or her bigoted beliefs. The modern “racist” largely comes in two varieties: those who harbor racial animus but who are *unwilling* to acknowledge their racially-biased attitudes to others, and those who harbor racial animus but who are *unable* to acknowledge their racially biased attitudes to others.<sup>185</sup> Legal academics have begun to import this research into their scholarship.<sup>186</sup> This section explores how implicit racial bias research aids in our understanding of the Black-primate association, particularly with regard to President Obama.

An implicit construct is “the introspectively unidentified (or inaccurately identified) trace of past experience that mediates [the category of responses that are assumed to be influenced by that construct].”<sup>187</sup> In turn, implicit cognition reveals mental associations that people are unwilling or are unable to report. This is because such cognitions might conflict with expressly-held values or beliefs. Moreover, implicit cognitions reveal information that is not readily

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<sup>185</sup> See *supra* notes 77 to 81 and accompanying text.

<sup>186</sup> Charles Lawrence was the first to articulate how unconscious race bias is important to our understanding of the role that race plays vis-à-vis the law. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). See also IAN AYRES, PERVERSIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 419–25 (2001); R. Richard Banks et al., *Discrimination and Implicit Racial Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006); Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL’Y 225, 238–40 (2003); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1063 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Kristin A. Lane, Jerry Kang, & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427 (2007); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering*, 57 DUKE L.J. (forthcoming 2007); Lateef Mtima, *The Road to the Bench: Not Even Good (Subliminal) Intentions*, 8 U. CHI. L. SCH. ROUNDTABLE 135 (2001); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U.L. REV. 155 (2005); Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL’Y J. 459 (2003); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 915 (1999); Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 500-507 (2007); Reshma M. Saujani, *The Implicit Association Test: A Measure of Unconscious Racism in Legislative Decision-making*, 8 MICH. J. RACE & L. 395 (2003); Michael S. Shin, Comment: *Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047, 2060-2076 (2002); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 446–47 (2003).

<sup>187</sup> 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) [hereinafter SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS].

available to introspection for people with a desire to retrieve and/or express such information.<sup>188</sup> Therefore, when individuals are studied, the key feature of implicit attitude measures is that individuals—often unaware that their attitudes are being measured—are unable to exert conscious control over their responses. As such, implicit attitude measures have two comparative advantages over explicit measures. First, when explicit measures are used, individuals may not reveal their true attitudes or preferences because of social desirability biases, thus attenuating the magnitude of the relationship that researchers identify between attitudes and behavior. Second, individuals may not even be aware of their true preferences or attitudes.<sup>189</sup>

In situations where people have the motivation and the opportunity to consciously regulate their behavior, they rely primarily on effortful processing to do so—e.g., seen in explicit self-report measures. In contrast, when either motivation or opportunity to deliberate are lacking, behavior is guided primarily by less controlled processes, which implicit measures try to tap. Thus, implicit measures should be particularly valuable predictors of behavior for situations in which people have limited control over their actions.<sup>190</sup> The Implicit Association Test (“IAT”) is a popular measure of the relative strength of associations between pairs of concepts,<sup>191</sup> including positive/negative attributes and race.

White 6-year-olds demonstrate implicit pro-White/anti-Black bias, with self-reported attitudes revealing bias in the same direction. However, in 10-year olds and adults, the same magnitude of implicit race bias is observed, although self-reported race attitudes dissipate with age—vanishing entirely in adults.<sup>192</sup> Ultimately, more than 70% of Whites harbor anti-Black/pro-White biases.<sup>193</sup> These implicit preferences are manifested as faster responding to the White/pleasant combination, often on a computerized task, than to the Black/pleasant combination.<sup>194</sup> Whites also pair White names with pleasant words and Black names with unpleasant words more easily than they make the reverse pairings. And they find it easier to associate their in-group (i.e., American names) with pleasant words and the out-group (i.e., Surinam names) with unpleasant words than vice versa.<sup>195</sup> Even with equally unfamiliar exemplars for both in-group and out-group, Whites still display a pro-in-group implicit bias. Thus, it appears that even when there is minimal experiential or historical input available,

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<sup>188</sup> 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* 266.

<sup>189</sup> Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 *POLI. BEHAV.* 343, 345 (2007).

<sup>190</sup> Malte Friese et al., *Predicting Voting Behavior with Implicit Attitude Measures: The 2002 German Parliamentary Election*, 54 *EXPERIMENTAL PSYCH.* 247, 247 (2007)

<sup>191</sup> Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV: What We Know So Far About the Method*, in *IMPLICIT MEASURES OF ATTITUDES* 62 (Bernd Wittenbrink & Norbert Schwarz eds., The Guilford Press 2007).

<sup>192</sup> 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).

<sup>193</sup> Brian A. Nosek et al., *supra* note 113; Greenwald & Krieger, *supra* note \_\_ at 958.

<sup>194</sup> Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 1464, 1474 (1998).

<sup>195</sup> 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).

peoples' minds are prepared to display bias effortlessly.<sup>196</sup> Even Whites who know that the IAT measures undesirable racial attitudes and who explicitly self-report egalitarian attitudes still find it difficult to control their biased responses.<sup>197</sup> Thierry Devos and Mahzarin Banaji found that Whites make no distinction between Blacks and Whites on explicit measures of "Americanness." However, on implicit measures, Whites more easily pair American symbols with White faces rather than with Black faces.<sup>198</sup> This is even so where faces of Black Americans are more familiar than White faces.<sup>199</sup> In addition to experimental studies, which rely on small sample sizes, implicit racial attitude data has been collected via web-based IATs, which rely on large sample sizes. These web-based studies reveal that, among children (N = 28,816) and adults (N = 351,204), White is associated with good and Black with bad. Light skin is associated with good and dark skin with bad (N = 122,988). White is associated with harmless objects and Black with weapons (N = 85,742).<sup>200</sup>

Implicit racial bias is linked to the amygdala—an almond-sized subcortical brain structure, involved in emotional learning, perceiving novel or threatening stimuli,<sup>201</sup> and fear conditioning.<sup>202</sup> William Cunningham and colleagues found that Whites' amygdalas are activated far more when they are subliminally shown Black faces as compared to White faces. Moreover, the degree of amygdala activation is significantly correlated with participants' IAT scores.<sup>203</sup>

No mere abstraction, implicit race bias predicts real-world behavior. For example, Samuel Gaertner and John McLaughlin subliminally primed individuals with the word "White" or "Black" and then immediately replaced the word with a string of letters that were sometimes actual words and sometimes nonsensical. The actual words selected were associated with stereotypes of either Whites or Blacks. As quickly as possible, individuals had to identify whether the string of letters was, indeed, a word. They were faster at recognizing positive words (e.g., "smart") if they were primed with the word "White" instead of "Black."<sup>204</sup> Dovidio and colleagues also demonstrated that response times to negative target words were significantly faster following the Black prime than following the White prime.<sup>205</sup> And Patricia Devine's

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<sup>196</sup> *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).

<sup>197</sup> 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., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 317 (2000).

<sup>198</sup> Thierry Devos & Mahzarin R. Banaji, *American = White*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 452-53 (2005)

<sup>199</sup> *Id.* at 455.

<sup>200</sup> Lane et al., *supra* note 181.

<sup>201</sup> Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 AM. PSYCHOLOGIST 717, 720 (2001)

<sup>202</sup> See Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2000).

<sup>203</sup> See William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 811 (2004).

<sup>204</sup> Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 Soc. Psychol. Q. 23, 23 (1983).

<sup>205</sup> John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL & SOC. PSYCHOL. 510, 522-523 (1997).

research reveals that subliminal priming with words stereotypically associated with Blacks leads individuals to interpret ambiguous behavior as more aggressive.<sup>206</sup> Possibly, these results stemmed from more than simply using words with negative affect (e.g., “lazy”). Bargh and colleagues found that Whites who were subliminally primed with Black male faces (as opposed to White male faces) for a fraction of a second, responded with greater hostility and anger toward an experimenter after being told that they would have to repeat a boring task because of a computer malfunction. Here, presumably, exposure to Black faces not only activated the category “African American” but also activated the associated stereotype “hostile” and the behaviors that go along with it, leading participants to enact those behaviors within the experimental situation.<sup>207</sup>

Implicit racial attitudes also predict a host of other behaviors: Laurie Rudman and Richard Ashmore conducted an experiment on the relationship between implicit racial attitudes and harmful behaviors towards Blacks.<sup>208</sup> In their second study, they discovered that implicit bias predicted budget cuts for Asian, Black, and Jewish student organizations.<sup>209</sup> More importantly, implicit anti-Black bias predicted self-reported racial discrimination. Included in this category of behaviors were exclusion, verbal slurs, and physical harm.<sup>210</sup>

Franklin Gilliam and Shanto Iyengar investigated how local news crime scripts might create ingrained heuristics for understanding crime and race. They created variations of a local newscast, and among them was one in which there was a crime story with a Black suspect mugshot, and another crime story with a White-suspect mugshot. Both suspects were represented by the same morphed photograph; the only difference was skin hue in order to control for facial expression and features. The suspect appeared for only five seconds in a ten-minute newscast. Nonetheless, having seen the Black suspect, Whites showed six percent more support for punitive remedies than did the control group, which saw no crime story. When they were instead exposed to the White suspect, their support for punitive remedies increased by only one percent, which was not statistically significant.<sup>211</sup>

Allen McConnell and Jill Leibold found that Whites who revealed stronger negative attitudes toward Blacks (vs. Whites) on the IAT had more negative social interactions with a Black (vs. a White) experimenter.<sup>212</sup> In the employment context, implicit race bias also predicts the frequency with which individuals choose to ask racially stereotypic interview questions of

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<sup>206</sup> Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 11-12 (1989).

<sup>207</sup> John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238-39 (1996)

<sup>208</sup> See generally, Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359 (2007).

<sup>209</sup> *Id.* at 363-68.

<sup>210</sup> *Id.* at 361-63.

<sup>211</sup> Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 Am. J. POL. SCI. 560, 563-68 (2000).

<sup>212</sup> Allen R. McConnell & Jill M. Leibold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 438-440 (2001). Others have made similar findings. See also John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 65-66 (2002).

Black as compared to White job candidates during simulated job interviews.<sup>213</sup> Mark Chen and John Bargh similarly found that the subliminal activation of stereotypes leads to behavioral confirmation. For instance, once racial stereotypes have been activated and manifested in a perceivers' hostile behavior toward a naive interaction partner, that behavior in turn elicits a similar response from the partner, which leads each person to believe that the other has provoked the hostile interaction.<sup>214</sup> In addition, William Cunningham and colleagues found that the stronger the endorsement of right-wing ideology, the stronger the tendency for automatic associations between Black/bad and White/good.<sup>215</sup> Similarly, John Jost and colleagues and Brian Nosek found that among Whites, political conservatism is positively associated with ingroup favoritism on both implicit and explicit measures.<sup>216</sup>

Implicit racial bias is also implicated in more life-threatening situations. B. Keith Payne subliminally primed non-Black participants with a Black or White face and subsequently asked them to identify, as fast as possible, whether the object displayed was a tool or gun. Those who are primed with the Black face more quickly identify guns correctly. In contrast, those primed with the White face more quickly identify tools correctly. When participants are time-pressured to force more errors, those primed with a Black face err more in mistaking a tool for a gun (false alarm).<sup>217</sup> Joshua Correll added to this work by creating a video game that placed photographs of a White or Black individual holding either a gun or other object (i.e., wallet, soda can, or cell phone) into diverse photographic backgrounds. Participants were instructed to decide as quickly as possible whether to shoot the target. Severe time pressure designed into the game forced errors. Individuals are more likely to mistake a Black target as armed when he in fact is unarmed (false alarms); conversely, they are more likely to mistake a White target as unarmed when he in fact is armed (misses).<sup>218</sup>

In the area of health care, Alexander Green and colleagues studied internal medicine and emergency medicine physicians; they found that none of the physicians reported explicit preferences for Whites over Blacks. Nonetheless, they found an implicit preference for White and implicit stereotypes that Blacks are less cooperative with medical procedures and less cooperative generally. More importantly, as physicians' pro-White bias increased so did their likelihood of providing White patients, and not treating Blacks, with a treatment for cardiovascular disease.<sup>219</sup>

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<sup>213</sup> D. Sekaquapetwa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXP. SOC. PSYCHOL. 75, 77-78 (2003).

<sup>214</sup> Mark Chen & John A. Bargh, *Nonconscious Behavioral Confirmation Process: The Self-fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 552-54 (1997).

<sup>215</sup> William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULLETIN 1332, 1336 (2004).

<sup>216</sup> 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).

<sup>217</sup> 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).

<sup>218</sup> Joshua Correll et al., *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315-17, 1319 (2002).

<sup>219</sup> Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1234-37 (2007).

Implicit race bias research also puts the Black-primate association into context, generally, and with particular regard to President Obama. For example, Phillip Goff and colleagues investigated the relationship between implicit racial attitudes and the 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.<sup>220</sup> Goff and colleagues found that individuals more easily identified ape images when primed with Black male faces than when not so primed. Moreover, individuals found it more difficult to identify ape images when primed with White male faces.<sup>221</sup> In a second study, individuals were first subliminally shown images of ape line drawings or jumbled line drawings. Then they were given a facial interference task designed to gauge how distracted they would become when presented with faces prior to a test measuring their attentional bias to Black and White faces.<sup>222</sup> Their results indicated that priming individuals with images of apes demonstrated more attentional bias towards Black faces.<sup>223</sup> In another study, Goff and colleagues had White males take, either, a race IAT or a “dehumanization IAT,” that included ape words (e.g., ape, monkey, baboon) and big cat words (e.g., lion, tiger, panther) and complete a stereotype knowledge questionnaire. Among the questions on the questionnaire was “I am aware of the stereotype that African Americans are like apes.”<sup>224</sup> On the personalized IAT, participants demonstrated a pro-White/anti-Black bias. On the dehumanization IAT, participants more easily categorized words in the Black-ape condition than they did in the Black-big cat condition. Implicit anti-Black bias was found not to be responsible for the Black-ape association. Furthermore, given the low numbers of participants who reported awareness of the historical representation of Blacks as primates, the results suggested that the Black-primate association operates outside of explicit cultural knowledge of the association.<sup>225</sup>

Implicit anti-Black bias predicts Whites’ justification of violence against Blacks. For example, Goff and colleagues subliminally primed individuals with images of apes or big cats. They then asked these individuals to view a videotape of police officers beating a suspect who individuals were led to believe was Black or White.<sup>226</sup> Individuals who believed the suspect was White perceived the police as being no more justified when primed with apes vis-à-vis big cats. Individuals who believed the suspect was Black perceived the police as being more justified when primed with apes vis-à-vis big cats. Moreover, individuals who were primed with big cats did not think the police were more justified in beating the White or Black suspect. In contrast, individuals who were primed with apes thought the police were more justified in beating the Black, as opposed to the White suspect.<sup>227</sup> In a final study, Goff and colleagues reviewed capital punishment cases, particularly death-eligible cases, between 1979 and 1999 in Philadelphia, Pennsylvania. They analyzed 153 cases for which there were both defendant mug shots and

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<sup>220</sup> Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 295 (2008).

<sup>221</sup> *Id.* at 296.

<sup>222</sup> *Id.* at 297.

<sup>223</sup> *Id.* at 298.

<sup>224</sup> *Id.* at 301.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 301-02.

<sup>227</sup> *Id.* at 302.

press coverage of those defendants' cases. Goff and colleagues found that Black, as opposed to White, capital defendants were more likely to be portrayed as ape-like in news coverage, and this portrayal was associated with higher levels of state-sponsored executions.<sup>228</sup>

The consequence of implicitly shaping President Obama's image among American citizens cannot be understated. Implicit anti-Black biases are malleable.<sup>229</sup> For example, exposing Whites to negative Black representations increases their implicit anti-Black biases.<sup>230</sup> Furthermore, after exposure to negative representations of Blacks via news broadcasts, those already predisposed to harbor stereotypes about Blacks, vis-à-vis those who are not, more likely support harsher treatment of Blacks in certain contexts.<sup>231</sup> Not all of those exposed to aggression-related or inducing cues act aggressively; priming with such cues only increases aggressive cues among those low in agreeableness.<sup>232</sup> In the context of political ideology, those who are center-right on the political spectrum tend to be lower in agreeableness than those who are center-left.<sup>233</sup> Moreover, political conservatism is associated with implicit anti-Black bias<sup>234</sup> and is disambiguated from mere conservative ideology.<sup>235</sup> This may be better understood in light of research that suggests that "[o]ne major criterion continually reappears in distinguishing left from right: attitudes toward equality. The left favors greater equality, while the right inevitably sees society as hierarchical."<sup>236</sup> Thus, 73.6% Conservatives harbor implicit anti-Black biases.<sup>237</sup> Significantly, Whites who harbor stronger implicit anti-Black biases are more likely to engage in acts of racial aggression against Blacks.<sup>238</sup> The juncture at which implicit race bias, political ideology, the Black-primate association, and potential threats to President Obama's life come intersect most starkly is among right-wing extremists.<sup>239</sup>

Accordingly, what should be of concern to those who seek to protect President Obama's life—both in the short and long run—is the effect that implicit primate imagery might have had on “ordinary,” but implicitly anti-black Americans. They might have been influenced by such priming, and though not inclined to plot against President Obama's life, will share enough in

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<sup>228</sup> *Id.* at 304.

<sup>229</sup> Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 811-12 (2001).

<sup>230</sup> Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 137-39 (2002).

<sup>231</sup> Travis L. Dixon, *Psychological Reactions to Crime News Portrayals of Black Criminals: Understanding the Moderating Roles of Prior News Viewing and Stereotype Endorsement*, 73 Communication Monographs 162, 176-77 (2006).

<sup>232</sup> Brian P. Meier et al., *Turning the Other Cheek: Agreeableness and the Regulation of Aggression-Related Primes*, 17 PSYCHOL. SCI. 136, 185 (2006).

<sup>233</sup> Gian Vittorio et al., *Personality Profiles and Political Parties*, 20 POL. PSYCHOL. 175, 175 (1999).

<sup>234</sup> See Greenwald & Krieger, *supra* note \_\_, at 958.

<sup>235</sup> See Inna Burdein, *Principled Conservatives or Covert Racists: Disentangling Racism and Ideology Through Implicit Measures*, (May 2007) (unpublished Ph.D. dissertation, State Univ. of New York, Stony Brook) (on file with ProQuest).

<sup>236</sup> ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 40 (Polity Press 1998).

<sup>237</sup> See Greenwald & Krieger, *supra* note \_\_, at 958.

<sup>238</sup> Laurie A. Rudman and Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 362-63 (2007).

<sup>239</sup> See Eli Lake & Audrey Hudson, *Federal Agency Warns of Radicals on Right: 9-page Report Sent to Police*, WASH. POST, April 14, 2009 at A01; see also Paul Krugman, *The Big Hate*, N.Y. TIMES, June 12, 2009 at 27.

their belief-system with right-wing extremists.<sup>240</sup> As such, despite the fact that those who would threaten President Obama's life have little community encouragement—vis-à-vis in decades past—for such actions, today there may be enough overlapping ideology and rhetoric such that implicitly anti-black people might lead such extremists to think that they have such social support. Furthermore, imagery that dehumanizes President Obama might keep implicitly anti-Black Americans, not themselves inclined toward violence, from reporting plots against President Obama as well.<sup>241</sup>

## Conclusion

During the 2008 Presidential campaign—from the primaries to the election—and thereafter, critics and commentators have used visual and discursive imagery to characterize the first Black President (and his family) as a primate, in various forms. As may have been expected, when labeled as racist for such conduct, these individuals retreated to the conventional by stating that their association of the President with various forms of primates was devoid of racial meaning and merely a joke. The same can be said of Sean Delonas' *New York Post* cartoon. Unmoored from its historical, cultural, and psychological foundations, such an explanation might be fitting. Placed in its proper context, however, such imagery fails to belie racial meaning. Moreover, such racial significance is heightened by the fact that a historical and psychological understanding of such imagery underscores how such associations have been used to dehumanize and justify violence against Blacks. What humor theory shows is that, in fact, jokes are not trivial, and are a form of rhetorical violence which can, in certain instances, awaken socially unacceptable animosities and incite physical violence. Coupled with the vast empirical data on implicit racial bias, it is clear that Delonas' cartoon and similar representations are no laughing matter. In an environment where Barack Obama, both as a presidential candidate and as President, has received unprecedented threats against his life, the potential implications of such seemingly benign imagery neither be ignored by those who care about the President as an individual nor by those who pass legislation to secure the safety of him as an institution.

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<sup>240</sup> See Brian Lickel et al., *A Case of Collective Responsibility: Who Else Was to Blame for the Columbine High School Shootings*, 29 PERSONALITY & SOC. PSYCHOL. BULLETIN 194, 194 (2003); Cf. Joshua D. Freilich & William Alex Pridemore, *Politics, Culture, and Political Crime: Covariates of Abortion Clinic Attacks in the United States*, 35 J. CRIM. JUST. 323, 323 (2007).

<sup>241</sup> Gregory S. Parks & Jeffrey J. Rachlinski, *Barack Obama's Candidacy and the Collateral Consequences of the "Politics of Fear,"* in BARACK OBAMA AND AFRICAN-AMERICAN EMPOWERMENT 234 (Manning Marable and Kristen Clarke eds., Palgrave 2009).