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# The Obama Effect: Understanding Emerging Meanings of "Obama" in Anti-Discrimination Law

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# The Obama Effect: Understanding Emerging Meanings of “Obama” in Anti-Discrimination Law

ANGELA ONWUACHI-WILLIG\* AND MARIO L. BARNES\*\*

## INTRODUCTION

The election of Barack Obama to the U.S. presidency on November 4, 2008, prompted many declarations from journalists and commentators about the arrival of a post-racial society, a society in which race is no longer meaningful.<sup>1</sup> For many, the fact that a self-identified black man had obtained the most prominent, powerful, and prestigious job in the United States symbolized the end of an era in which Blacks<sup>2</sup> and other racial minorities could make legitimate claims about the harmful

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1. See, e.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (“[P]ost-racialism in its current iteration is a twenty-first-century ideology . . . reflect[ing] a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action. According to post-racial logic, the move is to effectuate a ‘retreat from race.’” (quoting DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (1993))); see also Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 31–36 (2010) (analyzing the rise of post-racialism and its connection to earlier societal commitments to colorblindness). Cf. Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?* 98 GEO. L.J. 967, 968–70 (2010) (pointing out that post-race-like perspectives have actually been advanced within constitutional equal protection jurisprudence since at least the nineteenth century); Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 373 (2012) (“[S]ome commentators have claimed the existence of a colorblind and post-racial society as a result of the election of an African American president. These impetuous declarations about the end of racism create suspicion that these assertions themselves may be rooted in racism as a form of backlash against any racial justice gains in our society.”); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1134 (2010) (asserting that “the post-racial claim ultimately serves to legitimate the practice of continued discrimination against racial minorities”).

2. Throughout this Article, the words “Black” and “White” are capitalized when used as nouns to describe a racialized group; however, these terms are not capitalized when used as adjectives. Also, the term “Blacks” is used instead of the term “African Americans” because the term “Blacks” is more inclusive. See *Why “Black” and Not “African*

effects of racism.<sup>3</sup> In fact, on the night of the election, conservative talk show host Bill Bennett proclaimed that Blacks would have no more excuses for any failures or unattained successes.<sup>4</sup> Black actor Will Smith essentially agreed with Bennett, proclaiming the following: “I love that all of our excuses have been removed. African-American excuses have been removed. There’s no white man trying to keep you down, because if he were really trying to keep you down, he would have done everything he could to keep Obama down.”<sup>5</sup>

Along the same lines, many conservatives pointed to Obama’s election as a symbol of a racism-free society when they initiated constitutional challenges to the Voting Rights Act of 1965.<sup>6</sup> Despite the fact that Obama had earned only one in four votes from Whites in areas covered by section 5 of the Act while earning nearly half of all votes from Whites nationally, Texas lawyer Gregory Coleman argued that the Voting Rights Act was basically irrelevant in today’s society; to him and other conservatives, Obama’s election as president demonstrated as much.<sup>7</sup>

*American*”?, J. BLACKS IN HIGHER EDUC., Spring 1994, at 18, 18–19. Additionally, “[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies.” Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4 (emphasis in original).

3. See Mario L. Barnes, *Reflection on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 6, 12–14 (2009) (presenting, but not arguing this point). For those who embrace the notion of a post-racial society, “Barack Obama becomes the latest and penultimate black success story, which proves that unsuccessful Blacks merely do not work hard enough.” *Id.* at 12. Perhaps, the only potentially greater black success story would involve a president who was also a woman (or a member of another historically disenfranchised group).

4. Wornie L. Reed & Bertin M. Louis, Jr., “No More Excuses”: *Problematic Responses to Barack Obama’s Election*, 13 J. AFR.-AM. STUD. 97, 97–100 (2009) (also noting that certain black Americans were saying “now blacks have no more excuses”). Bennett also once made controversial comments that suggested a link between the abortion of black babies and the reduction of crime rates in the country. He said that, if one’s sole purpose was to reduce crime, “[y]ou could abort every black baby in this country, and your crime rate would go down. That would be an impossible, ridiculous and morally reprehensible thing to do, but your crime rate would go down.” Jack Tapper, *William Bennett Defends Comment on Abortion and Crime*, ABCNEWS.COM (Sept. 29, 2005), <http://abcnews.go.com/WNT/Politics/story?id=1171385&page=1>. Bennett insisted that his hypothetical remarks were valid, asserting:

There’s no question this is on our minds . . . . What I do on our show is talk about things that people are thinking . . . we don’t hesitate to talk about things that are touchy. . . . I’m sorry if people are hurt, I really am. But we can’t say this is an area of American life (and) public policy that we’re not allowed to talk about—race and crime.

*Id.*

5. *Reflections on Living History*, USA TODAY, Jan. 21, 2009, at 14A.

6. Peter Wallsten & David G. Savage, *Conservatives Invoke Obama in Voting Rights Act Challenge*, L.A. TIMES (Mar. 18, 2009), <http://articles.latimes.com/2009/mar/18/nation/na-voting-rights18>. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (declining to rule on the constitutionality of a challenge to pre-clearance procedures under section 5 of the Voting Rights Act, which require covered states to seek Department of Justice approval for proposed changes to their election laws).

7. See Wallsten & Savage, *supra* note 6.

Coleman declared, “The America that has elected Barack Obama as its first African American president is far different than when [the Voting Rights Act] was first enacted in 1965.”<sup>8</sup>

Overall, many pondered whether Obama’s election signaled a new day for Blacks.<sup>9</sup> The fact that Obama was biracial only made the symbolism stronger. The son of a black Kenyan father and a white mother from Kansas, Obama represented a break from our nation’s troubled past with race and racism, not just because of his ability to become president but also because of his individual racial background.<sup>10</sup>

In this Article, we explore the proclamations that have been made about an emerging “post-racial” society within the context of workplace anti-discrimination law. Specifically, as the title of our panel for this symposium asks, we inquire: What is the significance of having a biracial, black-white president (or more specifically, the first self-identified black president) to the enforcement of anti-discrimination law? What impact, if any, has President Barack Obama’s campaign for the presidency and election as president had on discrimination in the workplace?

Based in part on our review of discrimination cases in which President Obama’s name has been invoked—in most cases, either to demean minority workers or with an otherwise discriminatory purpose—we conclude that having a biracial, black-white (or self-identified black) president has had a surprising effect on the enforcement of anti-discrimination law. Indeed, we contend that Obama’s campaign and election have, to an extent, had an unusual effect in the work environment. Rather than revealing that racism is over or that racial discrimination is diminishing in the workplace, Obama’s presence and prominence have developed a specialized meaning that ironically has resulted in an increase in or at the very least a continuation of regular discrimination and harassment within the workplace. In fact, our review of a number of anti-discrimination law cases filed during the political ascendance and election of Obama suggests that, within certain contexts, individuals have made references to Obama in ways that demonstrate racial animus against Blacks and those associated with Blacks or as a means for explaining why offending conduct toward racial minorities does not involve discrimination. In other words, in these contexts, the term “Obama” itself has become a new tool for racial harassment and discrimination as well as a new tool for denying the reality of racism.

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8. *Id.*

9. See Jonathan Kaufman & Gary Fields, *Election of Obama Recasts National Conversations on Race*, WALL ST. J., Nov. 10, 2008, at A8 (discussing the myriad possibilities that Obama’s election may signal for U.S. race relations).

10. According to Berkeley Law Professor Ian Haney López, it was Obama’s unique background and the nature of the political moment, rather than improved racial attitudes, that created the opportunity for Obama to be elected. See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1024 (2010) (“The nation elected Obama in the midst of profound economic, environmental, martial, and constitutional crises. Perhaps the crises, coupled with Obama’s exceptional racial background—combining Kenya and Kansas, an immigrant success story, and the positive exotic of Hawaii—better explain his election than any purported fundamental shift in racial attitudes.”).

In Part I of this Article, we use the literature regarding Obama's presidential campaign as well as research concerning implicit bias to explore some of the reasons why one of our proudest moments as a nation—the election of our first self-identified black president—is unlikely in itself to have a significant impact on the enforcement of anti-discrimination law. Thereafter, in Part II, we turn to and examine specific anti-discrimination cases as a means of considering the actual effect that Obama's presence and election have had on anti-discrimination law. Specifically, we examine several cases that reveal how Obama, or rather his name or existence, has been utilized as a weapon by perpetrators of discrimination and harassment against Blacks or individuals who are associated with Blacks. In Part III, we then focus on one sign of hope—pun intended—in the development of anti-discrimination law. In particular, we point out that, while “Obama” has been used as a tool for discrimination and harassment in the workplace, such misuse has not typically gone without punishment or acknowledgement by either employers or judges. If nothing else, such employer actions and cases demonstrate the significance of employer-facilitated anti-discrimination norms in the workplace and the continuing need for judicial protection against various discriminatory practices in the workplace, even as they emerge in new forms or, in this case, through new slurs.

#### I. IT'S A NEW DAY?

After Obama was elected to be president of the United States, many individuals articulated their expectation that this event would have significant, positive impacts on the lives of Blacks across the country and in many capacities, especially for black children. For example, journalist Sean Yoes asserted that Obama symbolized for black children a world of endless possibilities.<sup>11</sup> Yoes wrote that “all those young, eager eyes fixed on Obama around the world now see, in his example, that when someone tells black children they can grow up to be whatever they want to be, it's real. Very real.”<sup>12</sup> Similarly, but focusing on black boys and men in particular, one writer declared the following about the potential impact of Obama's election: “Black boys and men are being given another remarkable example from which to pattern themselves. Even those young men who feel ignored or discouraged now have hope. . . . Most black boys don't aspire to become President, but many now know that it is possible.”<sup>13</sup>

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11. See Sean Yoes, *Young Black Boys Share What President Obama Means to Them*, BLACKAMERICAWEB.COM (Nov. 11, 2008, 3:40 AM), [http://www.blackamericaweb.com/?q=articles/news/moving\\_america\\_news/2366/1](http://www.blackamericaweb.com/?q=articles/news/moving_america_news/2366/1).

12. *Id.*

13. *The Obama Effect: Influencing African-American Boys and Men*, MYBROTHA.COM (Jan. 20, 2008), <http://www.mybrotha.com/obama-effect.asp>. One of us made a similar observation. See *University of Iowa Law Professor Says Obama Election Moves Us Closer to Racial Equality*, U.S. FED. NEWS (Nov. 5, 2008), <http://news-releases.uiowa.edu/2008/november/110508lawprof-obama.html> (including a statement from Professor Onwuachi-Willig shortly after the election that her children will always have grown up in a world where it was understood that a black man could be president).

On an even broader scale, Harvard Law Professor David Wilkins described what he thought could be changed reactions from Whites to Blacks more generally, stating: “[Obama’s election] change[d] the view of who could be an important person. . . . No one is quite sure who [any black person they meet is] . . . . Now the assumption is you might know the next president of the United States.”<sup>14</sup> Finally, on the humorous side, writers at the comedic news source, *The Onion*, ran an article entitled “Nation’s Blacks Creeped Out by All the People Smiling at Them.”<sup>15</sup> The web article joked about widespread, emerging reactions of warmth by Whites towards Blacks, stating:

A majority of African-Americans surveyed in a nationwide poll this week reported feeling ‘deeply disturbed’ and ‘more than a little weirded out’ by all the white people now smiling at them. . . .

Although poll respondents said that the regularity of jovial white strangers greeting them in elevators has risen approximately 450 percent since mid-January, the incidents are reportedly nowhere near as frequent as they were on Nov. 4, 2008. On that day, the country was temporarily seized by an epidemic of unsolicited white-on-black hugging.<sup>16</sup>

Although Obama’s election was a great and memorable moment in the history of a nation that has endured a troubled past around issues of race and inclusion, and although it provides a strong reason for expecting improvement with respect to race relations and discrimination in the workplace, there are a number of reasons why the ascendance of Obama—our first biracial, black-white (or self-identified black) president—is unlikely in itself to have a significant impact on the enforcement of anti-discrimination law.<sup>17</sup> One would think that the election of Obama, which was

14. Jonathan Kaufman, *Black Power Brokers Ready to Rise in Tandem with New President*, WALL ST. J., Nov. 6, 2008, at A1 (also quoting Peniel Joseph, a professor at Brandeis University, who said, “Obama being elected president shatters the last glass ceiling.”).

15. *Nation’s Blacks Creeped Out by All the People Smiling at Them*, THE ONION (Feb. 16, 2009), <http://www.theonion.com/articles/nations-blacks-creeped-out-by-all-the-people-smili,2662/>.

16. *Id.*

17. One of the reasons the election may not have created improved circumstances for workplace race relations is that Obama’s election appears to have had only a marginal effect on racial attitudes. See, e.g., Taylor Harris, *No “Obama Effect” on Racial Discrimination*, WASH. EXAMINER, July 5, 2009 (discussing 2009 CNN/Essence poll where white and black respondents indicated that there had been some improvement in race relations since the election of President Obama, but where the number of Blacks who believed race discrimination was still a serious problem increased from 38% in 2008 to 55% in 2009). Perhaps, to the contrary of what one might have initially expected, since Obama’s election, the turn toward post-racialism—which posits that racism arises out of the maladaptive attitudes of a limited few—has led to structural forms of disadvantage being ignored. See Barnes et al., *supra* note 1, at 968; see also Haney López, *supra* note 10, at 1069 (“This sense that, whatever might explain continued racially correlated inequalities, it is not racism, reflects a pinched conception of racism as the discrete acts of individual malefactors. When conceptualized as bad acts by bad persons, racism surely is far more rare than previously and obviously cannot explain the bulk of racially disparate social outcomes.”).

one giant step toward racial reconciliation in this country, would make us all more vigilant about eradicating racial discrimination everywhere, including in the workplace. After all, in the post-racial world for which Obama is a significant symbol, any evidence against the actual achievement of a racism-free society should produce skepticism. However, various factors, such as Obama's own identity performance during his campaign, studies regarding the psychology of Whites who supported Obama, and studies concerning implicit bias, suggest a more complicated relationship between the presumed import of a racial minority president and current anti-discrimination law.

In this Part, we briefly explore each of the aforementioned factors. In so doing, we explicate why they are more likely to signal the reinforcement of or increase in racial discrimination, rather than the decrease of it, since Obama's election.

### A. Identity Performances

One reason why we, as a society, cannot interpret Obama's presidential election as a signal of greater anti-discrimination enforcement is what can be interpreted as Obama's own performance of his race—which was largely marked by his avoidance of race as a topic and of a few black people who were deemed to be “too” racially defined<sup>18</sup>—during his historic campaign. In his book, *Covering: The Hidden Assault on Our Civil Rights*, Professor Kenji Yoshino explains how discrimination has generally shifted from the exclusion of all outsiders per se, for example, Blacks, to the exclusion of only unacceptable outsiders.<sup>19</sup> Yoshino notes,

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18. Specifically, this phrase is a comment on racial minorities' understanding that they must behave or perform their identities in certain ways to achieve palatability within certain majority settings. See Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1658 (2004) (acknowledging that people of color become more racially palatable when they perform their identities in ways that are “unstereotypically nonwhite” rather than in ways that identify them as “stereotypically nonwhite”); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1306–07 (discussing how minority workers who perform their identities consistent with in-group expectations seek to distance themselves from outgroup members who engage in unacceptable racial performance). Broadly, theories of identity performance posit that a person is no longer merely judged by their status identity (the minority identity category to which they are perceived to belong). Rather, it is behavior and how one's behavior comports or deviates from race-based stereotypes that controls whether the person will be accepted. This idea has been extensively explored in contemporary anti-discrimination scholarship. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 714–19 (2001) (exploring identity performance within the context of intersectionality theories to explicate how workplaces invest in intragroup discrimination for outsiders); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1267–70 (2000) [hereinafter Carbado & Gulati, *Working Identity*] (analyzing identity performance through the concept of “working identity,” or outsiders managing the consequences of negative stereotypes and the benefits of positive ones related to their perceived identity status, within the workplace).

19. See YOSHINO, *supra* note 18, at 21–22.

“We are at a transitional moment in how Americans discriminate. . . . [I]ndividuals no longer need[] to *be* white, male, straight, Protestant, and able-bodied; they need[] only to *act* white, male, straight, Protestant, and able-bodied.”<sup>20</sup> Similarly, Professor Angela Harris has commented that theories of identity performance are significant because they reveal the changing nature of racism, from an enterprise dictated by traditional categories to one where norms—premised upon physiognomy and performance—predominate.<sup>21</sup> In that same vein, Professors Devon Carbado and Mitu Gulati have explicated how outsiders, especially racial outsiders such as Obama, negotiate their identities within public spaces in order to counter negative stereotypes about their group or groups and to fit in or survive within the mainstream.<sup>22</sup> Additionally, in his article, “Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy,”<sup>23</sup> Professor Frank Rudy Cooper details how various outsiders, in particular black men, have incentives to perform their identities in ways that will maintain their place within society’s hierarchies of race, gender, class, and sexuality.<sup>24</sup> Moreover, in our article, “By Any Other Name?: On Being ‘Regarded As’ Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White,”<sup>25</sup> we describe how racial identity performance by Blacks who wish to be accepted by the majority, “carries with it the need to . . . distance one’s self from persons who can challenge one’s identity performance.”<sup>26</sup> Finally, in her article, “Volunteer Discrimination,” Professor Angela Onwuachi-Willig teaches us specifically about the racial comfort strategy of “distancing, which occurs when conforming outsiders consciously work to distinguish themselves from other racial outsiders who reject dominant cultural appearance standards and performances.”<sup>27</sup>

When one carefully examines Obama’s campaign for the presidency, one can readily see that Obama was able to win in part because he engaged in all of these racial comfort strategies. As Professors Eduardo Bonilla-Silva and Victor Ray explained: “Obama has reached the level of success he has in large part because he has made a *strategic* move toward racelessness and adopted a post-racial persona

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20. *Id.* at 22 (emphasis in original).

21. See Angela P. Harris, *Love and Architecture: Race, Nation, and Gender Performances Inside and Outside the State*, 52 CLEV. ST. L. REV. 121, 121–22 (2005).

22. See Carbado & Gulati, *Working Identity*, *supra* note 18, at 1260–61, 1277–79.

23. Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006).

24. See *id.* at 859–60. For example, middle-class heterosexual black men—who are caught between the bind of the socially constructed images of the assimilationist “Good Black Man” and the dangerous “Bad Black Man”—are incentivized to perform their identity in a way that fits the assimilationist ideal by downplaying their race and highlighting their social class in order to maintain their place in the hierarchy above heterosexual black women and gay black men. *Id.* at 853, 859–70, 874–88; see also Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (describing how outsiders downplay or “cover” their difference to make insiders feel comfortable).

25. Onwuachi-Willig & Barnes, *supra* note 18.

26. *Id.* at 1308 n.101.

27. Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1898, 1921–25 (2007).



and political stance.”<sup>28</sup> Indeed, Obama had a staff that “carefully researched how to handle the issue of race” and how to make voters feel “comfortable with the idea of putting a *black* family in the White House.”<sup>29</sup>

Part of Obama’s campaign strategy seemed to include an active disregard of race or “racial” figures, even when they seemed difficult to ignore.<sup>30</sup> First, throughout his campaign, Obama covered and worked his identity to counter the stereotype of Blacks as too consumed with race.<sup>31</sup> Specifically, he downplayed his status as a black man during the campaign and rarely ever mentioned the elephant in the room, race.<sup>32</sup> For example, when Obama accepted the Democratic nomination for the presidency on the forty-fifth anniversary of Dr. Martin Luther King, Jr.’s “I Have a Dream” speech, he never spoke the Reverend’s name or even asserted the words “black” or “African American” during his speech.<sup>33</sup> Professor Cornel West, a professor of African American studies and religion at Princeton University, expressed alarm at the absence of King or race from Obama’s speech, stating:

28. Eduardo Bonilla-Silva & Victor Ray, *When Whites Love a Black Leader: Race Matters in Obamerica*, 13 J. AFR.-AM. STUD. 176, 178 (2009) (emphasis in original).

29. Adam Nagourney, Jim Rutenberg & Jeff Zeleny, *Near-Flawless Run from Start to Finish Is Credited in Victory*, N.Y. TIMES, Nov. 5, 2008, at P1 (emphasis added). The Obama campaign’s “post-racial” election strategy caused *Huffington Post* writer Jeff Chang to ask: “Do ‘post-racial politics’ merely mean a new way of marginalizing a racial justice agenda?” Jeff Chang, *The Ongoing Evolution of Obama’s “Post-Racial Politics,”* HUFFINGTON POST (Feb. 12, 2008, 5:36 PM), [http://www.huffingtonpost.com/jeff-chang/the-ongoing-evolution-of-\\_b\\_86312.html](http://www.huffingtonpost.com/jeff-chang/the-ongoing-evolution-of-_b_86312.html). Even conservative Shelby Steele expressed doubt that Obama’s election would result in any real revolution in our nation’s racial problems, highlighting that “the larger reality is the profound disparity between black and white Americans that will persist even under the glow of an Obama presidency.” Shelby Steele, *Obama’s Post-Racial Promise*, L.A. TIMES (Nov. 5, 2008), <http://www.latimes.com/news/opinion/commentary/la-oe-steele5-2008nov05,0,6553798.story>.

30. See Cho, *supra* note 1, at 1591 (“[H]is road to the White House was marked by contradiction—a rhetoric and campaign of ‘post-racial’ universalism by Obama, contrasted with a campaign trail often racialized by the mainstream media and Republican challengers.” (internal citation omitted)).

31. See Manning Marable, *Racializing Obama: The Enigma of Postblack Politics and Leadership, Introduction to BARACK OBAMA AND AFRICAN AMERICAN EMPOWERMENT: THE RISE OF BLACK AMERICA’S NEW LEADERSHIP* 1, 4–5 (Manning Marable & Kristen Clarke eds., 2009) (discussing Obama’s attempt to mute his race during the campaign).

32. The following political commentary described the purpose and futility of candidate Obama’s racial avoidance strategy:

The desire to ignore the elephant in the room is easy to understand, but Obama will not have that luxury. With the Jeremiah Wright fiasco, Obama was stripped of his post-racial image, transformed in the eyes of many whites from a candidate who happened to be black into a black candidate. And now he faces a Republican machine intent on blackening him further still. Add to that his exotic background (Kenyan father, Indonesian upbringing), his middle name, his urbanity and intellectualism, and the scale of the challenge ahead for him comes into sharp relief.

John Heilemann, *The Color-Coded Campaign; Why Isn’t Obama Doing Better in the Polls? The Answer No One Wants to Hear*, N.Y. MAG., Aug. 18, 2008.

33. *Obama Avoids Race on King’s “Dream” Anniversary*, MPR NEWS (Aug. 29, 2008), [http://minnesota.publicradio.org/display/web/2008/08/29/obama\\_king/](http://minnesota.publicradio.org/display/web/2008/08/29/obama_king/).

It looks like [Obama]'s running from history . . . . He couldn't mention Martin, he couldn't mention the civil rights movement, he couldn't mention those who sacrificed and gave so much. It's very, very difficult to actually create a new world if you don't acknowledge the world from which you are emerging.<sup>34</sup>

Indeed, Obama spoke about race (and brilliantly so) only when his back was against the wall because of the backlash against his spiritual counselor and minister at Trinity United Church of Christ in Chicago, the Reverend Jeremiah Wright.<sup>35</sup> During his speech, Obama, on the one hand, criticized Reverend Wright, stating "Reverend Wright's comments were not only wrong but divisive, divisive at a time when we need unity . . . racially charged at a time when we need to come together to solve a set of monumental problems."<sup>36</sup> On the other hand, however, Obama did not renounce Wright during his speech. Instead, he explained why Blacks of Wright's generation may still hold anger or bitterness about the nation's clear, past racial wrongs, and stated, "As imperfect as he may be, he has been like family to me," and "I can no more disown him than I can disown the black community."<sup>37</sup>

Additionally, throughout his campaign, Obama seemed to act on the incentives that Professors Angela Onwuachi-Willig and Osamudia James identified in their article "The Declining Significance of Presidential Races?" by engaging in actions and speech to distance himself from black persons who came across as "too black" or as too connected to the Civil Rights Movement, such as the Reverend Jesse Jackson.<sup>38</sup> As Bonilla-Silva and Ray asserted, "He [Obama] . . . distanced himself from most leaders of the civil rights movement, from his own reverend, from his own church, and from anything or anyone who makes him 'too black' or 'too political.'"<sup>39</sup> The most prominent example of distancing by Obama during his

34. *Id.*

35. Wright came under fire for comments that suggested that the chickens came home to roost when the United States was attacked on September 11, 2001, and that Hillary Clinton could not understand the struggles of Blacks. See Alex Mooney, *Controversial Minister Off Obama's Campaign*, CNN.COM (Mar. 14, 2008), [http://articles.cnn.com/2008-03-14/politics/obama.minister\\_1\\_obama-campaign-reverend-wright-sermons?\\_s=PM:POLITICS](http://articles.cnn.com/2008-03-14/politics/obama.minister_1_obama-campaign-reverend-wright-sermons?_s=PM:POLITICS); Alex Johnson, *Controversial Minister Leaves Obama Campaign: Presidential Candidate Condemns Words but Not Ministry of Former Pastor*, MSNBC.COM (Mar. 13, 2008, 9:09 PM), <http://www.msnbc.msn.com/id/23634881/>.

36. John Bentley, *Obama: U.S. "Cannot Afford to Ignore" Race*, CBSNEWS (Mar. 18, 2008, 11:44 AM), [http://www.cbsnews.com/8301-502443\\_162-3947887-502443.html](http://www.cbsnews.com/8301-502443_162-3947887-502443.html).

37. *Id.*

38. See Angela Onwuachi-Willig & Osamudia James, *The Declining Significance of Presidential Races?*, 72 LAW & CONTEMP. PROBS. 89, 99–100 (2009) (discussing Obama's management of his racial performance during the campaign and his preference for a message of universalism rather than tying himself to the legacy of the Civil Rights Movement); David A. Hollinger, *Obama, Blackness, and Postethnic America*, CHRON. HIGHER EDUC., Feb. 29, 2008, at 7. Berkeley history Professor Hollinger opined: "Unlike Jesse Jackson or Al Sharpton, whose presidential candidacies were more focused on color, Obama has never offered himself as the candidate of a particular ethnoracial group. His transracial appeal, coupled with the willingness of millions of white voters to respond to it, is almost always the focus of media depictions of Obama as a 'postracial' or 'postethnic' candidate." *Id.*

39. Bonilla-Silva & Ray, *supra* note 28, at 178.

campaign occurred during his speech after the controversy over Reverend Wright began. At that time, Obama worked to distance himself—not from Wright himself (in fact, for a long time, Obama refused to denounce Wright)—but rather from the racial anger and frustration that Obama explicitly linked to Wright’s generation, and not his own generation.<sup>40</sup> Obama stated during his speech:

This is the reality in which Reverend Wright and other African-Americans of his generation grew up. They came of age in the late fifties and early sixties, a time when segregation was still the law of the land and opportunity was systematically constricted. What’s remarkable is not how many failed in the face of discrimination, but rather how many men and women overcame the odds; how many were able to make a way out of no way for those like me who would come after them. . . .

Even for those blacks who did make it, questions of race, and racism, continue to define their worldview in fundamental ways. For the men and women of Reverend Wright’s generation, the memories of humiliation and doubt and fear have not gone away; nor has the anger and the bitterness of those years. That anger may not get expressed in public, in front of white co-workers or white friends. But it does find voice in the barbershop or around the kitchen table. At times, that anger is exploited by politicians, to gin up votes along racial lines, or to make up for a politician’s own failings.<sup>41</sup>

In this vein, Obama functioned as what conservative scholar Shelby Steele has referred to as a bargainer, “winning the loyalty and gratitude of whites by flattering them with his racial trust: I will presume that you are not a racist if you will not hold my race against me.”<sup>42</sup>

But Obama’s strategies aside, the racial vitriol that emerged during his campaign, and that has continued to surface since his election as president, indicates that, even for acceptable Blacks, inclusion or acceptance can be short lived or at least wavering. During his campaign, Obama’s opponents and their supporters used his race, both explicitly and implicitly, as a tool against him in the election, often relying on negative minority stereotypes to mark both him and his wife, Michelle, as an “other.”<sup>43</sup> For example, during his campaign, a white female

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40. See, e.g., Jeff Zeleny, *Obama Adds to Distance from Pastor and Opinions*, N.Y. TIMES, Apr. 29, 2008, at A14.

41. *Barack Obama Speaks to Jeremiah Wright Statements (Text of Speech)*, NOWPUBLIC (Mar. 18, 2008, 6:43 AM), <http://www.nowpublic.com/world/barack-obama-speaks-jeremiah-wright-statements-text-speech>.

42. Shelby Steele, *Obama and Our Post-Modern Race Problem*, WALL ST. J., Dec. 30, 2009, at A17.

43. See Onwuachi-Willig & James, *supra* note 38, at 99–101 (exploring how race and class functioned together to disadvantage President Obama in the race to the White House); see also Ari Berman, *Smearing Obama*, THE NATION, Mar. 31, 2008, at 10 (“The purpose of the smear campaign is to paint [Obama] as an Arab-loving, Israel-hating, terrorist-coddling, radical black nationalist.”); Trina Jones & Mario L. Barnes, *Post-Racial? The U.S. Is Not Ready to Drop Safeguards*, L.A. DAILY J., Aug. 28, 2009, at 1, 8 (discussing events evincing racial bias before and after Obama’s election, such as the Birther Movement, the vitriol

Republican community leader in California surrounded Obama's image with pictures of fried chicken, watermelon, ribs, and Kool-Aid on a food stamp, explicitly indicating that Obama would be different from other presidents.<sup>44</sup> Another website during the campaign advertised sales of "Obama Waffles," which included a picture of Obama with popping, big eyes and thick lips and included an image of Obama in cultural Mexican clothing, with a recipe for "Open Border Fiesta Waffles."<sup>45</sup> One anti-Obama sign even read: "Use the 'N-Word'—Never."<sup>46</sup> Furthermore, after his inauguration, race-based attacks against Obama continued. Indeed, at one point, Tea Party leaders came under fire for racially tinged signs against Obama that appeared at their rallies.<sup>47</sup> A review of just a few signs from these rallies includes slogans or statements such as: (1) Obama's Plan, White Slavery; (2) Obama, What You Talking Bout Willis! Spend My Money?; (3) Impeach Osama Obama AKA Hussein; (4) Barack Hussein Obama, The New Face

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displayed at healthcare policy townhall meetings in the summer of 2009, the racialized discourse deployed during the confirmation process of Justice Sotomayor in spring 2009, and the attacks that emanated from the president commenting on the arrest of Harvard Professor Henry Louis Gates). With regard to Michelle Obama, in particular, and the use of negative stereotypes, see Shanette C. Porter & Gregory S. Parks, *Michelle Obama: Redefining Images of Black Women*, in *THE OBAMAS AND A (POST) RACIAL AMERICA?* 116, 118–21 (Gregory S. Parks & Matthew W. Hughey eds., 2011). Within the United States, being the "other" means being racialized in a world where whiteness is viewed as neutral and normal. As Professor Martha Mahoney explained, "[T]he idea that noticing race is itself prejudiced rests on a fundamental sense that race involves the inferiority of the 'Other.'" Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 808 & n.35 (2003) (emphasis omitted); see also Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 9 (2008).

44. Onwuachi-Willig & James, *supra* note 38, at 103–05.

45. See Chip Berlet, *Bigoted Obama Waffles; Bigoted Values Voter Conference*, HUFFINGTON POST (Sept. 15, 2008, 8:26 AM), [http://www.huffingtonpost.com/chip-berlet/bigotedobama-waffles-pac\\_b\\_126404.html](http://www.huffingtonpost.com/chip-berlet/bigotedobama-waffles-pac_b_126404.html); see also Ali Frick, *'Obama Waffles' Featuring Racist, Stereotyped Images Sold at Values Voter Summit*, THINK PROGRESS (Sept. 13, 2008, 3:51 PM), <http://thinkprogress.org/politics/2008/09/13/29102/obama-waffles-featuring-racist-stereotyped-images-sold-at-values-voter-summit/>. The *Huffington Post* described the product box, noting: "The recipe card on the Obama Waffles box including [sic] ingredients such as goats milk and jalepeno peppers, and advises as a 'Tip: While waiting for these zesty treats to invade your home, why not learn a foreign language.' The 'Recommended Serving' is '4 or more illegal aliens.'" Berlet, *supra*.

46. Jane Caputi, *Character Assassinations: Hate Messages in Election 2008 Commercial Paraphernalia*, 86 DENV. U. L. REV. 585, 595 (2009) (emphasis omitted).

47. The most significant negative response to the signs targeting President Obama came from the National Association for the Advancement of Colored People (NAACP), which drafted a statement denouncing racist elements within the Tea Party. Shannon Travis, *NAACP Passes Resolution Blasting Tea Party 'Racism,'* CNN.COM (July 14, 2010), [http://articles.cnn.com/2010-07-14/politics/naacp.tea.party\\_1\\_tea-party-hilary-shelton-rampant-racism?\\_s=PM:POLITICS](http://articles.cnn.com/2010-07-14/politics/naacp.tea.party_1_tea-party-hilary-shelton-rampant-racism?_s=PM:POLITICS). After the statement was issued, however, major news outlets reported that less than 5% of signs included racist messages. Ross Douthat, *Op-Ed., Tales of the Tea Party*, N.Y. TIMES, Oct. 18, 2010, at A35; Amy Gardner, *Few Signs at Rally Expressed Racially Charged Anti-Obama Themes*, WASH. POST (Oct. 14, 2010, 6:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/13/AR2010101303634.html> (discussing the survey data of UCLA graduate student which indicated that only a small percentage of signs at the rally included racist messages).

of Hitler; and (5) Stand Idle While Some Kenyan Tries to Destroy America? WAP!! I Don't Think So!!! Homey Don't Play Dat!!!<sup>48</sup> If anything, these more blatant acts of racism and racial commentary indicate that Obama was wise to engage in his racial avoidance strategy during his campaign. More so, they confirm a reality that in many ways seems counterintuitive—that, in itself, the election of our first biracial, black-white or self-identified black president has not yet had, and may not ever have, much of an impact on the enforcement of anti-discrimination law. In fact, recent Equal Employment Opportunity Commission (EEOC) statistics demonstrate that workplace discrimination complaints are at record levels.<sup>49</sup>

### B. Moral Credentials and Statements

A second reason why Obama's success in his presidential campaign does not signal a new day in terms of the eradication of discrimination in the workplace is that studies demonstrate that, for some Whites, their vote for Obama was designed more as a means for making a statement about the irrelevancy of race to them and to society in general than it was to making a statement about supporting a highly qualified man, who happened to be black, in the job.<sup>50</sup> As Professor Jeff Rachlinksy and psychologist Gregory Parks explained in their article "Implicit Bias, Election '08, and the Myth of a Post-Racial America":

Psychologists have long found that many white Americans are somewhat well aware of their own prejudices and those of the society in which they live and find facing these biases an unpleasant

48. *Ten Most Offensive Tea Party Signs and Extensive Photo Coverage from Tax Day Protests*, HUFFINGTON POST (Apr. 16, 2009, 12:30 PM), [http://www.huffingtonpost.com/2009/04/16/10-most-offensive-tea-par\\_n\\_187554.html](http://www.huffingtonpost.com/2009/04/16/10-most-offensive-tea-par_n_187554.html).

49. *See Federal Job Bias Complaints at All-Time High*, CBSNews, (Jan. 11, 2011, 12:09 PM), <http://www.cbsnews.com/stories/2011/01/11/business/main7234557.shtml> (describing the increase in complaints as follows: "Discrimination claims rose in every category and, as in past years, claims based on race, sex and retaliation were most frequent. Race discrimination claims rose 7 percent, while retaliation claims jumped 8 percent."). *But see* Joel Wm. Friedman, *The Impact of the Obama Presidency on Civil Rights Enforcement in the United States*, 87 IND. L.J. 349, 356–58 (2012) (highlighting that Obama and Attorney General Eric Holder "have announced their intention to revitalize the Justice Department's enforcement of employment discrimination . . . statutes," and that Obama's EEOC appointments all have strong records in protecting civil rights).

50. Scholar Manning Marable has expressed this point, with regard to downplaying race for the benefit of white voters, as a deliberate strategy of the Obama campaign:

Early on in their deliberation process, the Obama precampaign group recognized that most white Americans would never vote for a *black* presidential candidate. However, they were convinced that most whites would embrace, and vote for, a remarkable, qualified presidential candidate *who happened to be black*. "Race" could be muted into an adjective, a qualifier of minimal consequence. So ethnically, Obama did not deny the reality of his African heritage; it was blended into the multicultural narrative of his uniquely "American Story . . ."

Marable, *supra* note 31, at 4–5 (emphasis in original). *Cf.* Heilemann, *supra* note 32 (indicating that Obama's limited discussion of race during the campaign transformed him "from a candidate who happened to be black into a black candidate").

experience. They react by engaging in actions designed to quell the uncomfortable sense that they and their peers are biased. . . . A white voter who supports Obama does not necessarily want a black man to be president but might only want to be able to congratulate himself or herself for backing a black person.<sup>51</sup>

More importantly, after the election, researchers at Stanford University found that, for some people, their support of Obama during the election actually gave them license to support racism, rather than to defeat it.<sup>52</sup> Specifically, these researchers discovered that “expressing support for Obama [made] some people feel justified in favoring whites over blacks,” giving those people the “moral credentials” they needed to “express their true feelings about race that may upset or offend others.”<sup>53</sup> In the study, participants who indicated their intent to vote for Obama before making hiring and funding decisions favored Whites more than participants who made those decisions before declaring any such intention.<sup>54</sup> Generally, the studies seem to reflect that viewing oneself as generally fair or moral, in a particular context, frees one up to act somewhat immorally.<sup>55</sup> With regard to workers who supported Obama, similarly, they would potentially feel free to behave in a manner that is adverse to the interests of minority workers, without feeling like they were investing in bigotry.<sup>56</sup>

51. Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 697–98 (2010) (internal citations omitted). For a general discussion of implicit bias and the election of Barack Obama, see Leslie Ashburn-Nardo, Robert W. Livingston & Joshua Waytz, *Implicit Bias: A Better Metric for Racial Progress?*, in THE OBAMAS AND A (POST) RACIAL AMERICA?, *supra* note 43, at 30, 37–39. Studies have shown that this desire to avoid feelings that one is racially biased has more generally contributed to the tendency of some to downplay the relevant effects of race. See, e.g., Jeannine Bell, *The Personal, the Political, and Race*, 44 L. & SOC'Y REV. 487, 489 (2010) (discussing research that indicated Whites engaged in “strategic colorblindness” when confronted with situations where race was relevant).

52. See Daniel A. Effron, Jessica S. Cameron & Benoit Monin, *Endorsing Obama Licenses Favoring Whites*, J. EXPERIMENTAL SOC. PSYCH., May 2009, at 590, 592; Adam Gorlick, *Backing Obama Gives Some Voters License to Favor Whites Over Blacks*, *Study Shows*, STAN. UNIV. NEWS (Mar. 2, 2009), <http://news.stanford.edu/news/2009/march4/obama-moral-credentials-favor-whites-030409.html>; see also Bonilla-Silva & Ray, *supra* note 28, at 178 (“[R]acism will remain in place and, worse yet, Obama’s election may become an obstacle in advancing our agenda.”).

53. Gorlick, *supra* note 52.

54. Effron et al., *supra* note 52, at 591.

55. This contradictory relation between one’s stated or outward beliefs about the importance of race and one’s race-influenced behavior is consistent with earlier studies of implicit bias. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 4 PSYCHOL. SCI. 315, 315 (2000) (discussing studies of aversive racism, a theory explaining that Whites who view themselves as non-prejudiced discriminate in “subtle, rationalizable ways”). In particular, Dovidio and Gaertner argue that, although self-reported bias decreased between 1988–89 and 1998–99, and although Whites do not discriminate in employment decisions against Blacks whose qualifications are clearly strong or weak relative to white candidates, they do discriminate based on race where the decision is more ambiguous. *Id.* at 318.

56. We are not, however, suggesting that a greater freedom to discriminate arising out of

Indeed, at least one of the cases that we reviewed, *New York v. Estella*,<sup>57</sup> revealed how Whites may use their support for Obama as proof that they are not racist, especially when their racial-equality credentials have been challenged. In *Estella*, the court considered a black defendant's motion to set aside a verdict in the face of evidence that one juror, a white man, admitted to race-based decision making to the prosecution.<sup>58</sup> Although this white juror admitted that he was intoxicated at the time he made the comment to the prosecution and could not remember the details of the interaction, he denied making the following statement, "I guess I based my [decision] on race."<sup>59</sup> In so doing, the juror used his support for Obama as proof that he could not have made a bigoted decision. Specifically, this juror "allegedly stated that he had watched the October 15 presidential debate and he was 'very impressed with (now President) Obama,[]' noting that 'he made McCain look bad.'"<sup>60</sup> The juror further stated that he had voted for Obama as support for his contention that he could not have been influenced by race in his decision making.<sup>61</sup> Given the studies that show how Obama's election can give people moral credentials to act in anti-black ways, as well as individual actions such as those by the challenged juror in *Estella*, we contend that hope for true, significant change in anti-discrimination law enforcement remains dim. Rather than suggest a decrease in racial discrimination, or even an increase in the reinforcement of anti-discrimination norms, these studies suggest Obama's election may have actually freed up white supporters to practice discrimination, potentially requiring, but not necessarily resulting in, greater enforcement.

## II. REALITY BITES

Despite President Obama being regarded by many as proof of the declining salience of race, the reality of many Blacks' lives in the United States remains in stark contrast with the dream of a successful or even a more forceful battle against discrimination.<sup>62</sup> Huge disparities in various categories, particularly employment,

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one's having supported a black presidential candidate, alone, accounts for the continued prominence of workplace racial discrimination. Adding to our existing knowledge of the operation of implicit and explicit racial bias, new studies regarding views about diversity suggest that white workers maintain negative attitudes toward multiculturalism because they view the concept as non-inclusive. See, e.g., Victoria C. Plaut, Flannery G. Garnett, Laura E. Buffardi & Jeffrey Sanchez-Burks, "What About Me?": *Perceptions of Exclusion and Whites' Reactions to Multiculturalism*, 101 J. PERSONALITY & SOC. PSYCHOL. 337 (2011). Ironically, studies also show Whites' rejection of multiculturalism within the workplace correlates with minority workers' lessened psychological engagement at work. See, e.g., Victoria C. Plaut, Kecia M. Thomas & Matt J. Goren, *Is Multiculturalism or Color Blindness Better for Minorities?*, 20 PSYCHOL. SCI. 444 (2009).

57. 874 N.Y.S.2d 353 (N.Y. Co. Ct. 2009), *aff'd*, 889 N.Y.S.2d 759 (N.Y. App. Div. 2009).

58. *Id.* at 354.

59. *Id.* at 354–55 (alteration in original).

60. *Id.* at 355.

61. *Id.* at 356.

62. See, e.g., MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2d ed. 2006) (presenting long-term racial disparities in wealth accumulation); Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57 (2009) (looking at data suggesting

persist between Blacks and Whites. In other words, even in an Obama era, Blacks lag severely behind Whites in terms of employment rates and opportunities.<sup>63</sup> It is this consistent inability of even qualified Blacks to gain material parity that has signaled the continuing significance of race in an ostensibly post-racial America.<sup>64</sup> For example, a recent survey from the Bureau of Labor Statistics revealed that white unemployment was at 8.7% while black unemployment was at 16.1%.<sup>65</sup> Moreover, the disparities in particular parts of the country are astonishing. For example, in the Minneapolis-St. Paul area, the black unemployment rate is 20.4% while the white unemployment rate is only 6.6%.<sup>66</sup> Reports further show that the unemployment rate for Blacks rose from 11.2% in September of 2008 to 15.9% in September of 2010; at the same time, the unemployment rate for Whites during the same period decreased from 8.6% to 8.3%.<sup>67</sup> Such disparities even exist among college graduates, with black male college graduates having an unemployment rate of 7.8% and white male college graduates having an unemployment rate of 4.4%.<sup>68</sup> Beyond the rates of unemployment, black men with college educations have consistently earned substantially less money than their white male counterparts.<sup>69</sup>

To explore the effect, if any, of President Obama's election on anti-discrimination law, we conducted a review of anti-discrimination cases in which Obama or the word "Obama" specifically had been raised. Initially, we looked broadly at the invoking of Obama in a number of settings and cases,<sup>70</sup> but later and

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persistent economic inequality and examining the interplay between race and class).

63. See Barnes et al., *supra* note 1, at 982–92 (analyzing statistical data revealing the difference that race makes to poverty levels, income and wealth accumulation, employment, home ownership, educational opportunity, and treatment within the criminal justice system); Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948–2009*, 44 *LAW & SOC'Y REV.* 431, 442–50 (2010) (analyzing over sixty years of data of black-white racial disparities in various areas of life, and noting persistent disadvantages for Blacks in income, wealth, treatment within the criminal justice system, and employment, but some progress in education and the ability to gain political office).

64. See ROY L. BROOKS, *RACIAL JUSTICE IN THE AGE OF OBAMA* xiv (2009). Specific to the question of race and disadvantage, Professor Brooks has opined: "In my view, African Americans face a race problem today, but one that is more accurately described as a paucity of financial, human, and social capital (in other words, capital deficiencies) than as one of white racism." *Id.*

65. Nicole Hardesty, *7 Shocking Facts About Minority Unemployment*, HUFFINGTON POST (Nov. 1, 2010, 12:23 PM), [http://www.huffingtonpost.com/2010/11/01/minority-unemployment-facts\\_n\\_775351.html](http://www.huffingtonpost.com/2010/11/01/minority-unemployment-facts_n_775351.html). These numbers do not include people who are incarcerated. If included, the disparities between Whites and Blacks would be even greater, as Blacks are grossly overrepresented in the prison population.

66. *Id.*

67. *Id.*

68. *Id.* Studies suggest that bias explains at least some of this disparity. See Devah Pager, *The Mark of a Criminal Record*, 108 *AM. J. SOC.* 937, 957–59 (2003) (showing that with similar resumes, Blacks with no criminal history received less callback interviews for jobs than Whites with convictions).

69. BROOKS, *supra* note 64, at xiii (discussing data revealing that, in 1975, black male college graduates earned \$39,000 versus \$55,000 for their white male counterparts and that, in 2005, the gap had increased with black men earning \$45,000, while Whites earned \$65,000).

70. See *supra* notes 57–61 and accompanying text (discussing the *Estella* case, where a juror tried to use his support of Obama to shield him from a claim of racism and where he



consistent with the topic of this symposium, we narrowed our focus to all of the discrimination cases where plaintiffs or defendants made references to Obama or were targeted by others with references to Obama, whether positive or negative (though in all instances, the references were negative). Our exploration included not only Title VII and state workplace discrimination cases, but also all cases where Obama-related harassing conduct was aimed at third parties (for example, customers) rather than workers. These cases revealed that, within certain workplaces and public settings, Obama's presence and name do carry racialized meaning during interactions between minority and majority workers.<sup>71</sup> Only, ironically, instead of serving as a symbol of progress—as a sign of shattered glass ceilings within workplaces across the country—"Obama," the word, and to some extent, the person, has become a tool for racial harassment in the workplace and other public forums.<sup>72</sup>

#### *A. Obama's Rise as a Source of Workplace Animus*

In one subset of cases, some employees have claimed that their workplaces grew increasingly hostile as a function of Obama's ascendance toward, and assumption of, the presidency. For example, one plaintiff's attorney, who filed a suit on behalf of employees who claimed that Obama's rise created negative repercussions for them at work, termed the phenomenon the "Obama Effect"—"that is, latent racism against black employees emerging in the workplace in response to President Obama's successful presidential campaign."<sup>73</sup>

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made a statement that his decision making was race based). In another jury case, a black jury venire member's support for Obama was provided as a reason for using a peremptory strike against her. *Jaquith v. S. Orangetown Cent. Sch. Dist.*, 349 F. App'x 653, 654 (2d Cir. 2009). When the attorney was questioned about his actions in peremptorily striking both potential black jury members from selection, he explicated that he struck one of the jurors because the juror "stated that she was present because then just-inaugurated 'President Obama said everybody should serve,'" which counsel took to mean that she was "a little bit over-eager to try to do good as a preconceived notion of what good might be." *Id.*

71. Given the small number of cases that currently fit into this category, we use this case study, chiefly, to identify an emerging development in racial discrimination cases, rather than to make claims related to the statistical significance of "invoking Obama."

72. The ironic effect of the Obama election should not be a surprise given that research has suggested, more generally, that the election of a black man has coincided with an increased belief that race does not matter and with less support for policies designed to address racial inequalities. See Cheryl R. Kaiser, Benjamin J. Drury, Kerry E. Spalding, Sapna Cheryan & Laurie T. O'Brien, *The Ironic Consequences of Obama's Election: Decreased Support for Social Justice*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 556 (2009) (eliciting perceptions based on the question: "Do Americans think that, because of Barack Obama's election, affirmative action and other policies that address racial injustice are no longer necessary?"); see also Kristine A. Lane & John T. Jost, *Black Man in the White House: Ideology and Implicit Racial Bias in the Age of Obama*, in *THE OBAMAS AND A (POST) RACIAL AMERICA?*, *supra* note 43, at 48, 49–50 ("Indeed, in keeping with past research on motivation to control racism, some evidence suggests that Obama's presidency could ironically *worsen* race relations in the United States, to the extent that it encourages people to dismiss evidence of racial discrimination and stop striving for egalitarian goals." (emphasis in original)).

73. Law Office of Julie Johnson, PLLC, *Two Former African-American Employees Have Filed a Lawsuit Against Hotels.com, and Its Parent Company, Expedia, Inc. (Nasdaq:*

In a similar suit in a federal court in Texas, a group of workers sued Turner Industries, alleging that, for ten years, they had complained to supervisors “about nooses hung in workplaces, racial slurs, segregated bathrooms and unequal treatment in Turner facilities in Louisiana and Texas.”<sup>74</sup> Additionally, the suit alleged that “black employees were forced to do dangerous tasks that white workers refused to perform and were passed over for better jobs in favor of white employees” and that “the discrimination grew worse after President Obama was elected.”<sup>75</sup> “In April 2010, the Equal Employment Opportunity Commission found that black workers at the Turner Industries plant in Paris, Texas, were taunted with slurs, intimidation tactics and symbols of discrimination and were given lower-paying jobs and denied promotions.”<sup>76</sup>

In another case, *Shuler v. Corning, Inc.*, a plaintiff alleged that during a conversation, in the workplace break room, “his supervisor stated that it was convenient that Barack Obama was black and that Obama was just trying to get black votes [and] . . . that his supervisor remarked that Barack Obama was probably related to the terrorist Osama bin Laden.”<sup>77</sup> The complaint indicated that the plaintiff felt “intimidated and harassed by these racially charged statements.”<sup>78</sup> The case was ultimately dismissed because the judge ruled that “[t]he supervisor’s statements in the break room regarding Barack Obama being black [did] not constitute sufficiently severe or pervasive conduct to alter the conditions of employment based on the standard set forth by the Supreme Court.”<sup>79</sup>

Three other harassment cases similarly linked attacks on Obama to an alleged pattern of workplace racial harassment. In *Campbell v. Knife River Corporation-Northwest*, a black driver alleged that his supervisor treated him unfairly and referred to him as a “stupid fucking nigger.”<sup>80</sup> He also complained that, in July of 2008, there were two pictures of candidate Obama posted in the office—one photo

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*EXPE*), in Dallas County District Court, *Alleging That Hotels.com Discriminated Against Them Because of Their Race*, HG.ORG (Jan. 29, 2010), <http://www.hg.org/article.asp?id=18045>. On June 3, 2009, a Texas attorney filed an employment discrimination suit in a Dallas County District Court, alleging that two black female employees of Hotels.com were discriminated against based upon the Obama effect. *Public Access to Court Records*, DALLAS CNTY.ORG, [http://dallascounty.org/public\\_access.php](http://dallascounty.org/public_access.php) (records search performed using “DC0907055”). Court records indicate that the case, *Latimer-Hiland v. Hotels.com GP, LLC*, which had grown to include six plaintiffs, was dismissed through an Agreed Order of Dismissal on September 13, 2010. *Id.* For a description of the filing, see Law Office of Julie Johnson, PLLC, *supra* (involving the claims of two original plaintiffs who were allegedly terminated on Inauguration Day and received discriminatory performance reviews and other racially motivated unfair treatment as a result of Obama’s success).

74. Melinda Deslatte, *Suit Claims Discrimination at Oil Services Company*, ABC NEWS (Feb. 2, 2011), <http://abcnews.go.com/Business/wireStory?id=12815111>.

75. *Id.*

76. *Id.*

77. *Shuler v. Corning, Inc.*, No. 4:08CV00019, 2008 U.S. Dist. LEXIS 64171, at \*2–3 (W.D. Va. Aug. 21, 2008).

78. *Id.* at \*3.

79. *Id.* at \*7. The judge further determined, “An objectively reasonable person would not find comments regarding a Presidential candidate’s race enough to create a racially hostile work environment. Nor could a reasonable person find the alleged comments in the break room altered the conditions of Plaintiff’s employment.” *Id.* at \*8.

80. 783 F. Supp. 3d 1137, 1154 (D. Or. 2011).

placed Obama's face on a monkey; a second photo was a picture of Obama in traditional Middle Eastern clothing, with a caption under it that read "do you want this to be your president."<sup>81</sup> In *Campbell*, the court denied the employer's motion for summary judgment on the plaintiff's racial harassment hostile environment claim. Pointing to the use of the term "nigger" in the workplace as well as the "disparaging pictures of Obama," the court declared that "[t]he combination of racial slurs and disparate treatment is enough to deny summary judgment to the defendant on the hostile environment claim."<sup>82</sup>

In *Gibbs v. Brown University*, a black woman employed in the Admissions Office complained of being unfairly and constructively demoted at work by her supervisor in 2006.<sup>83</sup> Furthermore, she claimed harassment at the hands of the supervisor and a coordinator in the office.<sup>84</sup> According to the plaintiff, her coordinator sent an offensive e-mail that included racial epithets and also made comments in which she stated that, if Obama were elected, he would be assassinated and that he would never be president because he was black.<sup>85</sup> Like the court in *Shuler*, this court ruled in favor of the employer; only the *Gibbs* court granted summary judgment, not a motion to dismiss, for the defendant in the case. The *Gibbs* court reasoned that the election comments were insensitive, but that offhand utterances did not "alter the conditions of employment."<sup>86</sup> Additionally, the court described the e-mail as "inexcusable" but did not consider it to be evidence of insult that was "sufficiently severe or pervasive so as to create a hostile and abusive work environment."<sup>87</sup>

In *Lyle v. Cato Corp.*, the plaintiff—a black woman who was an assistant manager at the defendant's store<sup>88</sup>—claimed that she was repeatedly subjected to racist comments by her supervisor.<sup>89</sup> With regard to candidate Obama, the plaintiff

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81. *Id.* at 1144. The EEOC issued the plaintiff a right to sue notice, and parts of his case survived a motion for summary judgment. *Id.* at 1146, 1153–54.

82. *Id.* at 1154.

83. No. 09-cv-392-ML, 2011 U.S. Dist. LEXIS 34834, at \*2 (D.R.I. Mar. 31, 2011).

84. *Id.*

85. *Id.* at \*22–23.

86. *Id.* at \*24, \*30.

87. *Id.* at \*25–26. *Cf.* Diehl v. Unemployment Comp. Bd. of Rev., No. 1118 C.D. 2010, 2011 Pa. Commw. Unpub. LEXIS 251, at \*3 (Pa. Commw. Ct. Mar. 23, 2011) (including a finding by the Unemployment Compensation Review Board that the plaintiff committed misconduct and was ineligible for benefits where she was terminated after stating "I guess it's okay to hang them from trees now a days" (reference to lynching Blacks) in a conversation about a Christmas ornament depicting President Obama).

88. 730 F. Supp. 2d 768, 771 (M.D. Tenn. 2010) (noting that the plaintiff was first hired in November of 2007 as a second assistant manager at a Cato store in Murfreesboro, Tennessee, and then was transferred to a store in Antioch, Tennessee, as first assistant manager in May of 2008).

89. *Id.* at 776–77. The statements were made on myriad occasions between 2008 and 2009 and included such stereotypical comments as "you blacks love your fried chicken" and "blacks have a tendency to steal." *Id.* These statements were similar to statements made in another case in which a pro se plaintiff, who alleged discrimination and racism in her workplace, was not able to make a *prima facie* case under Title VII. *See Taylor v. Riverside Behavioral Health*, No. 10-CV-243-TCK-FHM, 2011 U.S. Dist. LEXIS 43000 (N.D. Okla. Apr. 20, 2011). For the racism in the work environment claim, which the court construed as

specifically asserted that the supervisor questioned why the plaintiff would vote for Obama who was “not even really black” and that “the crime rate is going to go up because a lot of black people think he’s going to get them off.”<sup>90</sup> Unlike *Gibbs*, a portion of this case survived a summary judgment motion, with the court determining that, taken together, the supervisor’s repeated comments were severe and pervasive enough to constitute a hostile work environment.<sup>91</sup>

### B. Invoking “Obama” as a Term of Derision

Other plaintiffs did not claim that it was Obama’s meteoric rise that brought on their mistreatment at work. Rather, these plaintiffs made the more particularized claim that the very name Obama became a racial slur in the workplace. Such trends by employees and supervisors to use the word “Obama” as a racial slur suggest a worsening rather than an improvement of race relations in work environments.

For example, even before Obama was elected, plaintiffs at one company alleged that their workplace supervisor in *EEOC v. Ready Mix USA* repeatedly uttered comments about Obama as a means of increasing racial tension and discomfort in the workplace for black employees.<sup>92</sup> Specifically, in addition to referring to black employees as “nigger,” frequently stating that he “want[ed] ‘black pussy,’” hanging a noose in the break room and warning black “employees that it was for them if they did not get their work done that day,” and also telling black employees that they would get murdered like the three civil rights workers in *Mississippi Burning* if they did not get their work done, this supervisor stated that “Barack Obama, if elected, ‘won’t last a day in office’ because a white person would kill him; he then changed his mind to say a black person would kill Obama if elected president.”<sup>93</sup> Although the local office of Ready Mix USA did not react to complaints by black employees about the supervisor, the supervisor was ultimately terminated when complaints were made and received at the home office for the company.<sup>94</sup>

Along the same, but not as violent, lines as in *EEOC v. Ready Mix USA*, in *Holly v. Tamko Building Products, Inc.*, one white employee used the word Obama as a racial adjective during an interaction with his co-workers.<sup>95</sup> Specifically, while

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a Title VII disparate treatment claim, the plaintiff alleged that the defendant, a therapist in the office, uttered, while watching Obama’s inauguration, that “[j]ust because we have a black president doesn’t mean we have to celebrate it by eating fried chicken and collard greens” and noted “how bad the country will be with a black man running it.” *Id.* at \*7 (alteration in original).

90. *Lyle*, 730 F. Supp. 2d at 776.

91. *Id.* at 779, 783. Summary judgment was granted with respect to the plaintiff’s claims of retaliation under Tennessee state law, Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. *Id.* at 779.

92. No. 2:09-cv-923-MEF-TFM, 2010 U.S. Dist. LEXIS 89258, at \*4 (N.D. Ala. Aug. 26, 2010); see also *Sturdivant v. Kone, Inc.*, No. 3:09-cv-224-RJC-DCK, 2010 WL 2723729, at \*2 (W.D.N.C. July 8, 2010) (involving a case where one co-worker said, “They got all these painters up there in Washington, D.C. because they’re going to make the White House now the black house.”), *aff’d*, No. 10–1887, 2011 WL 2335200 (4th Cir. Apr. 8, 2011) (per curiam). The case, which granted summary judgment to the defendant, was recently affirmed by the Fourth Circuit. *Sturdivant*, 2011 WL 2335200, at \*1.

93. *Ready Mix USA*, 2010 U.S. Dist. LEXIS 89258, at \*4–5.

94. *Id.*

95. 318 S.W.3d 284 (Mo. Ct. App. 2010).

sitting near co-workers at a company picnic, this employee held a watermelon slice in his hand and said, "I'm going to sit down and eat my 'Obama fruit.'"<sup>96</sup> This employee, too, was fired.

Similarly, in *Nelson v. Pinnacle Engineering, Inc.*, Chrystal Nelson, a white woman with a black fiancé was subjected to offensive comments by the chief executive officer (CEO) of her employing company. In one instance, the plaintiff overheard the CEO say a "gift for you for all the Obama people outside" as the CEO handed another employee a rifle.<sup>97</sup> Quite differently, in *Bissett v. Beau Rivage Resorts, Inc.*, the plaintiff, a white woman who worked as a count room manager at a casino, was fired after employees complained about her making racially offensive remarks.<sup>98</sup> The white manager's racially demeaning comments included statements that she hoped President Obama did not invite "vulgar rap stars" to the White House and that people were going to get guns and shoot him.<sup>99</sup> With regard to an Asian and African American male employee who complained about her conduct, the plaintiff stated in her deposition that he had "Obama Issues."<sup>100</sup>

Additionally, we examined cases not only where Obama may have been used as a tool for insults, but also where employees who challenged such insults claimed to have experienced retaliation as a result. For example, in *Ezell v. Dessent Roofing Co.*, the plaintiffs alleged retaliation through the denial of work assignments as a result of their protests against a poster in the workplace that ridiculed Obama.<sup>101</sup>

We even reviewed cases where Obama was used as a tool for attacks against black customers by employees and even other customers. For instance, in *Bradley v. Blue Chip Casino*, three white patrons at a blackjack table in the defendant's Blue Chip Casino mistreated a black patron at the table, essentially chasing him away from the table, when one of the three men asserted, "No you can't play here Obama!" to the plaintiff.<sup>102</sup> In a similar vein, in *Goble v. Speedway SuperAmerica LLC*, an employee at a gas station and convenience store, Todd Goble, made disparaging remarks about Obama as a means of insulting a black female customer.<sup>103</sup> In that case, Goble engaged in a verbal argument with a black female customer, to whom he refused to sell cigarettes because he was concerned that her driver's license had been altered.<sup>104</sup> In response to Goble's refusal, the customer said, "'[G]ood thing Obama was elected' because 'the racism [is] going to stop.'"<sup>105</sup> Later, even though the customer had already left the store and was, in

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96. *Id.* at 286.

97. No. A09-2114, 2010 WL 3306919, at \*1 (Minn. Ct. App. Aug. 24, 2010). In the case, the unemployment law judge's decision to deny Nelson's claim for unemployment was affirmed as the court determined "the facts cited by Nelson would not have caused an average, reasonable employee to quit based on sexual or racial harassment." *Id.* at \*5.

98. No. 1:10cv99-LG-RHW, 2011 U.S. Dist. LEXIS 27820, at \*1, \*5 (S.D. Miss. Mar. 16, 2011).

99. *Id.* at \*8, \*10 (noting that the plaintiff also did not deny saying the following: that in the human resources department, "black skin wins").

100. *Id.* at \*8.

101. No. 10 C 683, 2010 U.S. Dist. LEXIS 79902, at \*2-3 (N.D. Ill. Aug. 5, 2010).

102. No. 2:09-CV-154 JVB, 2009 WL 3199154, at \*1 (N.D. Ind. Sept. 25, 2009).

103. No. A09-924, 2010 WL 1850243, at \*1 (Minn. Ct. App. May 11, 2010).

104. *Id.*

105. *Id.* (alteration in original).

fact, in the parking lot, Goble utilized the store's intercom system, which could be heard outdoors, to yell, "Obama sucks" as an attack on the customer.<sup>106</sup> After an investigation, Goble lost his job because of this and other infractions.

*C. There Is Still Hope . . .*

The good news is that both employers and courts are, in many instances, recognizing that the use of Obama's name and being, in these situations, can be racially motivated and can result in the creation of colorable claims of discrimination.<sup>107</sup> The harassing employees in *Holly*, *Ready Mix USA*, *Bissett*, and *Goble* all lost their jobs,<sup>108</sup> and the courts in many of the cases described above determined that the challenged comments were racially tinged or motivated.<sup>109</sup> For example, in *Holly*, despite the fact that the offending employee claimed that his reference to "Obama fruit" was not racialized, all the reviewing bodies involved in the case rejected his arguments. There, the employee argued: "[I]n my mind I was calling the president a melon head, no reference to racial whatsoever, I'm not a racist, but it was just a political statement in my mind."<sup>110</sup> But the Appeals Tribunal for the Missouri Division of Employment Security paid him no heed, explaining that while the "term 'Obama fruit' taken alone is not a racially derogatory

106. *Id.* He had used the intercom on at least one other previous occasion to attack another customer. *Id.* at \*1, \*4.

107. *But see supra* notes 78, 81–85, 87, 94.

108. *See Bissett v. Beau Rivage Resorts, Inc.*, 2011 U.S. Dist. LEXIS 27820, at \*1, \*10 (S.D. Miss. Mar. 16, 2011) ("On May 12, 2009, . . . [the] Vice President of Human Resources, issued a memorandum to Bissett that terminated her employment."); *EEOC v. Ready Mix USA*, No. 2:09-cv-923-MEF-TFM, 2010 U.S. Dist. LEXIS 89258, at \*4, \*6 (N.D. Ala. Aug. 26, 2010) (noting that Lesco, the white supervisor, who made disparaging remarks about black employees killing the president, was ultimately fired after pouring pepper on a white piece of paper and referring to it as an illustration of the Million Man March); *Goble*, 2010 WL 1850243 at \*1 ("At the conclusion of the internal investigation . . . SuperAmerica terminated Goble's employment."); *Holly v. Tamko Bldg. Prods., Inc.*, 318 S.W.3d 284, 286 (Mo. Ct. App. 2010) ("On June 8, 2009, Appellant's employment with TAMKO was terminated.")

109. *See, e.g., Bissett*, 2011 U.S. Dist. Lexis 27829, at \*19 (denying that the plaintiff faced discriminatory animus due to her opposition to President Obama, and while not addressing her specific statements about President Obama, still finding that it "was not unreasonable for employees to be upset or offended by some of Bissett's statements"); *Lyle v. Cato Corp.*, 730 F. Supp. 2d 768, 776–79 (explaining that the pattern of racialized comments, including statements that candidate Obama was not "really black" and that the crime rate would go up because "a lot of black people think he is going to get them off," supported a determination that a hostile work environment existed); *Goble*, 2010 WL 1850243, at \*2 (finding that the employer had a right to expect a higher standard of behavior from an employee who yelled "Obama sucks" at a customer over the intercom system, in part, because SuperAmerica had a "legal duty to not interfere on the basis of race with its customers' freedom to . . . [contract]"); *Nelson v. Pinnacle Eng'g*, 2010 WL 3306919, at \*1, \*4 (referring to the CEO's comments as including "a racial epithet" made about the president, but indicating that the effect of the comments would be questionable because they were not made to the claimant and took place six months prior to her quitting).

110. *Holly v. Tamko Bldg. Prods., Inc.*, 284 S.W.3d 284, 287 (Mo. Ct. App. 2010) (quoting appellant).

comment,” it was in the involved setting where “the claimant was eating a slice of watermelon at a company sponsored cookout.”<sup>111</sup> The Minnesota Court of Appeals upheld this decision.<sup>112</sup> Likewise, in *Goble*, in its examination of Goble’s use of the store intercom to yell at a customer, the defendant-employer Speedway SuperAmerica conducted an internal investigation, during which Goble admitted to his actions, and found that Goble had engaged in racial wrongdoing.<sup>113</sup> On appeal, when Goble challenged the denial of unemployment benefits to him because of his misconduct, the Minnesota Court of Appeals affirmed, noting that “there are several reasons why SuperAmerica would reasonably expect Goble to adhere to higher standards of behavior,” including that “SuperAmerica has a legal duty to not interfere on the basis of race with its customers’ freedom to form and enjoy contractual relationships.”<sup>114</sup> Similarly, in *Nelson*, even though the court ultimately affirmed the unemployment law-judge’s decision that an average reasonable employee would not have quit based on the harassment as alleged by plaintiff, the court pointedly noted that the CEO’s comments about Obama were “highly inappropriate” and referred to them as a “racial epithet.”<sup>115</sup>

Such acknowledgments in employment discrimination law cases are significant. After all, in some cases, certain courts have even held that words that have historically and, in certain cases, geographically developed racialized meanings do not constitute racial epithets or comments. Consider, for example, courts’ analyses regarding the use of the word “boy” in reference to black men in the South.<sup>116</sup> For instance, in *Ash v. Tyson Foods, Inc.*, a workplace discrimination case where two African American plaintiffs, Ash and Hithon, claimed a white supervisor referred to each of them as “boy,” a district court found the word to be evidence of racial animus and awarded the plaintiffs \$1.75 million in compensatory and punitive damages.<sup>117</sup> On appeal, the Eleventh Circuit Court of Appeals stated, “After reviewing the record, we conclude once again that the use of ‘boy’ by [the supervisor] Hatley was not sufficient, either alone or with the other evidence, to provide a basis for a jury reasonably to find that Tyson’s stated reasons for not promoting the plaintiffs was racial discrimination.”<sup>118</sup> The court ruled in this manner even though they acknowledged that the U.S. Supreme Court had previously held “that the word ‘boy’ used without modification was ‘not always benign’ and could be evidence of racially discriminatory intent.”<sup>119</sup> At a second trial, another jury awarded the plaintiffs over \$1.3 million in compensatory and punitive damages, but the Eleventh Circuit once again struck the jury award down

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111. *Id.*

112. *Id.* at 289.

113. *Goble v. Speedway SuperAmerica LLC*, No. A09-924, 2010 WL 1850243, at \*1 (Minn. Ct. App. May 11, 2010).

114. *Id.* at \*2.

115. *Nelson v. Pinnacle Eng’g, Inc.*, No. A09-2114, 2010 WL 3306919, at \*4 (Minn. Ct. App. Aug. 24, 2010).

116. *See* *Ash v. Tyson Foods, Inc.*, 190 F. App’x 924, 925 (11th Cir. 2006).

117. *See* *Hithon v. Tyson Foods, Inc.*, No. 96-RRA-3257-M, 2008 WL 4921515, at \*1 & n.1, \*6 (N.D. Ala. Sept. 30, 2008) (setting aside the compensatory and punitive damages from the first trial), *aff’d in part, rev’d in part sub nom. Ash*, 190 F. App’x.

118. *Ash*, 190 F. App’x at 926.

119. *Id.*

in August of 2010.<sup>120</sup> In light of cases like *Ash*, courts' recognition of the term "Obama" as a racialized term in the cases described above reflects great promise in the ability of courts to have a nuanced understanding of race and racial discrimination in future anti-discrimination cases.

#### CONCLUSION

Of all the many things that a post-racial America could portend, it is very doubtful that most proponents of the philosophy would imagine that a significant legacy of the move away from a belief in the salience of race might be the creation of new and increased forms of racial discrimination within the workplace. Certainly some post-racialists might argue that believing in racial "overcoming" has ostensibly little to do with instantiating racism. To them, any racial discrimination that remains in our supposedly post-racial world—including workplace discrimination—is aberrant individual behavior that should be punished through existing law. The problem with this logic is it fails to account for the existence of two very powerful societal influences: norms and (slow-changing) institutions. The rush of some to use the election of our first multiracial or self-identified black president as an occasion to declare our country beyond the stranglehold of racial animus and, more so, bias has completely ignored the fact that, in the everyday lives of most individuals, race still matters in quite meaningful ways.<sup>121</sup>

On the one hand, race matters because of the material resources that are still disproportionately distributed along racial/ethnic lines in America.<sup>122</sup> Additionally, it matters because race has been historically accepted as a real or at a least commonly employed lens through which to assess perceived social differences.<sup>123</sup>

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120. See *Hithon*, 2008 WL 4921515 at \*1; Bill Rankin, *Civil Rights Leaders Condemn Ruling on Use of Word 'Boy': They Protest a Federal Court's Reversal of \$1.75 Million Discrimination Award*, ATLANTA J.-CONST. (Oct. 29, 2010, 12:09 PM), <http://www.ajc.com/news/atlanta/civil-rights-leaders-condemn-691851.html> (noting, in a two to one panel, in reference to the plaintiffs, "While Hithon and Ash found the word offensive, 'the issue is not what was in their mind when they heard the term, but what was in Hatley's mind when he used it, and there was no new evidence about that.'").

121. Alex M. Johnson, Jr., *The Re-Emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547, 1562 (2009) (noting that, today, race still affects "where one goes to school, the job opportunities presented, who one marries, where one lives, the health care one receives, and even where one is interred following death").

122. See *supra* notes 62–69. The disproportionate allocation of resources along racial lines exists whether one believes it is caused by the self-destructive behaviors of minorities or created at the intersection of individual and structural racial oppression. See BROOKS, *supra* note 64, at xiv; Barnes et al., *supra* note 1, 997–1002; Haney López, *supra* note 10, 1068–70.

123. Although most scholars accept that race is a social rather than a biological construct, it does not mean that the vast majority of society treats the construct as something other than real. See, e.g., Onwuachi-Willig & Barnes, *supra* note 18, at 1295–97; see also Johnson, *supra* note 120, at 1562 ("I start with the assumption that race and the 'one drop of blood' rule are not based on any established scientific or biological definition. . . . [T]hat does not mean race has no meaning or power in our society. Quite the contrary, race is an intractable force in American society touching every facet of day-to-day American life . . .").



That lens affects not only individuals, but the institutions we, as a society, populate. How the lens works is as likely to be unknown to us as it is to involve a conscious reckoning. To surmise that, after generations of relying on the device, it can be so easily retired defies a commonsense approach to human behavior and a realistic understanding of what is necessary to dislodge entrenched and structural forms of disadvantage. For these reasons and others far too numerous to explore in this limited exercise, it is not surprising that signs of the demise of the salience of race—such as the election of Barack Obama—have not lead to uniform racial progress.

In the workplace, Obama's election certainly has not resulted in a decrease in the filing of discrimination suits. To the contrary, we have seen the cases both increase in number and evolve to use Obama, himself, as a tool to perpetuate workplace harassment and discrimination. These cases, while mostly being treated in the courts as typical Title VII complaints, at once prove the fallacy of a post-racial world and the precariousness of anti-discrimination law. Given the significant body of scholarship that has criticized the post-racial claim, we need not do more here than indicate that these cases do not bear out that we are in a world where race does not matter.

With regard to anti-discrimination law, the wording of Title VII is fairly straightforward. Title VII makes it illegal for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . privileges of employment, *because of such individual's race, color, religion, sex, or national origin*” or “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's race, color, religion, sex, or national origin.*”<sup>124</sup> Cases such as those analyzed in this Article, however, infer that we may consistently have to re-evaluate what it means for some workplace decision to be made “because of . . . race.”<sup>125</sup> As society changes, we have to learn how to understand racialized terms within their individualized contexts. After all, the word “Obama” itself is not necessarily a racial term, but as many of the cases above show, that word, though lacking of any racial meaning on its face, can be employed as a racial slur or insult. The cases further suggest something that many race scholars already understand—that the nature of race bias is elusive and shifting. Hence, it should not be surprising that Obama's election as president, although incredibly important and inspiring, may actually work to deter, rather than cause, improvement with respect to the eradication of discrimination and harassment in the workplace. That a moment of racial reconciliation might serve as the impetus for some to embrace more racially divisive attitudes reminds us that scholars must be vigilant to observe and respond to the constantly changing ways that racial difference continues to create disadvantages in the lives of workers.

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124. 42 U.S.C. § 2000e-2(a) (2006) (emphasis added).

125. *Id.* § 2000e-2(a)(1).