

JIM CROW ON THE “DOWN LOW”: SUBTLE RACIAL APPEALS IN PRESIDENTIAL CAMPAIGNS

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INTRODUCTION

In 1958, George Wallace campaigned to become the governor of Alabama. His rival, Alabama’s Attorney General, was an outspoken segregationist who persuaded state courts to declare the NAACP an illegal organization. The Attorney General was endorsed by the Ku Klux Klan and easily defeated Wallace. After the election, Wallace said, “no other son-of-a-bitch will ever out-nigger me again.”¹

George Wallace’s approach to campaigning was used from the Reconstruction Era of the late 19th century into the 1960s. Racial appeals in the South and elsewhere were direct and explicit. This changed in the 1960s. After *Brown v. Board of Education*² and the success of the Civil Rights Movement, overt racism slowly diminished and the public’s commitment to the principle of racial equality solidified. However, a significant body of research suggests that, despite these advances, negative stereotypes and racial resentment persist among a significant portion of the white public.³ Polling data shows that many whites believe that blacks lack the ability to work hard, abide by the law, and refrain from immoral sexual

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¹ DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 96 (1995) (exemplifying the racism of the day).

² 347 U.S. 483 (1954) (serving as a landmark decision that abolished the segregation of children in public schools solely on the basis of race).

³ See generally DAVID SEARS ET AL., *RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA* 16–27 (2000) (discussing how “symbolic racism” is a contributing factor in explaining whites’ attitudes towards racial policy and voting choices in elections with black candidates).

behavior. These attributes, they believe, violate the “American ethic” of hard work, self reliance, obedience to the law and self-discipline. Additionally, blacks are viewed as too demanding and undeserving of any special government assistance. These perceptions reflect racial resentment and unconscious discrimination.

Unconscious discrimination refers to the attitudes of whites who publicly support policies that promote racial equality and regard themselves as not prejudiced, but privately and often unknowingly act in ways that disadvantage minorities. These negative sentiments usually go unacknowledged because they conflict with the individual’s egalitarian value system. The unconscious dispositions are rooted in cognitive, motivational, and socio-cultural forces that affect everyone. Individuals who harbor unconscious biases do not discriminate against African Americans when it would be obvious to themselves and others, but they are likely to engage in discrimination when there are race-neutral justifications for their behavior.

Subtle racial appeals in political campaigns activate racial resentment.⁴ Campaigns will use race neutral “code” words to produce subtle appeals to racial resentment. The candidate will present an ostensibly race-neutral position on an issue while simultaneously alluding to racial stereotypes. The negative message is submerged within the race-neutral commentary. Additionally, sometimes race-neutral words are combined with explicit racial images to convey the racial meaning. Throughout this process, most viewers are not consciously aware that a racial message is even present.

Subtle racial appeals have been a powerful subtext in past presidential elections. They were the foundation of Richard Nixon’s Southern Strategy in 1968. His calls for “law and order” (in the wake of urban riots) and “less government interference” were the prominent themes of his campaign. These themes conveyed a racially coded message without any explicit reference to race. A decade later, Ronald Reagan took the art of subtle appeals to a new level. He exploited racial resentment with stories of “welfare queens” who wore fur and drove Cadillacs while receiving welfare payments under several aliases. Race was never mentioned, but the

⁴ Many in the field of psychology use the term “implicit,” which refers to the attitudes (i.e., the response) activated by the types of political messages we describe in this article. An implicit message is processed automatically by individuals with little knowledge of their intended consequences. However, not all of the racial appeals we describe are implicit. Many of them allow individuals to attribute their attitudes to ostensibly non-racial information and to justify their behavior in race-neutral terms. The messages are not always implicit, and the recipients are sometimes aware that there are racial implications. Because of the complex nature of the psychological response process, we use the term “subtle” to describe the types of racialized appeals that are the subject of this article.

connotation was clear: African Americans were malingerers who defrauded public assistance programs. The best known use of subtle appeals involved the Willie Horton commercial in George Bush's 1988 campaign against Michael Dukakis. No mention was made of race in the narrative, but Horton's mug shot was used to provoke fear and reinforce the stereotype of black men as dangerous rapists. Subtle appeals did not end with Willie Horton. They were used in the 2008 Presidential election as well.

This article will examine the role of subtle racial appeals in presidential campaigns. The first section explains how racial resentment and unconscious discrimination operate. The next sections analyze the role of subtle appeals in Richard Nixon's "Southern Strategy," Ronald Reagan's invocation of "welfare queens," and George Bush's Willie Horton ads. The section that follows examines the legal regimes that protect subtle appeals from governmental regulation. The article then explains how subtle appeals were employed during the 2008 Democratic primary. The following section describes how the appeals can be countered. Lastly, the article concludes with an examination of how the appeals were deployed in the general election. Subtle appeals are polarizing and inflict damage extending far beyond the electoral process. They deepen societal divisions, foster stereotypes and heighten racial resentment. The appeals can be powerful and, sometimes, deadly weapons in the arsenal of dirty political tricks; but, as the 2008 election showed, the negative messages can be neutralized when their hidden racial meanings are exposed.

I. RACIAL RESENTMENT AND UNCONSCIOUS DISCRIMINATION

Discrimination is often seen as a behavioral component of racial prejudice. However, it is better understood as an interaction of social cognitions about race and behavioral outlets that bring congruence to a person's racial preferences and social settings.⁵ Many of the ideas and beliefs held by adults are formed during their early childhood years.⁶ These beliefs serve as a basis for judgments about events, groups, and ideas during the adult years. Socialized beliefs can create stereotypes about the social environment. Stereotypes are cognitive short-cuts that help individuals give meaning to concepts and phenomena in society.

⁵ JAMES M. JONES, PREJUDICE AND RACISM 425-427 (1997) (describing other views of discrimination).

⁶ Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 739 (1995) (noting that such ideas and beliefs are not conceived in adulthood).

Stereotyping involves the creation of a mental image of a “typical” member of a particular category.⁷ Individuals are perceived as undifferentiated members of a group, lacking any significant differences from other individuals within the group. Common traits are assigned to the entire group. When a particular behavior by a group member is observed, the viewer evaluates the behavior through the lens of the stereotype. This causes the observer to conclude that the conduct has empirically confirmed the stereotyped belief about the group.⁸

After the success of the Civil Rights Movement in the 1960s, overt racism slowly diminished.⁹ Civil Rights laws made racial discrimination socially unacceptable and legally impermissible.¹⁰ As a result, a societal commitment to the principle of racial equality solidified. Today, although many whites publicly adhere to the norm of racial equality, negative stereotypes and attitudes about African Americans persist among a significant portion of the white public.¹¹ One of the more prevalent negative reactions to African Americans and public policies designed to benefit racial equality centers on racial resentment. Racial resentment is the adherence of many whites to a belief that African Americans are too demanding and undeserving of any special government assistance.¹² Racial resentment is different from traditional prejudice because the adherents do not subscribe to the notion of biological inferiority.¹³ The resentment is not overt; there is no conscious belief in racial inferiority. Instead, the attitude is based on socialized attitudes and beliefs that are developed by individuals at an early age. These sentiments often operate at an

⁷ Jones, *supra* note 5, at 164–201 (describing how stereotypes originate).

⁸ *Id.* (further expounding on stereotyping).

⁹ HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 143–156 (1997) (noting the effect of the Civil Rights Movement).

¹⁰ For example, Title II of the Civil Rights Act of 1964 prohibits discrimination in places of public accommodation. 42 U.S.C. § 2000(a). Title VI forbids racial discrimination in any program that receives federal funding. 42 U.S.C. § 2000(d). Title VII prohibits employers from discriminating against individuals on the basis of race, sex, color, national origin or religion. 42 U.S.C. § 2000(e)-2. The Fair Housing Act of 1968 prohibits discrimination in the sale, rental and provision of housing on the basis of race, sex, religion, color, national origin, religion, disability, and familial status. 42 U.S.C. § 3604.

¹¹ DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR 92–127 (1996). This disposition has been variously labeled “symbolic racism,” “modern racism” and “racial resentment.” These attitudes include a belief that discrimination does not impose a significant impediment to black advancement. African Americans should simply work harder to improve their economic and social status. These are slightly different interpretations of the same phenomenon. The more overt forms of prejudice and racism have declined, but negative stereotypes about blacks persist. See Patrick J. Henry & David O. Sears, *The Symbolic Racism 2000 Scale*, 23 POL. PSYCHOL. 253, 254–258 (2002).

¹² See KINDER & SANDERS, *supra* note 11, at 116 (estimating the impact of racial resentment in areas where it is likely to be most apparent).

¹³ *Id.* at 115 (classifying racial resentment as distinct from other types of prejudice).

unconscious level. They originate from social dominance orientations and other rigid personality traits, and are expressed through stereotypes and other biases including discrimination.¹⁴

Polling data shows that many whites believe that blacks are deficient in values such as patriotism, obedience, and discipline. More specifically, the data suggests many whites believe black people lack the ability to work hard, abide by the law, and refrain from immoral sexual behavior.¹⁵ Data suggests whites believe that when Civil Rights laws removed the legal barriers to racism, the continuing levels of violence and poverty in inner city communities reflected the failure of blacks to take advantage of the opportunities available to them. Such data also indicates that these whites feel that inner city residents do not value individualism, hard work, discipline, or self-sacrifice, citing fraud and abuse in the welfare system, escalating crime rates, and the dissolution of the traditional family to reflect these shortcomings. Many opponents of affirmative action believe that it requires employers to give jobs to under-qualified blacks and even facilitates the admission of ill-prepared and undeserving black students to universities at the expense of better-qualified white students. Universities yield to the demands of black students to restrict campus discussions with "hate speech" codes. In short, there are many who feel that blacks make unwarranted demands, and violate the American ethic of hard work, self-reliance, obedience to the law and self-restraint.¹⁶ These attitudes are attributable to racial resentment.

Unconscious discrimination is closely related to racial resentment. It stems from a set of beliefs so deeply embedded in American culture that they are not explicitly learned.¹⁷ In *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, Professor Charles Lawrence explained that racism is deeply ingrained in our culture and is transmitted from one generation to another through a set of tacit understandings. These

¹⁴ *Id.* at 114–15 (stating that, by 1986, the majority of white people did not believe biological inferiority to be the cause of racial differences).

¹⁵ Lawrence Bobo & James Kluegel, *Status, Ideology, and Dimensions of Whites' Racial Beliefs and Attitudes: Progress and Stagnation*, in RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE 100–01 (Steven A. Tuch & Jack K. Martin eds., Greenwood Publishing Group 1997) (highlighting the 1990 general social survey results of whites and blacks). See SCHUMAN ET AL., *supra* note 9, at 5–6 (referring to negative attitudes among whites towards blacks as "sophisticated prejudice").

¹⁶ Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414, 416 (1981) (arguing that symbolic racism is most apparent in whites' attitudes towards government assistance programs like welfare).

¹⁷ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (describing the unconscious elements of racism and discriminatory beliefs).

beliefs, Lawrence claimed, are part of an individual's understanding of the society in which we reside. A white child is not *taught* that blacks are inferior, but *learns* such by observing the behavior of others. These unarticulated understandings are not present in an individual's conscious memory; they are stored deep within the psyche, where they reside at an unconscious level.¹⁸

Scholars representing a range of academic disciplines have produced an extensive body of research that demonstrates the existence of unconscious discrimination. In *The Content of Our Categories*,¹⁹ Professor Linda Krieger contends that much of the discriminatory conduct that occurs now is not the product of conscious animus. Krieger explains that decision-making relies on "categorization," a process in which similar objects are grouped together in a person's thought process. An individual determines what something is by ascertaining to what it is similar and from what it differs. Categorization simplifies and expedites this task. It allows individuals to identify objects, to make predictions about the future, to draw inferences, and to attribute outcomes to specific events. This process operates at an unconscious level. Individuals perceive, categorize, and evaluate information depending on the ways in which information is presented and the context in which it is received. The danger is that categorization can make it difficult for an observer to recognize a person's individual characteristics.

Stereotyping is a form of categorization. Stereotypes are embedded in children's memories long before they have ability to evaluate differences in groups.²⁰ Stereotypes are the natural by-products of ordinary perception, categorization, learning, memory, and judgment. Categorization, including racial stereotyping, is virtually automatic, operating at a level independent of conscious attitudes, beliefs, and perceptions. Stereotypes can be so deeply embedded that they persist even after an individual is presented with clear and convincing evidence that refutes the stereotype.²¹ Unconscious discrimination can influence decision making long before any final decision is made. The biases function outside of the decision maker's

¹⁸ *Id.* (further detailing the irrationality of racism with respect to cognition).

¹⁹ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

²⁰ Armour, *supra* note 6, at 742. Professor Armour cited the case of a 3-year-old child, who, upon seeing a black infant, said to her mother, "Look mom, a baby maid." This showed that the child had already developed a stereotyped association between African American women and low-status service occupations. *Id.*

²¹ See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1561-62 (1989) (explaining how racial stereotypes affect the cognitive processes of categorization in individuals).

conscious awareness; they can influence the way information is processed and used. Stereotypes can shape the interpretation of information and influence the ways in which that information is stored and retrieved from memory. A decision maker can treat a person differently on the basis of race or sex while believing that he or she is acting on the basis of some legitimate, nondiscriminatory reason.²²

An extensive body of research explains how unconscious stereotypes function in the human mind.²³ Dovidio and Gaertner use the term “aversive racism” to describe the actions of individuals who support policies that promote racial equality and consider themselves as not prejudiced, but act in ways that disadvantage minorities. Aversive racists often experience feelings of *uneasiness or fear* in the presence of racial minorities. Their negative attitudes are usually unacknowledged because they conflict with their egalitarian value systems. Aversive racists typically do not discriminate against African Americans when it would be obvious to others and themselves, but they are likely to engage in discrimination when there are race-neutral justifications for their behavior.²⁴ Individuals who harbor biases would find it aversive to recognize their own racism.²⁵

In one frequently cited experiment concerning the provision of emergency assistance, white bystanders were as likely to help a black

²² See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1034 (2006) (stating implicit biases can be developed unconsciously and form stereotypes); see also DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* 224–26 (2007) (arguing people will only act on their conscious motives as long as they are conscious of them); James M. Jones, *Psychological Knowledge and the New American Dilemma*, 54 J. SOC. ISSUES 641–62 (1998) (discussing, among other things, categorization and stereotyping); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 954–58 (2006) (suggesting implicit biases are more predictive than explicit biases of how people will approach racial interactions); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1489 (2005) (discussing the difficulties people have in shedding implicit biases).

²³ See generally Gary Blasi, *Advocacy Against Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002) (arguing that stereotype activation often takes place at a preconscious or subconscious level); Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT'L & COMP. L. 89 (2007) (comparing treatment of ethnic minorities in the United States and Britain); Kang, *supra* note 22, at 1489 (2005) (outlining the legal steps that must be taken to correct the harm of implicit racism); John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002) (examining implicit and explicit racial attitudes and their effect on behavior).

²⁴ Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61–89 (1986) (stating discrimination often goes unnoticed because it occurs in situations where it is difficult to define acceptable behavior and can be rationalized, but is less likely to occur when these situations are not present).

²⁵ “[R]acial bias is expressed in indirect ways that do not threaten the aversive racist’s non-prejudiced self-image...[D]iscrimination occurs when [that] bias is not obvious or can be rationalized on the basis of some factor other than race.” John F. Dovidio & Samuel L. Gaertner et al., *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315 (2002).

victim as a white victim when they were the only witness to an emergency and their personal responsibility was clear. However, in circumstances in which there were other witnesses to the emergency, they would justify not helping on the belief that someone else would intervene. In this situation, whites helped the black victim half as often as they helped the white victim. Racial bias was expressed in a way that could be justified based on a race-neutral reason.²⁶

Implicit Association Tests (IAT) is another experimental model that detects unconscious discrimination. The IAT measures automatic association response times between representations for race, gender, and age, and other classifications as well as positive and negative characteristics.²⁷ To measure racial associations, test takers' preferences are measured by response times in pairing positive words or negative words with depictions of alternating white and black faces. A quicker response time in pairing black faces with negative words and white faces with positive words indicates a subtle preference for a white face.²⁸ The test is premised on the notion that it takes participants longer to associate words and faces that the test takers consider incompatible.

The test developers determined that the time differential could be quantified to provide an objective assessment of a test taker's unconscious attitudes. Because reaction times are mapped in milliseconds, the associative process is automatic and not subject to the sort of conscious control that could make it difficult to determine whether the participants were producing consciously desired outcomes. Using the IAT, researchers have documented a preference for whites among test takers of different races who believed that they did not harbor any racial prejudices. The test results indicate that the test taker's attitudes about race were influenced by unconscious bias.²⁹ The extensive body of research and commentary

²⁶ SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL 24–26 (2000) (noting that in situations where there were other bystanders present, subjects used diffusion of responsibility to explain their reluctance to help black victims instead of racial bias).

²⁷ Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998) (explaining the parameters of the IAT). See Project Implicit: The Scientists, <https://implicit.harvard.edu/implicit/demo/background/thescientists.html> (providing the biographies of Brian Nosek and Professors Anthony Greenwald and Mahzarin Banaji, the scientists who developed and analyzed the IAT).

²⁸ Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2006) (stating that the IAT stems from the hypothesis that it is easier for people to associate pleasant words with white faces and names than with African-American faces and names).

²⁹ Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 485 (2005) (noting that the IAT has become a widely regarded test for measuring implicit biases within the field of psychology).

produced over the last two decades shows that the existence of unconscious discrimination cannot be seriously disputed.

II. SUBTLE APPEALS IN PRESIDENTIAL CAMPAIGNS

In the *Political Brain*,³⁰ Professor Drew Westen concludes, based on a series of clinical studies, that a decision to support a particular candidate is driven largely by the voter's emotions. Choices are made based on voters' feelings about political parties or their feelings about the candidates, and, if they are still undecided, their feelings about the candidates' policy positions. The rationale voters give exit pollsters are often *post hoc* rationalizations for what was, in reality, a choice driven largely by emotions. An objective evaluation may be a part of the decision-making process, but when reason and feelings conflict, emotions almost always prevail.

Candidates for elective office understand this phenomenon. They have, for decades, exploited voters' emotions by appealing to fears and negative racial stereotypes. Candidates or their surrogates use race neutral "code" words to produce subtle appeals. In television commercials, words are used in conjunction with explicit racial images to convey the racial meaning. Irrespective of the medium used, subtle appeals activate racial resentment.³¹ As Tali Mendelberg explains:

Implicit racial appeals convey the same message as explicit racial appeals, but they replace the racial nouns and adjectives with more oblique references to race. They present an ostensibly race-free conservative position on an issue while incidentally alluding to racial stereotypes or a perceived threat from African Americans. Implicit racial appeals discuss a nonracial matter and avoid a direct reference to black inferiority or to white group interest. They forgo professions of racial antipathy and do not endorse segregation or white prerogatives. They convey a message that may violate the norm of racial equality by submerging it in nonracial content. In an implicit racial appeal, the racial message appears to be so coincidental and peripheral that many of its recipients are not aware that it is there.³²

³⁰ WESTEN, *supra* note 22, at 119 (asserting that a person's emotions toward a candidate are more determinative of his voting choice than his or her beliefs).

³¹ See TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF RACIAL EQUALITY* 7 (2001) (arguing that implicit racial messages are recognizable and operate on voters' racial feelings); see also Nicholas Valentino et al., *Cues that Matter: How Political Ads Prime Racial Attitudes During Campaigns*, 96 AM. POL. SCI. REV. 75, 88 (2002) (discussing how the light in which a racial group is presented by a candidate affects voters' stereotypes).

³² MENDELBERG, *supra* note 31, at 9.

Coded racial appeals fueled a historic restructuring of party affiliations in the South. The Fifteenth Amendment, enacted shortly after the end of the Civil War, granted voting rights to African American males.³³ During the Reconstruction Era that followed, blacks served in many elective offices in the South.³⁴ In 1877, however, the Hayes-Tilden Compromise, which resolved a contested presidential election, resulted in the withdrawal of federal troops from the South.³⁵ Within a few years, whites seized control of state legislatures, often using violence and intimidation to achieve their goals.³⁶ It was in this context that racial segregation was established. The Reconstruction Civil Rights laws were eviscerated by a series of Supreme Court cases decided from 1880-1900, including *Plessy v. Ferguson*,³⁷ which endorsed racial segregation. By the first decade of the 20th century, the Fourteenth and Fifteenth Amendments were effectively nullified in the South. African Americans were disenfranchised.³⁸ When they regained power, white Southerners embraced the Democratic Party creating what became known as the “Solid South.” For the next seventy years, the South voted consistently for Democratic candidates who endorsed white supremacy, supported Jim Crow laws, and enforced racial segregation.

The first crack in the Solid South came in 1948, when Harry Truman took a pro-Civil Rights stance and desegregated the military.³⁹ Strom Thurmond led a delegation of Southern Democrats who walked out of the convention.⁴⁰ Thurmond ran for president that year as a “Dixiecrat.”⁴¹ In

³³ U.S. CONST. amend. XV, Section 1 states, “[T]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” Section 2 empowers Congress to enforce this article by appropriate legislation.

³⁴ See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 355 (Henry Steele Commager & Richard B. Morris eds.) (1988) (stating that over 600 blacks served as legislators in the South during Reconstruction).

³⁵ *Id.* at 587 (explaining that the inauguration of Hayes brought the end of Reconstruction and black enjoyment of political power).

³⁶ *Id.* at 590 (describing the shift in political power to whites after 1877 and the subsequent severe diminishment of blacks’ constitutional rights).

³⁷ 163 U.S. 537, 544 (1896) (establishing the “separate but equal” doctrine as constitutional).

³⁸ LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 225–26 (1998) (stating that by 1910, black men had been disenfranchised in almost every southern state due to poll taxes, literacy tests and residency requirements, etc.).

³⁹ Harvard Sitkoff, *Harry Truman and the Election of 1948: The Coming of Age of Civil Rights in American Politics*, 37 J. S. HIST. 597, 614–15 (1971) (describing Truman’s 1948 campaign as a “milestone in the coming of age of the civil rights issue”).

⁴⁰ Gerald R. Webster, *Demise of the Solid South*, 82 GEOGRAPHICAL REV. 43 (1992) (explaining that the presidential candidacy of Strom Thurmond brought Democratic loyalty in the South to an abrupt end).

⁴¹ *Id.* (stating that Strom Thurmond, running under the States’ Rights Party label, replaced Harry S. Truman on the ballot for the Democratic Nominee).

1960, President John F. Kennedy’s sympathetic stance toward Civil Rights further eroded the Democratic Party’s support in the South.⁴² In 1964, when Barry Goldwater ran against Lyndon Johnson, he carried the Southern vote based, in large measure, on his opposition to the Civil Rights Act of 1964 and his support for “states’ rights.”⁴³ This took place against the backdrop of “massive resistance,” in which efforts to desegregate public schools were actively resisted in the South.⁴⁴ “States’ rights” were code words for resistance to the federal government’s efforts to desegregate schools and Civil Rights laws that protected the rights of African Americans.

A. Richard Nixon’s Southern Strategy

It has been said that when President Lyndon Johnson signed the Civil Rights Act of 1964, he put down his pen and told an aide, “We have lost the South for a generation.”⁴⁵ As Johnson anticipated, Republican strategists recognized the potential for appealing to the resentment of white Southerners who were becoming disenchanted with the Democratic Party. In 1968, Richard Nixon and his advisors devised what became known as the “Southern Strategy.”⁴⁶ Nixon adopted tactics that contributed to Barry Goldwater’s success in the 1964 presidential election, and George Wallace’s strength as a third party candidate in 1968. Nixon’s code words were “law and order,” “states’ rights” and “freedom of choice.”⁴⁷

⁴² ROBERT D. LOEVY, *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 42 (1997) (noting that John F. Kennedy proposed what became the Civil Rights Act of 1964).

⁴³ See MENDELBERG, *supra* note 31, at 85–86 (explaining that Goldwater appealed to states’ rights without referencing “blacks,” “whites,” or “race,” as he attempted to avoid racial appeals of any kind).

⁴⁴ See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 88 (2001) (stating that some reasons desegregation remained a problem for many white parents were the desire for their children to receive a good education and concerns about interracial dating, social mixing, and marriage); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 114–15 (1998) (discussing the prevalence of anxieties and segregationist thoughts during the *Brown I* era); ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* 125–26 (1995) (suggesting that the Southern Manifesto was just one of a number of strategies employed to defy compliance with the *Brown I* mandate).

⁴⁵ Clay Risen, *How the South Was Won*, *BOSTON GLOBE*, Mar. 3, 2006, available at http://www.boston.com/news/globe/ideas/articles/2006/03/05/how_the_south_was_won/.

⁴⁶ JERRY F. HOUGH, *CHANGING PARTY COALITIONS: THE MYSTERY OF THE RED STATE-BLUE STATE ALIGNMENT* 156–58 (2006) (describing Nixon’s Southern Strategy as favoring the traditional Republican appeal to the Southern middle class and believing that “a denunciation of the Northern culture radicals on non-radical grounds” would allow for the extra votes needed for his victory); Jeremy D. Mayer, *Nixon Rides the Backlash to Victory: Racial Politics in the 1968 Presidential Campaign*, in *6 THE HISTORIAN* 351, 357 (2002) (explaining that at the convention Nixon’s strategic plan became clear with his outreach to the South).

⁴⁷ *Id.* at 361–63 (discussing how Nixon indirectly relied on Wallace’s southern supporters by endorsing “freedom of choice” and a desegregation policy which white southerners favored because it

Nixon's promise to restore "law and order" appealed to white voters in the South and elsewhere who had been shaken by riots that erupted in several cities during the mid-1960s. Nixon opposed the Fair Housing Act and promised to appoint federal judges who would counter the direction that the Supreme Court had taken in *Brown v. Board of Education*⁴⁸ and any subsequent decisions that struck down segregation laws in the South. Nixon also promised "freedom of choice" as an alternative to "forced" busing to desegregate schools. Nixon won Virginia, Tennessee, North Carolina, South Carolina, and Florida.⁴⁹ Texas was the only Southern state won by the Democratic nominee. This was the beginning of the Southern realignment in which large numbers of white voters shifted their allegiance from the Democratic Party to the Republican Party. Valentino and Sears attributed this transformation to "symbolic racism," which they defined as a combination of conservatism and racial animosity, rather than explicit racial beliefs.⁵⁰

B. Ronald Reagan and "Welfare Queens"

Ronald Reagan made subtle racial appeals the centerpiece of his campaign strategy. In 1964, three Civil Rights workers, Andrew Goodman, Michael Schwerner, and James Chaney, disappeared in Neshoba County, Mississippi.⁵¹ They were in the State to participate in "Freedom Summer," where thousands of civil rights activists, many of them white college students from the North, descended on Mississippi and other Southern states to try to end the political disenfranchisement of African

maintained segregated schools).

⁴⁸ 347 U.S. 483 (1954) (finding that the "separate but equal" doctrine had no place in public education and that segregation was a denial of equal protection under the Fourteenth Amendment).

⁴⁹ In the 1970s, "family values" was added to the lexicon. In 1971, Patrick Buchanan, a White House speechwriter, urged President Nixon to adopt "family values" as a theme for his reelection campaign. Nixon did not use the phrase during the 1972 campaign but the phrase "family values" has been invoked in every Republican Party Platform since 1976. Professor Twila Perry explained the racial connotation of the phrase. It denotes "[a]n alleged decline in values, often represented in the media by families headed by single mothers, and especially black single mothers [the lack of family values] has been blamed for a myriad of social problems, including unemployment, poor health, school drop-out rates and an increase in juvenile crime." Twila Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 345 (1996).

⁵⁰ Nicholas A. Valentino & David O. Sears, *Old Times There Are Not Forgotten: Race and Partisan Realignment in the Contemporary South*, 49 AM. J. POL. SCI. 672, 673-74 (2005) (describing modern racism as a belief that blacks' continuing disadvantages are a reflection of their own lack of work ethic, rather than racial discrimination).

⁵¹ Jack White, *Lott, Reagan and Republican Racism*, TIME, Dec. 14, 2002, available at <http://www.time.com/time/nation/article/0,8599,399921,00.html> (stating that the murder of the three civil workers was one of the 1960s ugliest cases of racist violence).

Americans in the region.⁵² Goodman, Chaney and Schwerner were murdered by local whites who were enraged by their presence.⁵³ In 1980, Ronald Reagan chose Neshoba County as the first stop in his election campaign.⁵⁴ Reagan told the crowd, "I believe in states' rights."⁵⁵ The whites in Neshoba County and others across the country understood what he was saying. When Reagan used "states' rights," the words had long been a code phrase for resistance to desegregation efforts. Strom Thurmond used the words in 1948; Barry Goldwater used them in 1965; and George Wallace used them in 1968.⁵⁶ The symbolism of the location added weight to Reagan's potent message.

In his first inaugural address, Ronald Reagan proclaimed, "government is not the solution to our problem; government is the problem."⁵⁷ Reagan attacked the legitimacy of food stamps, stating that working people at grocery check-out counters were outraged when a "strapping young buck" bought T-bone steaks with food stamps.⁵⁸ Race was not mentioned, but the connotation was clear. The "strapping young buck" was an undeserving, able-bodied African American who was taking advantage of the system.

Reagan's best known subtle appeal was one he repeated often. It was a story about a Chicago "welfare queen" who drove a Cadillac, had 80 aliases, 30 addresses, 12 Social Security cards, and collected benefits for four, non-existent, deceased husbands, defrauding the government of over \$150,000.⁵⁹ Race was not mentioned, but the story alluded to the stereotype

⁵² DOUGLAS MCADAM, *FREEDOM SUMMER* 4 (1990) ("Their days were taken up with a variety of tasks, principally registering black voters and teaching in so-called Freedom Schools.").

⁵³ See Ariel Hart, *41 Years Later, Ex-Klansman Gets 60 Years in Civil Rights Deaths*, N.Y. TIMES, June 24, 2005, at A14. Edgar Ray Killen was convicted of manslaughter for his involvement in the deaths of the three civil rights workers. *Id.*

⁵⁴ Bob Herbert, *Righting Reagan's Wrongs?*, N.Y. TIMES, Nov. 13, 2007, at A29. See LOU CANNON, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* 577 (2000). Reagan was insistent on attending the Neshoba County Fair in Philadelphia, Mississippi even after his pollster Richard Wirthlin tried discouraging him. *Id.*

⁵⁵ Herbert, *supra* note 54 (opining that Reagan knew exactly what he was doing when he addressed the crowd).

⁵⁶ See White, *supra* note 51 (noting the coded racial messages used by Republican presidential candidates during their campaign trail in the South).

⁵⁷ Ronald Reagan, President of the United States, First Inaugural Address (Jan. 20, 1981), <http://www.reaganlibrary.com/reagan/speeches/speech.asp?spid=22> (last visited Feb. 26, 2009) (discussing the economic crisis and stating that "[a]ll of us together, in and out of government, must bear the burden").

⁵⁸ Paul Krugman, *Innocent Mistakes*, <http://krugman.blogs.nytimes.com/> (Nov. 10, 2007, 19:36 EST); see GERTRUDE EZORSKY, *RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION* 62 (3d ed. 1991) (noting that people perceived the comment as referring to a black male).

⁵⁹ DAVID ZUCCHINO, *MYTH OF THE WELFARE QUEEN* 64-65 (1st Touchstone ed., 1999). The New York Times reported in 1976 that Ronald Reagan repeated told a story about a 47-year-old Chicago welfare recipient who "has 80 names, 30 addresses, 12 Social Security cards and is collecting veterans' benefits on four nonexistent deceased husbands." *Id.* The real welfare recipient Reagan was referring to,

of a welfare recipient as a dishonest black woman who was cheating the system. This exaggeration played on the stereotypes and resentment held by whites about welfare recipients. Reagan's message also took advantage of the strong association of the black race with poverty.⁶⁰

Lee Atwater, who was member of the Reagan administration in 1981, described the subtle appeals in Reagan's Southern Strategy in blunt terms:

You start out in 1954 by saying "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you. Backfires. So you say stuff like forced busing, states' rights, and all that stuff. You're getting so abstract now [that] you're talking about cutting taxes, and all these things you're talking about are totally economic things and a by-product of them is [that] blacks get hurt worse than whites. And subconsciously maybe that is part of it. I'm not saying that. But I'm saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me —because obviously sitting around saying, "We want to cut this," is much more abstract than even the busing thing *and* a hell of a lot more abstract than "Nigger, nigger."⁶¹

C. George Bush and Willie Horton

In the 1988 campaign, George H.W. Bush presented himself as the heir to Ronald Reagan's legacy.⁶² The Bush campaign successfully employed what is perhaps the best known subtle appeal.⁶³ Willie Horton was convicted of murder and sentenced to life imprisonment. He was granted a weekend leave by the Massachusetts prison furlough program. Horton left Massachusetts and traveled to Maryland where he assaulted a white couple, beating the man and raping the woman. He was eventually recaptured and return to prison. After Bush's campaign aides discovered the Horton

named Linda Taylor, was actually convicted for using two different aliases to collect \$8,000. *Id.* See "Welfare Queen" Becomes Issue in Reagan Campaign, N.Y. TIMES, Feb. 15, 1976, at 51, available at picofarad.info/misc/welfarequeen.pdf (noting that the "Welfare Queens" actually had far fewer aliases and defrauded the government of far less money than Regan claimed).

⁶⁰ In *Why Americans Hate Welfare*, Martin Gilens describes the racialization of poverty, which is perpetuated in the media and elsewhere. In one example, Gilens examines photographs that accompanied poverty stories in Time, Newsweek, and U.S. News and World Report. He found that, combining the coverage of poverty from the three magazines, 53.4 percent were pictures of black people. However, at the time, Blacks represented only 29.3 percent of poor people. MARTIN GILLENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 113 (2000).

⁶¹ ALEXANDER LAMIS, SOUTHERN POLITICS IN THE 1990s 8 (1999).

⁶² See KINDER & SANDERS, *supra* note 11, at 231–32. Bush took credit for the achievements of the Reagan administration while allying himself with the president. *Id.*

⁶³ See MENDELBERG, *supra* note 31, at 135–54. The author posits that although the Bush campaign denied any racial intent, there was much evidence to the contrary. *Id.*

controversy, Bush made repeated references to the Massachusetts furlough program in his campaign speeches.

Later, a commercial was produced by an external organization, Americans for Bush.⁶⁴ The commercial began with images of Bush and Dukakis. An announcer stated, "Bush and Dukakis on crime."⁶⁵ In the next scene, the commercial switched to a picture of George Bush. The voice over stated, "Bush supports the death penalty for first-degree murderers." The following scene showed a photograph of Dukakis. The narrator stated, "Dukakis not only opposes the death penalty, he allowed first degree-murderers to have weekend passes from prison." The next scene showed a mug shot of Willie Horton. The voice over continued, "One was Willie Horton, who murdered a boy in a robbery, stabbing him nineteen times." Another photograph flashed on the screen showing Horton dressed in army fatigues, with a straggly beard and an unkempt Afro. Horton was accompanied by a police officer that was apparently placing him under arrest.

The narrator stated, "Despite a life sentence, Horton received ten weekend passes from prison. Horton fled, kidnapped a young couple, stabbing the man and repeatedly raping his girlfriend." The words "kidnapping" "stabbing" and "raping" appeared on the screen. The final scene showed a photograph of Dukakis. The words "Weekend passes." appeared on the screen, and suggested Dukakis' lax stance on crime.⁶⁶ Horton's race was never mentioned in the narrative, but his image activated a stereotype of a dangerous black criminal in the minds of white viewers. Dukakis did not challenge the commercial.⁶⁷ The racial implications of the ads were not challenged until Jesse Jackson accused the Bush campaign of racism.⁶⁸

D. Subtle Appeals in Other Campaigns

Subtle appeals did not end with Willie Horton. At a meeting of Jesse Jackson's Rainbow Coalition in Washington in June of 1992, Bill Clinton, who was then the Democratic nominee for president, criticized the

⁶⁴ See *id.* at 140–41. The National Security Political Action Committee (NSPAC), also known as Americans for Bush, produced the ad that Bush referred to as the "independent" television advertisement. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 165 (noting that Jesse Jackson single-handedly challenged the ad's message, likely without pre-approval from Dukakis).

⁶⁸ See MENDELBERG, *supra* note 31, at 152. Towards the end of the campaign, Jackson "accused the Republicans of using Horton's case to appeal to racial sentiments." *Id.*

Rainbow Coalition for providing a platform to rap artist Sister Souljah, who had been quoted as saying, after the riots in Los Angeles, "If black people kill black people every day, why not have a week and kill white people?"⁶⁹ In a press conference, Sister Souljah stated that she had been "used as a vehicle, like Willie Horton and various other black victims of racism."⁷⁰

During the 2000 Presidential campaign, George W. Bush delivered a speech at Bob Jones University, located in Greenville, South Carolina.⁷¹ The school had a reputation for being one of the most conservative religious schools in the United States, and had refused to admit any African American students until 1971. President Ronald Reagan fought to revoke the Internal Revenue Service's authority to deny the school's charitable tax exemption, which had been imposed based on the school's ban on interracial dating.⁷² Bush's appearance at Bob Jones had the same symbolic appeal to race as Ronald Reagan's speech in Neshoba County, Mississippi. After the racial message was exposed by the press, Bush sent a letter of apology to Cardinal John O'Connor, Archbishop of New York.⁷³

In Harold Ford's 2006 gubernatorial race in Tennessee, a commercial was shown in the final days of the campaign featuring a blonde woman wearing heavy make-up, and cheap jewelry. Her shoulders were bare and the rest of her body was not shown. The viewer had to imagine what she was, *or was not*, wearing. She gushed, explaining that she met Mr. Ford at a Playboy party and, at the end of the ad, she winked and said, "Harold, *call me*."⁷⁴ The image tapped into a deep and longstanding Southern taboo; black men lusting after white women. Ford lost the election.

⁶⁹ Sheila Rule, *The 1992 Campaign: Racial Issues; Rapper, Chided by Clinton, Calls Him a Hypocrite*, N.Y. TIMES, June 17, 1992, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE5D61E31F934A25755C0A964958260>. Sista Souljah, whose real name is Lisa Williamson, claimed that the statement was intended to convey the mindset of a gang member who would think nothing of killing blacks or whites. *Id.*

⁷⁰ *Id.*

⁷¹ James Dao, *The 2000 Campaign: The Challenger; Bradley Blasts Bush for Talk At Bob Jones U.*, N.Y. TIMES, Feb. 4, 2000, available at <http://query.nytimes.com/gst/fullpage.html?res=9E00E3DA103FF937A35751C0A9669C8B63>. Bill Bradley chided Bush for speaking at the University, "a bastion of Christian conservatism in South Carolina." *Id.*

⁷² *Bob Jones University v. U.S.*, 461 U.S. 574 (1983). The Supreme Court, in an 8-1 decision, ruled that schools that practice racial segregation could be denied tax exempt status. *Id.*

⁷³ See Amy Paulson, *Bush Attacks McCain for Anti-Catholic Charges*, CNN.COM, Mar. 1, 2000, available at <http://archives.cnn.com/2000/ALLPOLITICS/stories/02/27/campaign.wrap/>. Bush expressed regret and said that he should have spoken against anti-Catholic sentiment during his visit to Bob Jones University. *Id.*

⁷⁴ Robin Toner, *Ad Seen as Playing to Racial Fears*, N.Y. TIMES, Oct. 26, 2006, available at http://www.nytimes.com/2006/10/26/us/politics/26tennessee.html?_r=1&oref=slogin. At the time, Mr. Ford was running for the Tennessee Senate position. *Id.*

III. SUBTLE APPEALS, THE FIRST AMENDMENT AND THE FCC

This section explains why the First Amendment’s speech protections, and related Federal Communications Commission laws, preclude any significant governmental efforts to regulate subtle appeals. The First Amendment of the United States Constitution protects speech even when it is degrading and offensive. In *Chaplinsky v. New Hampshire*,⁷⁵ a person was arrested for calling a policeman “a God damned racketeer” and “a damned Fascist.”⁷⁶ The Supreme Court upheld the conviction and denied constitutional protection for words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” However, *Chaplinsky* has since been eroded by later decisions. In *Brandenburg v. Ohio*,⁷⁷ the Court ruled that advocacy of criminal conduct is protected unless the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁷⁸ In *Cohen v. California*,⁷⁹ the Court narrowed *Chaplinsky* further by ruling that fighting words must be directed at a specific individual.

In *R.A.V. v. City of St. Paul*,⁸⁰ the Supreme Court considered a challenge to a St. Paul ordinance punishing the placement of symbols that were likely to “arouse[] anger, alarm or resentment.”⁸¹ A teenager was convicted of violating the ordinance after he burned a cross in a black family’s yard. The Supreme Court reversed the conviction after the majority concluded that the ordinance unconstitutionally criminalized some hurtful expressions, but not others based on the political preferences of state legislators. In *Wisconsin v. Mitchell*,⁸² the Court held that a Wisconsin statute that imposed stiffer sentences for racially motivated assaults than for other types of assaults did not violate the First Amendment because the law was aimed primarily at conduct rather than speech. In *Virginia v. Black*,⁸³ the Court held that, because cross-burning has such a long history as a “particularly virulent form of intimidation,” the state of Virginia could legitimately prohibit that form of expression while not prohibiting other

⁷⁵ 315 U.S. 568 (1942).

⁷⁶ *Id.* at 569.

⁷⁷ 395 U.S. 444 (1969).

⁷⁸ *Id.* at 447.

⁷⁹ 403 U.S. 15 (1971).

⁸⁰ 505 U.S. 377 (1992).

⁸¹ *Id.* at 391 (quoting the Minnesota ordinance in question).

⁸² 508 U.S. 476 (1993).

⁸³ 538 U.S. 343 (2003).

types of intimidating expression.⁸⁴ However, unlike assaults or cross-burnings, subtle racial appeals are forms of pure expression that are protected by the First Amendment no matter how offensive the implied message may be.

Subtle appeals are often contained in television and radio commercials. Broadcast advertisements are protected by the First Amendment and the Communications Act of 1934. Section 312(a)(7)⁸⁵ and 315(a)⁸⁶ of the Communications Act regulate political programming. Section 315 prohibits a broadcaster from censoring the content of a political candidate's communication, regardless of its offensiveness. If a broadcast licensee has determined, in accordance with section 312(a)(7), that a candidate has a right of access to the airwaves, the content of the message cannot be censored, even if it includes offensive racial epithets. In 1972, the Atlanta NAACP petitioned the Federal Communications Commission ("FCC") for a ruling that would have allowed television stations to refuse to air the political advertisements of a senatorial candidate.⁸⁷ The candidate produced an advertisement in which he said:

I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and the niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you.⁸⁸

The NAACP filed a complaint with the FCC, which argued that Stoner's advertisements were inflammatory and posed an imminent threat to public safety. The FCC found no factual support for the NAACP's claims and held the broadcasters were obligated to air the candidate's

⁸⁴ The Court reversed the cross-burner's conviction because of a jury instruction that might have caused the convictions of cross-burners whose motivations were ideological rather than attempts to arouse fear. *Id.* at 363.

⁸⁵ 47 U.S.C. § 312 (2004).

⁸⁶ *Id.* at § 315.

⁸⁷ *In re Complaint by Atlanta NAACP, Atlanta, Ga. Concerning Section 315 Political Broad. by J. B. Stoner*, 36 F.C.C.2d 635, 635 (1972).

⁸⁸ *Id.* at 636.

advertisements.⁸⁹

In 1978, J. B. Stoner ran again, this time as a candidate for Governor of Georgia. As in his 1972 campaign, Stoner purchased time on local radio and television stations and used the word “nigger” in his advertisements.⁹⁰ Julian Bond, who was then the leader of the Atlanta, Georgia NAACP petitioned the FCC to ban the use of the word “nigger” as an obscene or indecent utterance, relying on a case decided that year, *FCC v. Pacifica Foundation*.⁹¹ In *Pacifica*, the Supreme Court held that the FCC could impose civil sanctions when a broadcast contained “patently offensive” language.⁹² The FCC reasoned that the “indecent” language in the radio broadcast described, in patently offensive terms, sexual and excretory activities and organs, at a time when there was a risk that children might have been listening to the broadcast. Despite Stoner’s repeated use of a virulent racial epithet that was “patently offensive” to African Americans and many whites, the FCC concluded that broadcasting the word ‘nigger’ did not fall within the *Pacifica* holding. The decency regulations extend to profane language, but the FCC’s definition is limited to words that are sexual or excretory in nature, or those derived from such terms. The Commission has recognized that racial or religious epithets are considered offensive, but its profanity analysis does not reach racial epithets because they do not refer to “sexual or excretory activities and organs.”⁹³ If an overt racial appeal of this magnitude does not violate the FCC’s decency regulations, the subtle allusions contained in subtle appeals must also be well beyond the scope of any regulatory constraints.

Racial appeals have not completely escaped lawmakers’ notice. Congress recognized the discriminatory effect of racial appeals in political campaigns when it amended the Voting Rights Act in 1982. Section 2 of that law prohibits states and municipalities from engaging in practices

⁸⁹ *Id.* at 637.

⁹⁰ In re Complaint by Julian Bond Atlanta NAACP Atlanta, Ga. Concerning Political Broad., 69 F.C.C. 2d 943, 943 (1978) (allowing civil sanctions for “patently offensive” language in a broadcast).

⁹¹ 438 U.S. 726 (1978). The case was the result of a radio station broadcast that aired a George Carlin monologue in which Carlin discussed words that could not be uttered on the public airwaves. Carlin’s list included ‘shit,’ ‘piss,’ ‘fuck,’ ‘cunt,’ ‘cocksucker,’ ‘motherfucker,’ and ‘tits.’ Prior to the broadcast, the station warned listeners that the monologue included language which might be regarded as offensive. The FCC received a complaint from a man who had heard the broadcast while driving in his automobile accompanied by his young son. The Supreme Court held that civil sanctions could constitutionally be imposed when a broadcast contained patently offensive words dealing with sex and excretion. The Court noted that audience, medium, time of day, and means of transmission were factors to be considered in determining whether sanctions were warranted. *Id.* at 751.

⁹² *Id.* at 728.

⁹³ In re Complaint by Julian Bond Atlanta NAACP Atlanta, Ga. Concerning Political Broad., 69 F.C.C.2d 943, 944 (1978).

designed to make it difficult for racial minorities to elect candidates of their choice. A violation of Section 2 occurs when, “based on the totality of circumstances . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial or language minority].”⁹⁴ To prevail on a claim under Section 2, a plaintiff must prove that minority voters “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁹⁵ Section 2’s prohibitions apply to any voting standard, practice, or procedure that abridges the right of a citizen to vote on the basis of her race, color, or membership in a language minority group.

The Senate Judiciary Committee issued a report that accompanied the 1982 amendment to Section 2.⁹⁶ The Report identified certain factors⁹⁷ that courts should use when determining whether a practice violates Section 2 of the Voting Rights Act. One of the seven factors listed is “[w]hether political campaigns have been characterized by overt or subtle racial appeals.”⁹⁸ Several voting rights cases have involved claims in which racial appeals, along with other factors, prevented minorities from having an equal opportunity to participate in the elective process.⁹⁹ However, racial appeals are not *per se* violations of the Voting Rights Act; they must be part of the “totality of circumstances” that causes minorities to have “less opportunity than other members of the electorate to participate in the

⁹⁴ 42 U.S.C. § 1973(b) (2000). “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [on account of statutorily designated language minority status].” *Id.* § 1973(a).

⁹⁵ 42 U.S.C. § 1973(a) (2000).

⁹⁶ S. Rep. No. 97-417 (1982), as reprinted in 1982 U.S.C.C.A.N. 177.

⁹⁷ *Id.* at 206–07. These factors are: “1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. The extent to which voting in the elections of the state or political subdivision is racially polarized; 3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. If there is a candidate slating process, whether members of the minority group have been denied access to that process; 5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. Whether political campaigns have been characterized by overt or subtle racial appeals; 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.” *Id.*

⁹⁸ *Id.*

⁹⁹ See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, 39 U. MICH. J.L. REFORM 643, 707–22, 771 (2006) (providing a complete list and analysis of Section 2 cases).

political process and to elect representatives of their choice.”¹⁰⁰ Subtle racial appeals in television advertisements or statements made on the campaign trail are not actions taken by state or local governments that undermine the voting rights of minorities. The appeals can be evidence of practices designed to create difficulties for minorities to elect favored candidates; but, in the absence of other factors, subtle appeals are beyond the reach of the Voting Rights Act.

IV. THE 2008 DEMOCRATIC PRIMARY

For the first time in the nation’s history, an African American and a woman were the leading contenders for Democratic Party’s presidential nomination. Subtle racial appeals were directed against the African-American candidate. The assertions by Hillary Clinton’s campaign aides that Barack Obama attended an Islamic “madrassa” school as a 6-year-old,¹⁰¹ and the innuendos about his youthful drug experimentation were subtle racial appeals. The Clinton campaign repeatedly deployed subtle racial appeals against Barack Obama.¹⁰² Hillary Clinton’s New Hampshire campaign co-chairman, Bill Shaheen, resigned after he questioned whether Obama’s youthful cocaine use made him unelectable.¹⁰³

During a rally in South Carolina on January 13, 2008, Robert Johnson, the billionaire founder of Black Entertainment Television (BET), alluded to Mr. Obama’s youthful drug experimentation. Johnson said,

¹⁰⁰ 42 U.S.C. § 1973(b) (2000).

¹⁰¹ Mark Murray, *Hillary Volunteer Sends Anti-Obama E-mail*, MSNBC, Dec. 5, 2007, <http://firstread.msnbc.msn.com/archive/2007/12/05/498088.aspx> (stating that a Clinton campaign volunteer passed along an e-mail that falsely stated Obama attended an Islamic madrassa as a child).

¹⁰² Alec MacGillis, *Clinton N.H. Official Resigns After Comments on Obama*, WASH. POST, Dec. 13, 2007, http://voices.washingtonpost.com/44/2007/12/13/clinton_apologizes_to_obama_fo_1.html (citing to a large pattern of negativity from the Clinton campaign towards Obama). It is recognized that Senator Clinton has been subjected to the sort of sexual stereotyping that was acknowledged in *Price Waterhouse v. Hopkins*. In that case, Hopkins, a female manager, sued Price Waterhouse, alleging sex discrimination in violation of Title VII after she was refused partnership in the firm. Price Waterhouse argued that Hopkins’ application for partnership was denied because of interpersonal shortcomings that affected her performance. Witnesses for Price Waterhouse stated, among other things, that Hopkins needed to wear more make up, and to walk and talk more femininely. Hopkins was the victim of sexual stereotyping because attributes deemed positive when possessed by males were viewed negatively when displayed by women. The partners’ negative evaluations of Hopkins were shaped by their perceptions about women’s typical and acceptable roles in society. Similar attitudes affected the Clinton campaign, but we have elected to focus on race in this article. We anticipate that the gender issues will be examined by scholars, but they are beyond the scope of this article. See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a defendant in a Title VII case has the burden of proving by a preponderance of evidence his employment decision was made irrespective of employee’s gender).

¹⁰³ MacGillis, *supra* note 102 (noting that Shaheen believed that Republicans would be able to pick apart Obama because of his past drug use).

“[T]o me, as an African-American, I am frankly insulted that the Obama campaign would imply that we are so stupid that we would think Hillary and Bill Clinton, who have been deeply and emotionally involved in black issues since Barack Obama was doing something in the neighborhood – and I won’t say what he was doing, but he said it in the book –”¹⁰⁴

The point in both instances was to associate Obama with the crime and drug use associated with inner city blacks.

In Iowa, Hillary Clinton’s campaign aides circulated an e-mail claiming Barack Obama attended an Islamic “madrassa” school as a 6-year-old.¹⁰⁵ The goal was to imply that Obama was a Muslim who did not subscribe to “American” values. The statement also attempted to exploit lingering fears caused by the terrorist attacks in New York City in 2001. During an interview on *60 Minutes*, Steve Kroft showed a video of a man in Ohio who said he had heard that Senator Obama didn’t know the national anthem, wouldn’t use the Holy Bible, and was a Muslim. After showing the clip, Kroft asked Senator Clinton if she believed that Obama is a Muslim. Senator Clinton responded, “[T]here is nothing to base that on. *As far as I know.*”¹⁰⁶ Clinton’s equivocation left open the possibility that Obama was a Muslim.

Attempting to counter favorable comparisons of Barack Obama to Martin Luther King, Hillary Clinton stated, “Dr. King’s dream began to be realized when President Lyndon Johnson passed the Civil Rights Act of 1964, when he was able to get through Congress something that President Kennedy was hopeful to do, the president before had not even tried, but it took a president to get it done.”¹⁰⁷ The implication was that it took a white president to get the Civil Rights Act through Congress, something Dr. King

¹⁰⁴ Posting of Katharine Q. Seelye, to the Caucus, <http://thecaucus.blogs.nytimes.com/2008/01/13/bet-chief-raps-obama-in-sc/?hp> (Jan. 13, 2008, 14:39 EST) (stating that Johnson was alluding to Obama’s past drug use).

¹⁰⁵ See Murray, *supra* note 94 (noting the e-mail falsely alleging that Obama attended a madrassa as a child); Jennifer Skalka, *Third Clinton Volunteer Knew of Smear E-Mail*, THE HOTLINE, Dec. 10, 2007, available at http://hotlineoncall.nationaljournal.com/archives/2007/12/third_clinton_v.php (describing an e-mail from two Clinton volunteers that implied Obama was not a “true” American).

¹⁰⁶ Bob Herbert, *Confronting the Kitchen Sink*, N.Y. TIMES, Mar. 8, 2008, available at <http://www.nytimes.com/2008/03/08/opinion/08herbert.html?ref=opinion> (quoting Senator Clinton’s response when asked if she believed Senator Obama was a Muslim) (emphasis added).

¹⁰⁷ Mike Allen & Ben Smith, *Hillary Clinton Attacks Barack Obama*, POLITICO, Jan. 13, 2008, <http://www.politico.com/news/stories/0108/7864.html> (noting the controversy that ensued after Senator Clinton stated that Presidents, and not Dr. King, were able to accomplish civil rights victories); Marjorie Valbrun, *Will They Play the Race Card?*, WASH. POST, Jan. 13, 2008, at B07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/11/AR2008011103281.html> (stating that Clinton diminished the role that Dr. King played in the civil rights movement).

could not have done. On another occasion, Bill Clinton said his wife did not have a chance of winning in South Carolina because African Americans would automatically vote for Mr. Obama because he is black. The effort there was to minimize Obama's victory in South Carolina as an example of black voters selecting a black candidate.

Bill Clinton compared Barack Obama to Jesse Jackson, who won South Carolina in 1984 and 1988 but failed to gain significant support outside the black community.¹⁰⁸ Clinton's point was that Obama, like Jackson, is African-American, and as such, could not receive support from White voters. On another occasion, Bill Clinton said Obama's campaign was a "fairytale."¹⁰⁹ One implication was that it was preposterous to think that an African American could be elected president.

Attack ads sometimes use dark images to add an ominous tone to their messages. As Kathleen Hall Jamieson explained, "[q]uick cuts, use of black and white, dark colors, shadowed lighting, stark contrasts, videotape, the voice of a seemingly 'neutral' announcer, and ominous music are the techniques associated with 'oppositional' production spots."¹¹⁰ The Clinton campaign used this technique when it darkened Obama's image in an attack ad. A 30-second commercial, "True," aired in Texas in March of 2008.¹¹¹ The goal was to emphasize Obama's race and to provoke fear in viewers.¹¹² The Clinton campaign produced a different commercial showing children sleeping in their beds. With a phone ringing in the background, a narrator's voice stated, "It's 3 a.m., and your children are

¹⁰⁸ Anne E. Kornblut, For Bill Clinton, Echoes of Jackson in Obama Win, Wash. Post, Jan. 26, 2008, available at http://voices.washingtonpost.com/44/2008/01/26/for_bill_clinton_echoes_of_jac.html (proposing that Bill Clinton compared Obama's presidential campaign to Jesse Jackson's campaigns in 1984 and 1988 to downplay the significance of Obama's win in South Carolina).

¹⁰⁹ Anne E. Kornblut & Shailagh Murray, *Clintons Move to Ease Some Racial Friction*, WASH. POST, Jan. 12, 2008, at A08, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/11/AR2008011103662.html>.

¹¹⁰ KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION AND DEMOCRACY* 51 (1992) (describing filming techniques used in creating negative advertisements); TED BRADER, *CAMPAIGNING FOR HEARTS AND MINDS: HOW EMOTIONAL APPEALS IN POLITICAL ADS WORK* 118–26 (2006) (citing statistical data about the use of scare tactics in political advertisements).

¹¹¹ Internet Video: *True*, Campaign Circus (Mar. 3, 2008), http://campaigncircus.com/video_player.php?v=8116 (showing an Obama attack ad where his skin appears to have been darkened).

¹¹² *Did the Clinton Campaign Darken Obama's Complexion?*, <http://kristof.blogs.nytimes.com/2008/03/06/did-the-clinton-campaign-darken-obamas-complexion/index.html?ref=opinion> (Mar. 6, 2008, 22:47 EST) (noting that adding dark hue to convey negativity is common in political attack ads); Posting of J. Thomas Cronin to *Daily Kos*, <http://www.dailykos.com/story/2008/3/3/14550/75567/858/467989> (Mar. 3, 2008, 11:29 EST) (speculating that Obama's complexion was darkened to make him appear more threatening); Emi Kolawole & Justin Bank, *Did Clinton Darken Obama's Skin?*, FACTCHECK.ORG., Mar. 5, 2008, http://www.factcheck.org/elections-2008/did_clinton_darken_obamas_skin.html (attributing Obama's skin appearing darker in a Clinton attack ad to the type of format in which the video is broadcasted, rather than to intentional racism).

safe and asleep. But there's a phone in the White House, and it's ringing. Something is happening in the world." As the ringing continued, the narrator went on, "Your vote will decide who answers that call, whether it's someone who already knows the world's leaders, knows the military . . . someone tested and ready to lead in a dangerous world. It's 3 a.m. and your children are safe and asleep. Who do you want answering the phone?" The ad ended with a depiction of Hillary Clinton wearing eyeglasses.¹¹³ The commercial used a dark background to add an ominous tone to the message; one clearly intended to provoke fear in viewers.¹¹⁴

Orlando Patterson, an African-American professor at Harvard University, analyzed the ad in an Op-Ed published by The New York Times. Patterson wrote:

"[I]t brought to my mind scenes from the past. I couldn't help but think of D. W. Griffith's 'Birth of a Nation,' the racist movie epic that helped revive the Ku Klux Klan, with its portrayal of black men lurking in the bushes around white society. The danger subtle in the phone ad—as I see it—is that the person answering the phone might be a black man, someone who could not be trusted to protect us from this threat."¹¹⁵

Patterson continued,

"The ad could easily have removed its racist sub-message by including images of a black child, mother or father—or by stating that the danger was external terrorism. Instead, the child on whom the camera first focuses is blond. Two other sleeping children, presumably in another bed, are not blond, but they are dimly lighted, leaving them ambiguous. Still it is obvious that they are not black . . ."¹¹⁶

Patterson identified the commercial's subtle message: "[O]ur loved ones are in grave danger and only Mrs. Clinton can save them. An Obama presidency would be dangerous—and not just because of his lack of experience. In my reading, the ad, in the insidious language of symbolism,

¹¹³ Internet Video: 3am and Hillary Clinton has Made her Choice (Children ad), YouTube, Mar. 8, 2008, http://www.youtube.com/watch?v=cQ_oV9V9Q1w (showing another example of a Clinton ad using a dark background to impose fear on viewers).

¹¹⁴ *Id.* The girl in the "red phone" ad is 17 years old and supports Barack Obama. *Clinton "Red phone" child supports Obama*, UNITED PRESS INT'L, Mar. 10, 2008, available at http://www.redorbit.com/news/politics/1288919/clinton_red_phone_child_supports_obama/index.html.

¹¹⁵ Orlando Patterson, *The Red Phone in Black and White*, N.Y. TIMES, Mar. 11, 2008, at A23.

¹¹⁶ *Id.*

says that Mr. Obama is himself the danger, the outsider within."¹¹⁷

In February of 2008, Pennsylvania Governor Ed Rendell, a Clinton supporter, said some white Pennsylvanians were likely to vote against Barack Obama because of his race. During a meeting with the editorial board of the Pittsburgh Post-Gazette Rendell said, "[y]ou've got conservative whites here, and I think there are some whites who are probably not ready to vote for an African-American candidate."¹¹⁸ Rendell's subtle message to Pennsylvania's Democrats was voting for Obama would be futile; it would be wiser to support Senator Clinton. Former vice-presidential candidate Geraldine Ferraro, and a member of Hillary Clinton's finance committee, said on March 7, 2008, "If Obama was a white man, he would not be in this position."¹¹⁹ Ferraro also said, "And if he was a woman (of any color) he would not be in this position."¹²⁰

The implication of the former statement was that Obama is an unqualified beneficiary of affirmative action and his many achievements were not legitimately earned. The latter statement meant that race trumps gender; African-American men are not victimized by bias to the same degree as white or black women. After a flurry of criticism, Ferraro defended her statements a few days later, saying, "Any time anybody does anything that in any way pulls this campaign down and says let's address reality and the problems we're facing in this world, you're accused of being racist, so you have to shut up."¹²¹ She also said, "Racism works in two different directions. I really think they're attacking me because I'm white. How's that?"¹²² There was nothing subtle about this statement; it set off a firestorm of controversy that resulted in an apology from Hillary Clinton and Ferraro's resignation from the campaign.¹²³

In another effort to create doubt about Obama, Clinton supporters used a whisper campaign to persuade party insiders that he would be a weak candidate.¹²⁴ They pointed to the vote in Ohio and claimed Obama only

¹¹⁷ *Id.*

¹¹⁸ Rendell: Race Factor Could Hurt Obama, ASSOCIATED PRESS, Feb. 12, 2008, available at http://ap.google.com/article/ALeqM5gljYa42R0UUEGs0_AyNg506-z8FgD8UP1VUG0.

¹¹⁹ Katharine Q. Seelye & Julie Bosman, *Ferraro's Obama Remarks Become Talk of Campaign*, N.Y. TIMES, Mar. 12, 2008, at A23; *Ferraro: Obama Where He Is Because He's Black*, ABC NEWS, Mar. 11, 2008, available at <http://abcnews.go.com/Politics/Vote2008/story?id=4428719&page=1>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Posting of Rebecca Sinderbrand to CNN Political Ticker, <http://politicalticker.blogs.cnn.com/2008/03/11/ferraro-theyre-attacking-me-because-im-white/> (Mar. 11, 2008, 17:27 EST).

¹²³ See Perry Bacon, Jr., *Ferraro Leaves Clinton Camp Over Remarks About Obama*, WASH. POST, Mar. 13, 2008, at A01 (noting Hillary Clinton as deeply regretful of Ferraro's comments).

¹²⁴ *Id.* (outlining the controversy surrounding Ferraro's racial comments); Mike Dorning & Christi Parsons, *Race Emerging as Issue in Democratic Campaign*, CHI. TRIB., Mar. 13, 2008, at 1 (indicating

carried heavily African-American districts and areas with upscale, highly educated whites, but not working class whites. On March 13, 2008, Clinton's chief campaign strategist, Mark Penn, told reporters that Barack Obama "can't win the general election."¹²⁵ The Clinton campaign later claimed that Penn had not made the statement. Clinton seemed to deny published reports¹²⁶ that she told New Mexico Governor Bill Richardson that Barack Obama could not win the general election. Her campaign aides claimed later that Clinton had misunderstood the question.¹²⁷ The effort here was to persuade party insiders that Obama could not win because he is African-American. This was the same tactic that Governor Ed Rendell used in Pennsylvania.

V. THE REVEREND WRIGHT CONTROVERSY

Race was directly injected into the Democratic primary when excerpts of Reverend Jeremiah Wright's sermons were released on YouTube in March of 2008.¹²⁸ Reverend Wright is the retired Pastor of Trinity United Church of Christ, in Chicago, Illinois.¹²⁹ The Church has approximately 8,500 members, and Barack Obama has been a member since 1988, when he worked as a community organizer in Chicago. Obama was married in Trinity and the title of his second book, *The Audacity of Hope*, was derived

there is race-based resistance to Obama's White House bid); Kevin Merida, *Race Tangled in the Race: Geraldine Ferraro's Pointed Campaign Discourse*, WASH. POST, Mar. 14, 2008, at C01 (summarizing controversy surrounding Ferraro's comments); Joyce Purnick, *Ferraro is Unapologetic for Remarks and Ends Her Role in Clinton Campaign*, N.Y. TIMES, Mar. 13, 2008, at A16 (stating Ferraro resigned without an apology); Peter Wallsten, *It's One Issue That Remains a Focus*, L.A. TIMES, Mar. 13, 2008, at A1 (suggesting that race issue keeps resurfacing despite the candidates' trying to shift focus to other issues).

¹²⁵ Jill Lawrence & Eugene Kiely, *Clinton Strategist Says Obama 'Can't Win the General Election'*, <http://blogs.usatoday.com/onpolitics/2008/03/clinton-strateg.html> (Mar. 13, 2008, 13:30 EST) (quoting Clinton campaign strategist as saying that not winning Pennsylvania raises serious questions about whether Obama can win the election).

¹²⁶ *Id.*

¹²⁷ See *Candidate Clinton to Richardson: 'Barack Obama Can't Win'*, <http://blogs.abcnews.com/politicalradar/2008/04/candidate-clint.html> (Apr. 02, 2008, 19:39 EST) (noting that Richardson and Clinton both deny that Clinton said Obama cannot win); Beth Fouhy, *Did Clinton Say Obama Can't Win? Aides Back Off Candidate's Apparent Denial*, HOU. CHRON., Apr. 4, 2008, available at <http://www.chron.com/disp/story.mpl/politics/5674032.html> (explaining that Clinton aides insisted that Clinton was merely stating that she does not speak about private conversations).

¹²⁸ Internet Video: Jeremiah Wright – Obama's mentor – Hate speech, YouTube, Mar. 13, 2008, <http://www.youtube.com/watch?v=vdJB-qkfUHc&feature=related>.

¹²⁹ See Jodi Kantor, *A Candidate, His Minister and the Search for Faith*, N.Y. TIMES, Apr. 30, 2007, at A1 (describing a party, attended by Barack Obama, honoring Reverend Wright's many years of service); see also Lisa Miller, *Trying Times for Trinity*, NEWSWEEK, Mar. 24, 2008, at 50 (contrasting the small, dying church that Jeremiah Wright helped to grow into a mega-church boasting 8,500 members).

from one of Reverend Wright's sermons.¹³⁰

Wright's sermons harshly criticized America for its mistreatment of African Americans. In one sermon Wright said, "The government gives them the drugs, builds bigger prisons, passes a three-strike law and then wants us to sing 'God Bless America.' No, no, no, God damn America, that's in the Bible for killing innocent people."¹³¹ In a 2003 sermon Wright said, "God damn America for treating our citizens as less than human. God damn America for as long as she acts like she is God and she is supreme."¹³² On the Sunday following September 11, 2001, terrorists attacks in New York and Washington, Wright told his congregation, "We bombed Hiroshima, we bombed Nagasaki, and we nuked far more than the thousands in New York and the Pentagon, and we never batted an eye."¹³³

Wright's comments, which made national headlines, alarmed and offended many of those who heard them.¹³⁴ Many whites assumed that as a long-standing and active parishioner, Obama agreed with Wright's statements. Wright's image and comments activated unconscious fears and resentments that many whites had about "threatening" black men such as Louis Farrakhan, the outspoken and controversial leader of the Nation of Islam.¹³⁵ Viewers automatically retrieved mental associations with Obama when Wright's words and image were broadcast. This reaction posed a threat to Obama's candidacy.¹³⁶

Prior to the Wright controversy, Obama had not made race a theme in his campaign. His message was much broader and more universal. Wright's remarks made it necessary for Obama to confront race directly. On March 18, 2008, Obama delivered a speech, *A More Perfect Union*, in

¹³⁰ See Brian Ross & Rehab El-Buri, *Obama's Pastor: God Damn America, U.S. to Blame for 9/11*, ABC NEWS, Mar. 13, 2008, available at <http://abcnews.go.com/blotter/story?id=4443788> (discussing the close relationship between Obama and Reverend Wright that began twenty years before Obama's run in the 2008 Democratic Primary).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Pew Research Center, National Discontent Approaches 20-Year High, Bush Approval at 28%, Obama Weathers the Wright Storm, Clinton Faces Credibility Problem 8 (2008), <http://people-press.org/reports/pdf/407.pdf> (reporting that a clear majority of whites who heard about Rev. Wright's sermons said they were personally offended by what he said).

¹³⁵ See THE FARRAKHAN FACTOR: AFRICAN-AMERICAN WRITERS ON LEADERSHIP, NATIONHOOD, AND MINISTER LOUIS FARRAKHAN (Amy Alexander ed., 1998) (attempting to gather the opinions of African-American writers on Louis Farrakhan, the religious leader who has a "sharp eye for controversy").

¹³⁶ See *Bill Moyers Journal* (PBS television broadcast Apr. 25, 2008, video and transcript at <http://www.pbs.org/moyers/journal/04252008/transcript1.html>). The excerpts from Wright's sermon were taken out of context, and when viewed in its entirety it is apparent that his statements are not reflections of racial hatred or disloyalty. *Id.*

Philadelphia, Pennsylvania. Obama condemned Wright's words, but asked Americans to understand the painful experiences that caused Wright to speak them. Obama also spoke sympathetically about the plight of working class whites and asked for a broader understanding of their difficulties. Obama pointedly disagreed with Wright's comments but declined to abandon him as a friend. Emphasizing the need to end racial divisiveness, Obama said:

[W]e have a choice in this country. We can accept a politics that breeds division, and conflict, and cynicism. . . . Or, at this moment, in this election, we can come together and say, "not this time." This time we want to talk about the crumbling schools that are stealing the future of black children and white children and Asian children and Hispanic children and Native American children. . . . This time we want to talk about the shuttered mills that once provided a decent life for men and women of every race, and the homes for sale that once belonged to Americans from every religion, every region, every walk of life. . . . This time we want to talk about the men and women of every color and creed who serve together, and fight together, and bleed together under the same proud flag. . . .

. . . .

I would not be running for President if I didn't believe with all my heart that this is what the vast majority of Americans want for this country. This union may never be perfect, but generation after generation has shown that it can always be perfected. And today, whenever I find myself feeling doubtful or cynical about this possibility, what gives me the most hope is the next generation—the young people whose attitudes and beliefs and openness to change have already made history in this election.¹³⁷

Obama's oratorical skills had been a hallmark of his campaign, but this speech raised him to a new standard.¹³⁸ Commentators predicted that the

¹³⁷ Senator Barack Obama, D-Ill., 2008 Democratic Primary Season Speech: *A More Perfect Union* (Mar. 18, 2008) (video and transcript available at <http://my.barackobama.com/page/content/hisownwords>).

¹³⁸ See *Obama Speech Brings Range of Reactions*, USA TODAY, Mar. 19, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-03-19-obama-reax_N.htm (providing different reactions to Obama's March 18, 2008, speech as collected by various staff members); see also Dave Astor, *Columnist Reaction to Obama Speech Was Not Always Predictable*, EDITOR & PUBLISHER, Mar. 20, 2008, http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003728 (discussing the reactions of columnists around the country).

speech would be historic.¹³⁹ *The New York Times* reported that the speech had been viewed more than 1.6 million times on YouTube and was widely e-mailed. Religious groups, academic institutions, and other organizations were enthusiastic about Obama's call for a national conversation about race.¹⁴⁰ Polling data indicated that the Wright controversy did not undermine Obama's campaign, though he did lose the Pennsylvania primary.¹⁴¹

The Wright controversy escalated after his appearance at the National Press Club in Washington D.C. on April 28, 2008.¹⁴² At this event Wright repeated his claim that American foreign policy was responsible for the September 11th attacks. Additionally, he reiterated his suggestion that the government may have created the AIDS virus to kill African Americans.¹⁴³ Wright spoke favorably about Louis Farrakhan, denied that he was anti-Semitic while still defending his interpretation of Zionism as racism, and accused the United States of engaging in terrorism.¹⁴⁴ Wright contended that the controversy was not about him or his statements, but was an "attack on the black church."¹⁴⁵ These remarks added fuel to the firestorm of controversy surrounding Wright.¹⁴⁶ The next day, Obama convened a

¹³⁹ See *Obama Speech Brings Range of Reactions*, *supra* note 138 (featuring statements from various people who heard the speech and felt it could help the state of race relations in this country); see also Astor, *supra* note 138 (compiling columnist reactions from around the country).

¹⁴⁰ See Larry Rohter & Michael Luo, *Groups Respond to Obama's Call for National Discussion About Race*, N.Y. TIMES, Mar. 20, 2008, at A21 (noting the excitement and enthusiasm among Americans over Barack Obama's speech); see also Rachel Streitfeld & Cody Combs, Rep. Lewis: Race Controversy Good for Dialogue, CNN.COM, Mar. 31, 2008, <http://www.cnn.com/2008/POLITICS/03/30/lewis.wright/index.html> (reporting that civil rights leader and Congressman John Lewis said the discussion about race could ultimately prove beneficial).

¹⁴¹ See PEW RESEARCH CENTER, *supra* note 134. A survey conducted by the Pew Research Center for the People & the Press, during the week of March 19th-22nd, showed that Obama maintained a 49% to 39% advantage over Hillary Clinton in the race for the Democratic nomination. This was essentially unchanged from the 49% to 40% lead he held in late February, before the Wright controversy developed. The Pew poll found that videos of Rev. Jeremiah Wright's controversial sermons and Obama's speech each received more public attention than any other event in the 2008 presidential campaign. Obama's speech was hailed by his supporters, endorsed by many of Clinton's followers and approved by one-third of Republican voters. *Id.*

¹⁴² See Reverend Jeremiah Wright, Trinity United Church of Christ, Remarks to the National Press Club (Apr. 28, 2008) (transcript available at <http://www.nytimes.com/2008/04/28/us/politics/28text-wright.html>, video available at http://www.huffingtonpost.com/2008/04/28/jeremiah-wright-at-nation_n_98949.html) (repeating the claims that caused the controversy, but adding that in order to properly understand them the entire sermon must be heard).

¹⁴³ *Id.* (answering questions regarding those topics, but emphasizing that they were aimed at the U.S. government and not the American people).

¹⁴⁴ See *id.* (commenting that the 9/11 terrorist attack was an inevitable response to the United States own acts of terrorism unto others).

¹⁴⁵ See *id.* (responding to questions concerning why Wright has decided to speak out).

¹⁴⁶ See, e.g., Colbert I. King, *The Next Willie Horton*, WASH. POST, May 3, 2008, at A15, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/05/02/AR2008050202796_pf.html (including Jeremiah Wright's arrival in the latest presidential campaign in a list of events that have

press conference in which he denounced Reverend Wright's remarks and made clear that their relationship had been completely severed. Obama explained that he was "outraged by the comments that were made and saddened over the spectacle"¹⁴⁷ He said Wright's "comments were not only divisive and destructive," but they also give comfort to "those that prey on hate and I believe they do not accurately portray the perspective of the black church."¹⁴⁸ Wright's strident comments made race salient in the Democratic primary. Every time Wright's words were broadcast on radio and television programs, they invoked subconscious associations with Obama that were primed by the media's negative presentations. Wright's comments activated the unconscious fears and stereotypes that many whites harbor about black militants.¹⁴⁹

Hillary Clinton's racial appeals became explicitly apparent after the North Carolina and Indiana primaries. During a May 5, 2008 interview with USA Today, Clinton said, "I have a much broader base to build a winning coalition."¹⁵⁰ As evidence for this assertion, Clinton cited an Associated Press article and said "Obama's support among working, hard-working Americans, white Americans, is weakening again, and how whites

played a pivotal role in influencing campaign outcomes.); *see also* Bill Moyers, *Was It Really What Jeremiah Wright Said, Or Was It Because He's Black?*, ALTERNET, May 3, 2008, available at <http://www.alternet.org/story/84330/> (discussing the varied public opinions of Jeremiah Wright and his contentious behavior); Peggy Noonan, *Loyal to the Bitterness*, May 2, 2008, WALL ST. J., May 2, 2008, at A11, available at <http://online.wsj.com/article/SB120966911007860195.html> (commenting on the impact and validity of Jeremiah Wright's statements); T. Shawn Taylor, *Obama's Painful Damage Control: A Pastor Most Impolitic*, CHI. TRIB., May 4, 2008, available at <http://archives.chicagotribune.com/2008/may/04/image/chi-obama-wright-trinitymay04> (stating pundits condemned Wright's statements as controversial and portrayed him as crazed and anti-American); *Wright Says Criticism is Attack on Black Church: Obama's ex-Pastor Hopes Controversy Sparks Race in America Dialogue*, ASSOCIATED PRESS, Apr. 28, 2008, available at <http://www.msnbc.msn.com/id/24351213/> (reinforcing the controversial impact of Jeremiah Wright's remarks in the media); Mortimer B. Zuckerman, *Reverend Wright's Wrongs*, U.S. NEWS & WORLD REPORT, May 2, 2008, available at <http://www.usnews.com/articles/opinion/mzuckerman/2008/05/02/reverend-wrights-wrong> (explaining that Jeremiah Wright's appearance "in the national television spotlight has turned our politics upside down").

¹⁴⁷ *See* Reverend Jeremiah Wright, *supra* note 142 (quoting the transcript of a press conference held by Senator Obama in response to statements made by Jeremiah Wright).

¹⁴⁸ *Id.*; Senator Barack Obama, *supra* note 137.

¹⁴⁹ *See* Shankar Vedantam, *The Willie Horton of the 2008 Campaign?*, WASH. POST., May 5, 2008, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/04/AR2008050401847.html> (commenting upon the damage Wright has caused Obama's public persona); *see also* Porter Shreve, *Feeling Blue in Indiana*, N.Y. TIMES, May 6, 2008, available at <http://www.nytimes.com/2008/05/06/opinion/06shreve.html?ref=opinion> ("Folks have been handed the cover issue and now don't have to say 'I'm not voting for Obama because he's black,' but instead, 'I'm not voting for him because he listened to a black preacher.'").

¹⁵⁰ Kathy Kiely & Jill Lawrence, *Clinton Makes Case for Wide Appeal*, USA TODAY, May 8, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-05-07-clintoninterview_N.htm.

in both states who had not completed college were supporting me."¹⁵¹ The article noted that Clinton's "blunt remarks about race" were made the day after the North Carolina and Indiana primaries.¹⁵²

In a May 9, 2008 article, Peggy Noonan, a former speechwriter for Ronald Reagan¹⁵³ reacted to Clinton's remarks in her Wall Street Journal column:

White Americans? Hard-working white Americans? "Even Richard Nixon didn't say white" . . . To play the race card as Mrs. Clinton has, to highlight and encourage a sense that we are crudely divided as a nation, to make your argument a brute and cynical 'the black guy can't win but the white girl can' is—well, so vulgar, so cynical, so cold, that once again a Clinton is making us turn off the television in case the children walk by.¹⁵⁴

The New York Times, which endorsed Clinton early in the primary, reacted in an editorial that harshly criticized Clinton because she "press[ed] her candidacy through negative campaigning with disturbing racial undertones."¹⁵⁵ On May 10, 2008, *New York Times*'s columnist Bob Herbert compared Clinton's remarks to Richard Nixon's Southern Strategy, calling them an insult to white and black Americans.¹⁵⁶ Another commentator wrote that Clinton "sounded less like George Washington and more like George Wallace."¹⁵⁷ Her message was, "Vote for me. I'm white. I can win because other whites will vote for me."¹⁵⁸

¹⁵¹ *Id.*

¹⁵² *Id.* (noting Hillary Clinton's continued determination to pursue the Democratic Nomination).

¹⁵³ See Peggy Noonan, *Biography*, available at <http://www.peggynoonan.com/biography.php> (chronicling the speechwriting experiences of Peggy Noonan).

¹⁵⁴ Peggy Noonan, *Damsel of Distress*, WALL ST. J., May 9, 2008, available at http://online.wsj.com/article/SB121027865275678423.html?mod=opinion_columns_featured_lsc.

¹⁵⁵ Editorial, *Sen. Clinton and the Campaign*, N.Y. TIMES, May 9, 2008, available at <http://www.nytimes.com/2008/05/09/opinion/09fri1.html?ref=opinion> (emphasizing the mistakes that The New York Times believes Hillary Clinton has made).

¹⁵⁶ See Bob Herbert, *Seeds of Destruction*, N.Y. TIMES, May 10, 2008, available at <http://www.nytimes.com/2008/05/10/opinion/10herbert.html?ref=opinion> (criticizing the rhetoric that Hillary Clinton has been using to influence the nation that she is the candidate favored by "hard working Americans, white Americans"); see also Eugene Robinson, *The Card Clinton is Playing*, WASH. POST, May 9, 2008, at A27, available at http://www.washingtonpost.com/wp/dyn/content/article/2008/05/08/AR2008050802807.html?nav=most_emaild (highlighting comments that Hillary has made that suggest white people will never vote for a black candidate).

¹⁵⁷ Ruben Navarrette Jr., *Commentary: No Racism in the Presidential Election?*, CNN.COM, May 14, 2008, <http://www.cnn.com/2008/POLITICS/05/14/navarrette/index.html>.

¹⁵⁸ *Id.*

VI. COUNTERING SUBTLE APPEALS

This section will explain how exposing hidden racial messages can undermine subtle appeals. Displays of overt bias are damaging to the careers of candidates and elected officials as they violate the norm of racial equality. During a 100th birthday party for Strom Thurmond, Senator Trent Lott noted that his state, Mississippi, was one of four states Thurmond won during his 1948 presidential campaign. Lott said, "We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years either."¹⁵⁹ Thurmond walked out of the Democratic Convention and, in 1948, ran as a "Dixiecrat" to protest the party's pro-civil rights stance. Segregation and "states' rights" were the central theme of Thurmond's campaign. The implication of Lott's remarks was the nation would have fared better if the segregationists had prevailed. Lott was widely condemned for his remarks.¹⁶⁰ President George Bush harshly criticized Lott, saying any suggestion that segregation was acceptable is "offensive and it is wrong."¹⁶¹ Despite repeated apologies, Lott could not stop the barrage of criticism, which was aided considerably by the "new media"¹⁶² The political firestorm resulted in his resignation from the position of Republican leader of the Senate.¹⁶³

Former Virginia Senator George Allen lost his bid for re-election in 2006 after footage of him using an ethnic slur was posted on YouTube. During a campaign stop, Allen experienced what became known as his "macaca moment." Ramanuja Sidarth, a campaign worker for Democratic nominee James Webb, was recording the Allen rally with video equipment. Pointing to Sidarth, Allen mocked him saying, "This fellow over here with the yellow shirt, macaca or whatever his name is. . . .[h]e's with my opponent.

¹⁵⁹ Bush Calls Lott's Comments 'Offensive': GOP Leader Faces Pressure for Further Explanation, CNN.COM, Dec. 13, 2002, available at <http://archives.cnn.com/2002/ALLPOLITICS/12/12/lott.comment/>.

¹⁶⁰ See *US Senate Leader Steps Down*, BBC NEWS, Dec. 20, 2002, available at <http://news.bbc.co.uk/2/hi/americas/2595189.stm> (stating that Mr. Lott had "spoke approvingly of a presidential candidate in the 1940s who had favored racial segregation").

¹⁶¹ Bush Calls Lott's Comments 'Offensive', *supra* note 159.

¹⁶² These include web sites, chat rooms, e-mail, online communities and the like. Weblogs were a driving force in Lott's ouster. See Noah Shachtman, *Blogs Make the Headlines*, WIRED, Dec. 2, 2003, available at <http://www.wired.com/culture/lifestyle/news/2002/12/56978>. Weblogs influence the way news is presented; they debate what the press reports, correct errors and refine the news flow. Gracie Lawson-Borders & Rita Kirk, *Blogs in Campaign Communication*, 49 AM. BEHAV. SCI. 548, 549 (2005).

¹⁶³ See *Lott Steps Down as Majority Leader*, CNN.COM, Dec. 20, 2002, available at <http://archives.cnn.com/002/ALLPOLITICS/12/20/lott.controversy/index.html> (discussing the events that led to Lott's decision to step down as majority leader).

He's following us around everywhere. . . . Let's give a welcome to macaca here. Welcome to America and the real world of Virginia."¹⁶⁴ Macaca is the genus for macaques, a type of monkey found in northern Africa and elsewhere.¹⁶⁵ The word is also a derogatory term for dark-skinned people that French colonials used in North Africa, where Senator Allen's mother was raised.¹⁶⁶ Mr. Sidarth, an American of Indian descent, was a senior at the University of Virginia who grew up in Fairfax, Virginia.¹⁶⁷ The remarks were captured by Sidarth's video recorder.¹⁶⁸ Prior to this incident, Allen had been leading in the polls. He was a rising star in the Republican Party and had been viewed as a potential presidential candidate.¹⁶⁹ The macaca incident set off a wave of controversy and criticism that probably cost Allen the election.¹⁷⁰ These examples show how displays of racial bias can derail the careers of elected officials.

Subtle appeals to race can be countered by making them explicit.¹⁷¹ This can be accomplished by exposing the racial connotation of the message. Mainstream and new media outlets can identify the subtle appeal and explain its racial meaning. Doing so makes voters aware of the racial nature of the message and shows that the candidates' tactics violate the equality norm. Unconscious racists engage in biased conduct when there are race-neutral justifications for their behavior, but they are less likely to discriminate when doing so would be obvious to themselves or others. Subtle appeals work best when the racial message is submerged and outside of the recipient's conscious awareness. They are less likely to succeed when the racial bias is exposed. As the Trent Lott and George Allen examples show, the availability of the new media makes exposure much easier than it would have been a decade ago when the old media framed political discourse.

¹⁶⁴ Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology: Name Insults Webb Volunteer*, WASH. POST, Aug. 15, 2006, at A01; see Editorial, *George Allen's America Whom it Includes, and Whom it Doesn't*, WASH. POST, Aug. 15, 2006, at A12 (positing the possible racial nature of Senator Allen's comments).

¹⁶⁵ See Craig, *supra* note 164 (noting various meanings of the word, depending upon spelling).

¹⁶⁶ *Id.* (quoting Allen as saying, "I would never want to demean him as an individual. I do apologize if he's offended by that. That was no way the point.")

¹⁶⁷ *Id.*

¹⁶⁸ See Internet Video: George Allen Introduces Macaca, YouTube, Aug. 15, 2006, <http://www.youtube.com/watch?v=r90z0PMnKwI>.

¹⁶⁹ See Christine Lagorio, *Allen Concedes Virginia Senate Race*, CBS NEWS, Nov. 9, 2006, available at <http://www.cbsnews.com/stories/2006/11/09/politics/main2169988.shtml> (stating that Senator Allen was leading in the polls until news of his comments became known).

¹⁷⁰ See Michael D. Shear & Tim Craig, *Allen on Damage Control After Remarks to Webb Aide*, WASH. POST, Aug. 16, 2006, at A01 (suggesting the controversy damaged the senator's reputation in the area of race relations).

¹⁷¹ See MENDELBERG, *supra* note 31, at 4.

The Clinton campaign's subtle appeals did not succeed and, in some cases, backfired because they were exposed for what they actually were – coded appeals to race.¹⁷² The exposure was aided considerably by the new media with its ability to disseminate information quickly from a broad range of sources at a rapid pace. Many observers, especially African Americans, were upset with Hillary Clinton's remarks, which seemed, to them, to diminish the accomplishments of Martin Luther King.¹⁷³ Observers were put off by Bill Clinton's statement that Obama's campaign was a "fairy tale"¹⁷⁴ and his efforts to marginalize Obama as "the Black candidate."¹⁷⁵

Bill Clinton had enjoyed unprecedented support among African Americans. He was so well liked that author Toni Morrison identified him as America's first Black President.¹⁷⁶ In the fall of 2007, Hillary Clinton held a strong lead over Barack Obama among African-American Democrats, particularly among Black women, 68 percent of whom identified her as their likely choice, compared to 25 percent who supported Obama. At the time, black men registered as Democrats were divided, with 42 percent favoring Clinton and 46 percent favoring Obama.¹⁷⁷ Clinton's support among blacks dropped precipitously after race was injected into the campaign. A survey conducted by CNN/Opinion Research Corporation in January of 2008 found that 59 percent of black Democrats supported

¹⁷² See Ben Smith, *Insults, Apologies Fuel Obama's Rise*, POLITICO, Feb. 28, 2008, <http://www.politico.com/news/stories/0208/8751.html> (discussing the numerous apologies made by Senator Clinton's campaign due to comments about Senator Obama's race); see also *Some Claiming Hussein- and Race-Baiting Strengthen Obama*, N.Y. MAG., Feb. 28, 2008, available at http://nymag.com/daily/intel/2008/02/some_claiming_hussein_and_race.html (noting Senator Clinton's refusal to reject the support of a Latino not voting for Senator Obama due to his race).

¹⁷³ See Wayne Washington, *Clinton Camp Hits Obama: Attacks 'Painful' for Black Voters*, <http://newsgroups.derkeiler.com/Archive/Alt/alt.politics.bush/2008-01/msg00842.html> (last visited Mar. 15, 2009) (arguing that black voters are divided over who to support and Senator Clinton's comments make that divide more evident); see also Ben Smith, *Racial Tensions Roil Democratic Race: Comments From Clintons On Obama, MLK Jr., Have Infuriated Some Americans*, CBS NEWS, Jan. 11, 2008, available at <http://www.cbsnews.com/stories/2008/01/11/politics/main3702777.shtml?source=search> (commenting on the groundswell of reaction to Clinton's remarks).

¹⁷⁴ Posting of Katharine Q. Seelye & Kate Phillips to The Caucus, <http://thecaucus.blogs.nytimes.com/2008/01/11/bill-clinton-tries-to-tamp-down-fairy-tale-remark-about-obama/> (Jan. 11, 2008, 19:52 EST) (remarking on former President Bill Clinton's efforts to quell the outrage over his comments).

¹⁷⁵ Glenn Greenwald, *Bill Clinton: The Chris Matthews of South Carolina*, SALON.COM, <http://www.salon.com/opinion/greenwald/2008/01/27/clinton/index.html> (last visited Mar. 17, 2008) (mentioning statements made by President Bill Clinton regarding Barack Obama).

¹⁷⁶ Andrea Sachs, *10 Questions for Toni Morrison*, TIME, May 7, 2008, available at <http://www.time.com/time/arts/article/0,8599,1738303,00.html> (featuring comment about President Bill Clinton by Toni Morrison).

¹⁷⁷ Poll: Black Support Helps Clinton Extend Lead, CNN.COM, <http://www.cnn.com/2007/POLITICS/10/17/poll.blacks.democrats/index.html> (displaying Hilary Clinton's expected support by Black voters).

Obama, and 31 percent backed Clinton.¹⁷⁸ By April of 2009, Hillary Clinton's support among black voters had virtually evaporated. A poll published on April 18, 2008 found that 80 percent of the black electorate supported Obama with only 6 percent favoring Clinton.¹⁷⁹

Several articles published in the New York Times, the Washington Post, regional newspapers, online journals and weblogs criticized Bill and Hillary Clinton's statements, as well as those made by Clinton's supporters.¹⁸⁰ The reports and commentary exposed the hidden racial messages in the anti-Obama statements and took the Clinton campaign to task for playing the "race card."¹⁸¹ The negative reactions to the Clinton campaign's subtle racial appeals undermined support for their candidate. At the annual State of the Black Union forum held in New Orleans on February 23, 2008, Hillary Clinton apologized, saying to the largely African-American audience, "If anyone was offended by anything that was said, whether it was meant or not, whether it was misinterpreted or not, then obviously I regret that."¹⁸² However, by then it was too late; the damage had been done.¹⁸³ On June 3, 2008, Senator Barack Obama won the Democratic presidential nomination.¹⁸⁴

VII. THE 2008 ELECTION

John McCain was officially nominated at the Republican Convention held in Minneapolis-Saint Paul, Minnesota, on September 1-4, 2008. The McCain campaign repeatedly questioned Obama's patriotism and attempted to paint him as an "exotic," whose views are outside of the American mainstream. However, it was McCain's selection of Sarah Palin

¹⁷⁸ Paul Steinhauser, *Poll: Obama Makes Big Gains Among Black Voters*, CNN.COM, <http://www.cnn.com/2008/POLITICS/01/18/poll.2008/index.html> (documenting the changes in voting trends).

¹⁷⁹ Michael Hirsh, *Hillary Drops Back: A New Newsweek Poll Shows Obama Pulling Away*, NEWSWEEK, Apr. 18, 2008, <http://www.newsweek.com/id/132721/page/1> (displaying poll data that shows Barack Obama's increasing numbers).

¹⁸⁰ See *supra* notes 155-58 and accompanying text; see also *Incident Tracker: Clinton Attacks Obama*, PBWIKI.COM, <http://clintonattacksobama.pbwiki.com/Incident+Tracker> (displaying and chronicling racial attacks made against Barack Obama by the Clinton camp).

¹⁸¹ *Id.*

¹⁸² Posting of Sean Callebs & Mike Roselli to CNN Political Ticker, <http://politicalticker.blogs.cnn.com/2008/02/24/clinton-offers-regrets-for-husbands-remarks/> (Feb. 24, 2008, 14:45 EST) (displaying Senator Hilary Clinton's regret for comments made by President Clinton).

¹⁸³ Dan Balz & Jon Cohen, *Blacks Shift To Obama, Poll Finds*, WASH. POST, Feb. 28, 2007, at A01 (mentioning the change in projected Black voting trends).

¹⁸⁴ See, e.g., Jeff Zeleny, *Obama Clinches Nomination; First Black Candidate to Lead a Major Party Ticket*, N.Y. TIMES, June 4, 2008, available at http://www.nytimes.com/2008/06/04/us/politics/04elect.html?_r=1&ref=us&oref=slogin (chronicling Barack Obama's presidential nomination).

as his running mate that set the tone for the final stages of his campaign. Palin was the first woman to be nominated as a candidate for Vice President by the Republican Party. Palin's selection signaled the McCain campaign's intention to exploit the same gender, race, class, and religious divisions that have worked for Republicans since Nixon launched his Southern Strategy in 1968.

In *Obama and The Palin Effect*, Deepak Chopra explains the nature of Palin's effect on her supporters. After noting Obama's appeals to lofty ideals, Chopra states:

[Palin] is the reverse of Barack Obama, in essence his shadow, deriding his idealism and exhorting people to obey their worst impulses. In psychological terms the shadow is that part of the psyche that hides out of sight, countering our aspirations, virtue, and vision with qualities we are ashamed to face: anger, fear, revenge, violence, selfishness, and suspicion of "the other." For millions of Americans, Obama triggers those feelings, but they don't want to express them. He is calling for us to reach for our higher selves, and frankly, that stirs up hidden reactions of an unsavory kind.¹⁸⁵

The "hidden reactions" to which Chopra refers include racial resentment and unconscious discrimination. Chopra explains that Palin's invocation of "small town values" ignores America's global presence and signals a return narrow-minded parochialism. At her acceptance speech at the Republican Convention, Palin spoke about "family values," which is a code for rejecting claims for social justice. The implicit message was that immigrants and racial minorities do not belong to the white "American family." Chopra concludes, "Palin reinforces the overall message of the reactionary right, which has been in play since 1980, that social justice is liberal-radical, that minorities and immigrants, being different from 'us' pure American types, can be ignored, that progressivism takes too much effort and globalism is a foreign threat."¹⁸⁶

Palin is, in many ways, a reincarnation of Richard Nixon and Ronald Reagan. She has Nixon's ability to exploit the anger and frustration of middle and working class voters. She has Ronald Reagan's sunny disposition – he smiled as he disparaged "Welfare Queens" and "young bucks" eating steaks purchased with food stamps. At the Republican

¹⁸⁵ Deepak Chopra, *Obama and the Palin Effect*, HUFFINGTON POST, Sept. 13, 2008, http://www.huffingtonpost.com/deepak-chopra/obama-and-the-palin-effec_b_123943.html.

¹⁸⁶ *Id.*

convention, Palin mixed humor with derisive sarcasm and, like Reagan, she delivered her most mean-spirited lines with a smile and a wink.

Largely unknown outside of Alaska prior to her nomination, the media scrutinized Palin's background focusing on her lack of depth and sophistication.¹⁸⁷ These attributes were not important to the following she attracted. Her appeal resonated at an emotional level deep within their psyches. Palin's supporters were attracted to her not as a person with the knowledge and skills that a President must possess, but because she is "one of us." Palin's supporters were the descendants of Nixon's "silent majority." They were the "Reagan Democrats" who voted for Republicans after deciding that the Democratic Party abandoned them, and instead favored the interests of impoverished families, racial minorities, feminists, and other groups. Most important, Palin's strongest supporters were Christian evangelicals who had traditionally supported republican candidates, but were reluctant to support John McCain.¹⁸⁸

Palin's remarks at the Republican Convention were just the beginning. On September 19, 2008, the McCain campaign released a commercial in which racial images were used to frighten white voters. The commercial used quick cuts, black and white images, shadowed lighting, and ominous tones, all hallmarks of attack ads.¹⁸⁹ The McCain ad started with an image of Franklin Raines, the former African-America head of Fannie Mae. A voice stated that Raines was the cause the problems that led to the government seizing control of that organization.¹⁹⁰ A few seconds later, the commercial switched to images of two black men, Franklin Raines and Barack Obama, followed by a picture of a seemingly vulnerable elderly white woman. The voice accused Fannie Mae of committing fraud while under Raines' command, and falsely claimed that Raines was Obama's

¹⁸⁷ See Jo Becker et al., *Once Elected, Palin Hired Friends and Lashed Foes*, N.Y. TIMES, Sept. 14, 2008 (suggesting that recent controversy has marred Palin's credentials); David Brooks, *Why Experience Matters*, N.Y. TIMES, Sept. 15, 2008 (generally discussing Sarah Palin's political record); Alec MacGillis, *As Mayor of Wasilla, Palin Cut Own Duties, Left Trail of Bad Blood*, WASH. POST, Sept. 14, 2008, at A1 (stating that Palin has faced many questions about whether she was qualified for Vice Presidency).

¹⁸⁸ Christian Evangelicals Send McCain a Message: Arizona Senator Will Have a Battle to Gain Their Trust and Support, ASSOCIATED PRESS, Feb. 12, 2008, available at <http://www.msnbc.msn.com/id/23137096/> (discussing Senator McCain's campaign with regard to Christian evangelical republicans).

¹⁸⁹ See JAMIESON, *supra* note 110, at 51.

¹⁹⁰ See Julie Bosman, *McCain Tries to Link Obama to Financial Crisis*, N.Y. TIMES, Sept. 20, 2008, at A13 (depicting the ad that portrayed Raines as Obama's main economic advisor); *Linking Obama to Ex-Fannie Mae Chief is a Stretch*, WASH. POST, Sept. 20, 2008, at A4 (stating that the video attempted to link Obama to Raines, the former chief executive of a bankrupt mortgage giant); Posting of Karen Tumulty to Swampland, http://swampland.blogs.time.com/2008/09/18/mccain_plays_the_race_card/ (Sept. 18, 2008, 21:45 EST) (finding that the attack ad suggested Obama's principal economic adviser was Franklin Raines).

financial advisor.¹⁹¹ Race was not mentioned, but the commercial invoked the stereotype of dishonest black men who would jeopardize voters' finances and pensions.

In a *New York Times* commentary, editorial writer Brent Staples examines the subtle and overt racial appeals made by Obama's opponents.¹⁹² A Georgia Congressman referred to Obama as "uppity."¹⁹³ Staples explains that in the pre-civil rights South, African Americans who violated the racial order were labeled "uppity niggers[,] and were subjected to violence and intimidation to keep them in line."¹⁹⁴ After initially standing by his statement, the Congressman retreated, saying that the dictionary definition carried no racial meaning. Staples finds this excuse "implausible" given the history and context attached to the term, which is very well-known in the South.

Representative Geoff Davis, a Republican from Kentucky, used a similar reference when he expressed his lack of confidence in Obama's preparedness to handle nuclear weapons. He said, "That boy's finger does not need to be on the button."¹⁹⁵ The reference to "boy" harkens back to the time when interpersonal interactions in the South were regimented by an unwritten code of conduct. As Gunnar Myrdal explained in the 1940s, "The Negro is expected to address the white person by the title of 'Mr.,' 'Mrs.,' or 'Miss' From his side, the white man addresses the Negro by his first name, no matter if they hardly know each other, or by the epithets 'boy,' 'uncle,' 'elder,' 'aunty,' or the like, which are applied without regard to age."¹⁹⁶ Myrdal concluded that "[t]he apparent purpose of this etiquette of conversation is the same as that of all the etiquette of race relations. It is to provide a continual demonstration that the Negro is inferior to white man and 'recognizes' his inferiority."¹⁹⁷ Staples ends his commentary with an examination of the meaning of a McCain commercial that accused Obama of being "disrespectful" to Sarah Palin. Staples concludes that the reference was subtle, but "its racial antecedents are very clear."¹⁹⁸

¹⁹¹ See Bosman, *supra* note 190 (describing the ad that depicted Obama as taking advice from Raines in regards to the mortgage and housing policy while linking Raines to financial fraud).

¹⁹² Brent Staples, *Barack Obama, John McCain and the Language of Race*, N.Y. TIMES, Sept. 22, 2008, at A22.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 611 (Transaction Publishers 2d ed. 1997) (1944).

¹⁹⁷ *Id.* at 612.

¹⁹⁸ Staples, *supra* note 192.

On October 5, 2008, Douglass K. Daniel, a reporter for the Associated Press, asserted that Sarah Palin's remarks during a speech made in Englewood, Colorado, on October 4, 2008 were "racially tinged."¹⁹⁹ Palin said, "Our opponent . . . is someone who sees America, it seems, as being so imperfect, imperfect enough, that he's palling around with terrorists who would target their own country. . . . This is not a man who sees America like you and I see America."²⁰⁰ Daniel observed that "Palin's words avoid repulsing voters with overt racism. But is there another subtext for creating the false image of a black presidential nominee 'palling around' with terrorists while assuring a predominantly white audience that he doesn't see their America?"²⁰¹ Daniel concluded that Palin's attack "carried a racially tinged subtext."²⁰² Daniel's interpretation of the "subtext" was accurate and it exposed hidden racial meaning of Palin's remarks. Her portrayal of Obama as "not like us" was an appeal to race. The "us" in this context refers to whites and, by implication, Obama is the "other," who should be feared because he associates with "terrorists" and does not share "our" values.

Palin's repeated use of racial code words at campaign events generated harsh and frightening reactions from the audiences.²⁰³ In an October 7, 2008 editorial, the *New York Times* stated that Palin's "rallies have become spectacles of anger and insult" and that the McCain campaign had resorted to "race-baiting and xenophobia."²⁰⁴ The *Times* observed, "[A]t a rally in Florida . . . a man yelled 'kill him!' as Ms. Palin delivered that line [about Obama "palling" around with terrorists] and others shouted epithets at an

¹⁹⁹ Douglass K. Daniel, *Palin's Ayers Attack "Racially Tinged"*, HUFFINGTON POST, Oct. 5, 2008, http://www.huffingtonpost.com/2008/10/05/ap-palins-ayers-attack-ra_n_132008.html.

²⁰⁰ *Id.*; Palin Makes Obama Terrorist Claim, BBC NEWS, Oct. 5, 2008, available at <http://news.bbc.co.uk/2/hi/americas/7653132.stm>.

²⁰¹ Daniel, *supra* note 199.

²⁰² *Id.* Palin cited a New York Times article to claim that Obama had a close ties to William Ayers, a 1960s radical. See *Fact Check: Is Obama 'Palling Around with Terrorists'?*, CNNPOLITICS.COM, Oct. 5, 2008, <http://politicalticker.blogs.cnn.com/2008/10/05/fact-check-is-obama-palling-around-with-terrorists/>. In fact, the Times article said the two were not close and a CNN Politics.com article examined the facts and found that Palin's claim was completely false.

²⁰³ See Dana Milbank, *In Fla., Palin Goes for the Rough Stuff as Audience Boos Obama*, WASH. POST, Oct. 6, 2008, available at http://voices.washingtonpost.com/the-trail/2008/10/06/in_fla_palin_goes_for_the_roug.html (showing that Palin caused the crowd to 'boo' Obama numerous times during a campaign speech); see also Joe Garofoli, *Thinly Veiled Racism Seen in New Attacks on Obama*, S.F. CHRON., Oct. 9, 2008, at A1 (finding that speakers at McCain-Palin rallies referred to the opposing presidential candidate as Barack Hussein Obama, placing emphasis on his middle name to implicate Obama's Muslim roots).

²⁰⁴ Editorial, *A Degenerating Foray Into Attack Politics*, N.Y. TIMES, Oct. 7, 2008, <http://www.nytimes.com/2008/10/08/opinion/08iht-edebate.1.16784154.html>.

African-American member of a TV crew.”²⁰⁵

Reacting to the conduct of the angry crowds that gathered at Palin's rallies, Georgia Congressman and Civil Rights leader John Lewis said,

During another period, in the not-too-distant past, there was a governor of the state of Alabama named George Wallace who also became a presidential candidate. George Wallace never threw a bomb. He never fired a gun, but he created the climate and conditions that encouraged vicious attacks against innocent Americans who were simply trying to exercise their constitutional rights.²⁰⁶

Lewis was referring to George Wallace's race baiting tactics as Alabama's Governor and, later, as a third party candidate in 1968. Palin's remarks were not overtly racist, but they were intended to provoke the fears of white, working class voters who felt that Obama was too different from them to serve as President, yet were unable to admit to themselves and others that they objected to him because he is black. The overt bias was directed against “Arabs” and Muslims who, in the minds of many, are associated with terrorism.²⁰⁷

The fear tactic was used again in mid-October of 2008, when the McCain campaign launched thousands of automated “robo” calls that linked Obama to “domestic terrorists.” The caller said,

You need to know that Barack Obama has worked closely with domestic terrorist Bill Ayers, whose organization bombed the U.S. Capitol, the Pentagon, a judge's home, and killed Americans. And Democrats will enact an extreme leftist agenda if they take control of Washington. Barack Obama and his Democratic allies lack the judgment to lead our country.²⁰⁸

²⁰⁵ *Politics of Attack*, N.Y. TIMES, Oct. 8, 2008, at A30; Rachel Weiner, *Palin Rally: “Kill Him” Yelled Again*, HUFFINGTON POST, Oct. 14, 2008, http://www.huffingtonpost.com/2008/10/14/palin-rally-kill-him-yell_n_134597.html.

²⁰⁶ Elisabeth Bumiller, *Congressman Rebukes McCain for Recent Rallies*, N.Y. TIMES, Oct. 12, 2008, at A36.

²⁰⁷ See Peter Beinart, *Is Barack Obama American Enough?*, TIME, Oct. 9, 2008, available at <http://www.time.com/time/magazine/article/0,9171,1848755,00.html> (noting that since 9/11, racism and fears of foreignness in America have fused with fears of terrorism).

²⁰⁸ Ernest Luning, *Another McCain Robocall Claims Obama Ties to Domestic ‘Terorist’*, COLO. INDEP., <http://coloradoindependent.com/11660/another-mccain-robocall-claims-obama-ties-to-domestic-terrorist> (Oct. 16, 2008, 12:25 GMT); Patrick Healy & Jo Becker, *Republicans Rain Negative Automated Calls on Voters in Swing States*, N.Y. TIMES, Oct. 17, 2008, available at <http://www.nytimes.com/2008/10/18/us/politics/18robo.html>; Sam Stein, *Wave of McCain Robocalls Reported, Some May Violate State Law*, HUFFINGTON POST, Feb. 28, 2009, http://www.huffingtonpost.com/2008/10/16/massive-mc-robocall-may_n_135348.html. William Ayers is a 63-year-old education professor at the University of Illinois at Chicago, who served with Obama

At a Greensboro, North Carolina fundraiser held in mid-October 2008, Palin said,

“We believe that the best of America is not all in Washington, D.C. . . . We believe that the best of America is in these small towns that we get to visit, and in these wonderful little pockets of what I call the real America, being here with all of you hard working very patriotic, pro-America areas of this great nation.”²⁰⁹

This was another example of Palin’s “us” versus “them” approach. It was intended to create divisions within the electorate. Her message was that small, predominately white communities are the “real America” and, by implication, the urban and metropolitan communities, where large numbers of racial minorities and immigrants reside, are not the “real America.”²¹⁰ Later, in claims that contained echoes of the McCarthy era, McCain and Palin repeatedly accused Obama of being a “socialist.”²¹¹ In late October, the McCain campaign distributed portions of a 2001 interview, claiming that it showed that Obama believed in “redistributing wealth.”²¹² This was another effort to portray Obama as alien, radical, and “un-American”; someone who should be feared and distrusted.

In November 2008, the Republican Party launched a television ad that

and others on two philanthropic boards and the board of an education project. Ayers was a member of a 1960s radical group, the Weathermen. See Chris Fusco & Abdon M. Pallasch, *Who is Bill Ayers?*, CHI. SUN TIMES, Apr. 18, 2008, available at <http://www.suntimes.com/news/politics/obama/902213,CST-NWS-ayers18.article#>. He spent ten years as a fugitive in the 1970s after the group bombed the Pentagon, the U.S. Capitol and other government buildings. *Id.* After surrendering in 1980, the charges against him were dropped because of improper government surveillance. *Id.* Obama and Ayers were described as friendly, but not close. *Id.*

²⁰⁹ *Biden Blasts Palin’s “Pro-America” Comments*, A.B.C. NEWS, <http://blogs.abcnews.com/politicalradar/2008/10/biden-blasts-pa.html> (Oct. 17, 2008, 17:44 EST); Juliet Eilperin, *Palin’s “Pro-America Areas” Remark: Extended Version*, WASH. POST, Oct. 17, 2008, http://voices.washingtonpost.com/the-trail/2008/10/17/palin_clarifies_her_pro-america.html.

²¹⁰ See *Palin Discusses Potential Plans for America*, CNN.COM, Oct. 21, 2008, <http://www.cnn.com/2008/POLITICS/10/21/palin.sitroom/index.html>. After the statement generated an outcry in the press, Palin apologized for any misunderstandings caused when she referred to the patriotic values of “the real America” and “pro-America areas of this great nation.” *Id.*

²¹¹ See Matthew Mosk, *McCain Assails Obama’s Plans as Socialist: McCain Assails Obama’s Plans as Socialist*, WASH. POST, Oct. 19, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/18/AR2008101802212>.

html (reporting that John McCain stated in an interview that he believed many Americans would equate Obama’s policy of “redistributing wealth” with socialism); *Palin Uses the Plumber to Call Obama Socialist on CNN*, http://weblogs.baltimoresun.com/entertainment/zontv/2008/10/palin_uses_the_plumber_to_call.html (Oct. 21, 2008, 19:24 EST) (quoting Sarah Palin’s interview with CNN, in which she stated, “Joe the plumber...came right out and said...it sounds like socialism to him. And he speaks for so many Americans...”).

²¹² See Michael Falcone, *McCain Campaign Cites Comments in 2001 on Courts in Attack on Obama*, N.Y. TIMES, Oct. 28, 2008, available at <http://www.nytimes.com/2008/10/28/us/politics/28wealth.html?ref=politics>. However, this article shows that the quote was taken out of context. *Id.*

featured Reverend Jeremiah Wright. The ad used dark hues, quick cuts, and ominous tones, all hallmarks of attack ads. During the thirty-second commercial, a narrator said, "If you think you could ever vote for Barack Obama, consider this: Obama chose as his spiritual leader this man."²¹³ The ad cut to a picture of Wright and was followed by several excerpts from Wright's sermons in which he attacked the United States. The commercial emphasized Obama's long relationship with Wright and ended with the narrator stating, "Does that sound like someone who should be president?"²¹⁴ There was nothing subtle about this ad; it was intended to frighten white voters.

McCain and Palin relied heavily on attacking their opposition throughout the 2008 campaign. Barack Obama, in contrast, executed a campaign strategy that emphasized his personal history and used a combination of third-party authentication and effective responses to his opponents' attacks. The strategy included connecting with white voters by speaking directly to them in television ads.²¹⁵ Obama's commercials showed pictures of him as a child with his white mother and grandparents. Other commercials showed him talking in an informal manner directly into the camera. This approach presented Obama as a reasonable person with whom white voters could relate; not the radical person depicted on the Internet and talk radio shows, and nothing like militant black politicians who made some white voters uncomfortable. Obama emphasized that his accomplishments were the product of hard work, personal responsibility, and self-discipline – values shared by most voters.

Obama also used "third-party authentication," endorsements by individuals that voters highly respect. Among his most prominent third-party authenticators were Ted and Caroline Kennedy, who endorsed Obama during the Democratic primary.²¹⁶ These individuals not only represented the heart of the Democratic establishment, but were the heirs to the powerful Kennedy legacy. Colin Powell reinforced the authentication process in October of 2008 when he endorsed Obama on *Meet the Press*

²¹³ *Pennsylvania Republicans Highlight Wright in Last-Minute Ad*, CNN.COM, Nov. 2, 2008, <http://www.cnn.com/2008/POLITICS/11/02/campaign.wrap/index.html>.

²¹⁴ *Id.*

²¹⁵ See Jason Zengerle, *The Message Keeper: How David Axelrod Learned to Conquer Race*, THE NEW REPUBLIC, Nov. 5, 2008, available at <http://www.tnr.com/politics/story.html?id=3ffae5b3-3ca3-4186-a9bf-59c00be8e98b> (stating that Obama "used his race as a message of hope and change for voters who may be receptive to such a pitch").

²¹⁶ See Jeff Zelney & Carl Hulse, *Kennedy Chooses Obama, Spurning Plea by Clintons*, N.Y. TIMES, Jan. 28, 2008, available at <http://www.nytimes.com/2008/01/28/us/politics/28kennedy.html> (reporting that Ted Kennedy grew disenchanted with Clinton's campaign and criticized Bill for making misleading statements about Obama and injecting race into the campaign).

and condemned the McCain campaign's divisive tactics, including its conflation of Muslims and terrorists.²¹⁷

When Obama was attacked by his opponents, he reacted promptly and effectively, but in ways that did not make him appear angry or militant. Responding to Hillary Clinton's attacks, Obama said, "[W]hat we need is change, not old-style thinking; conviction, not triangulation . . ." ²¹⁸ When McCain attacked, the Obama campaign responded with ads that turned McCain's comments against him by denouncing them as "a distraction" and "dishonorable."²¹⁹ The Obama campaign created a website called Fight the Smears, which was devoted to combating attacks.²²⁰ This proved to be a winning strategy.

CONCLUSION

Racial appeals in political campaigns have a long and dark history in American politics. They began in the Reconstruction Era during the late 19th century and continued into the mid-1960s as explicit racial appeals. They relied on hate and fear of African Americans for their potency. After the enactment of Civil Rights laws of the 1960s, overt appeals to race diminished, but they were quickly replaced with subtle appeals. Richard Nixon used coded appeals as the centerpiece of his Southern Strategy. "States' rights" and "law and order" were the code phrases of his campaigns. Ronald Reagan consistently used subtle appeals in his campaign and in the implementation of his governing policies. "Welfare Queens" driving Cadillacs and "strapping young bucks" buying T-Bone steaks with food stamps were the imagery he repeatedly invoked. George H.W. Bush used convicted rapist Willie Horton's frightening visage to defeat Michael Dukakis. In 1991, Bill Clinton clashed with Sister Souljah to establish his racial bona fides. A scantily-clad blonde kept Harold Ford out of Tennessee's governor's mansion in 2006.

When candidates use subtle racial appeals, their intent is to win, irrespective of any collateral damage to African Americans and other

²¹⁷ Posting of Elizabeth Bumiller to The Caucus, <http://thecaucus.blogs.nytimes.com/2008/10/19/powell-endorses-obama/> (Oct. 19, 2008, 9:21 EST). Powell stated that the ideas put forth by McCain and Palin's campaign were "beyond just good political fighting back and forth." *Id.*

²¹⁸ Zengerle, *supra* note 215.

²¹⁹ See Internet Video: "Honor," Barackobama.com, http://mybarackobama.com/page/content/honor_ad (last visited Mar. 15, 2009) (using McCain's own aggressive tactics against him).

²²⁰ See Fight The Smears – Learn The Truth About Barack Obama, <http://www.fightthesmears.com/> (last visited Mar. 18, 2009). The website corrected distortions and untrue statements made about him and invited visitors to the site to report any smears the identified. *Id.*

minorities, or race relations. The goal is to ignite the fears and passions of voters. The appeals inflict considerable damage to the political process and the negative effects extend far beyond the political arena. Subtle appeals heighten societal divisions, perpetuate fears and stereotypes, and foster racial resentment.

The 2008 Presidential election was an historic event. Part of the history was the democratization of the media. Twenty-four hour cable television programming, on-line news outlets, blogs, YouTube, Facebook, and other non-traditional media dramatically changed the ways in which elections are conducted and covered. Many of the media outlets influencing the 2008 election such as YouTube and Huffington Post did not exist 2004. *The New York Times* reported that YouTube videos mentioning Obama or McCain had been viewed 2.3 billion times.²²¹ The political debate was not framed by the mainstream media. Candidates' statements were immediately and intensely scrutinized in multiple news outlets. False claims and subtle appeals to race were quickly exposed. The Clinton campaign's use of subtle appeals backfired after their racial messages were exposed by media. The same thing happened to John McCain and Sarah Palin in the general election. Their efforts to provoke racial fears and to trigger latent biases were disclosed to the public. This rendered the appeals ineffective and in many instances, caused them to backfire. In this election, Jim Crow laid low and it is doubtful that we will see him anymore.

²²¹ David Carr & Brian Stelter, *Campaigns in a Web 2.0 World*, N.Y. TIMES, Nov. 2, 2008, available at [http://www.nytimes.com/2008/11/03/business/media/03media.html?_r=1&scp=1&sq=campaign 2.0&st=cs](http://www.nytimes.com/2008/11/03/business/media/03media.html?_r=1&scp=1&sq=campaign%20&st=cs) (reporting on the profound change in the media landscape over the past four years).