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“EIGHTEEN MILLION CRACKS”: GENDER’S ROLE IN THE  
2008 PRESIDENTIAL CAMPAIGN

GREGORY S. PARKS\*  
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ABSTRACT

In light of the 2008 presidential campaign, Gregory S. Parks and Jeffrey J. Rachlinski wrote an extensive analysis, titled *A Better Metric*, likening the campaign to an interview process and hiring decision for a high-ranking job. Though unpublished, their work spawned a number of published articles, book chapters, and a book on the role of unconscious race and gender bias in the evaluations of President Barack Obama, First Lady Michelle Obama, and Secretary of State Hillary Clinton. In light of the analogy between voting and hiring decisions, this article argues that questions about sexism and gender bias along the campaign trail implicate the law. Title VII of the Civil Rights Act of 1964 protects individuals from gender bias in the workplace. While modern conceptions of how such bias actually operates, largely drawn from social and cognitive psychology, should aid legal decision-makers in determining whether bias indeed occurred in any particular case, greater insight into the intersection of psychology and the law is needed. Here, we explore the roles that sexism and implicit, or unconscious, gender bias played in the 2008 presidential race, analyzing these factors through the lens of Title VII. Further, we buttress the proposition put forth by a growing body of legal scholars that the role of implicit attitudes in decision-making has significant implications for Title VII jurisprudence.

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## INTRODUCTION

As a chief executive, commander-in-chief, foreign policy director and legislative leader, the President of the United States has a complex and challenging job. Yet despite the positional power and authority associated with the job, it is a job nonetheless.<sup>1</sup> Accordingly, presidential elections can be likened to an employment context. When U.S. citizens vote for a presidential candidate they attempt to evaluate who would be the best person for the job. Like employers, the American people are tasked with hiring (electing), promoting (re-electing), and—through their representatives—firing (impeaching and removing) job incumbents. Like employees, candidates are challenged to demonstrate their qualifications for, interest in, and fit to the position. Overall both sides strive to achieve an optimal fit between a job candidate and a position.

According to political theorists, voters select candidates who support and implement policies they favor.<sup>2</sup> More specifically, based on psychological theories of similarity and attraction,<sup>3</sup> voter preferences are posited to be for candidates who match their attitudes toward certain policies. The results of research on voting behavior, however, tell a somewhat different story as voters' candidate preferences have been shown to correlate with individual perceptions of candidates' traits, and emotional reactions to the candidates themselves.<sup>4</sup> As is

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1. Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 676-77, 686, 701 (2010); Gregory S. Parks et al., *Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210, 215 (2009), available at <http://www.pennumbra.com/debates/debate.php?did=20>; Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination Through the Lens of Title VII*, 20 HASTINGS WOMEN'S L.J. 3, 3-4 (2009); see also Jim Acosta et al., *Clinton: 'Think About This as a Hiring Decision'*, CNN.COM, May 18, 2008, <http://www.cnn.com/2008/POLITICS/05/18/campaign.wrap/index.html> (referring to the U.S. presidency as a job and the race for it as a job interview).

2. See J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 174 (1979) (describing different motivations of voters).

3. See DONN BYRNE, *THE ATTRACTION PARADIGM* 247-50 (1971) (discussing how similarity and attraction might apply in the context of candidates and voters).

4. Donald R. Kinder & David O. Sears, *Public Opinion and Political Action*, in 2

true in employers' hiring decisions,<sup>5</sup> subjective factors influence individual assessments regarding who is the "best person" for the job.

The 2008 presidential race provides a useful context in which to explore gender perceptions and attitudes, specifically how those factors influenced voting behavior during Hillary Clinton's presidential run.<sup>6</sup> If citizens held certain perceptions of Clinton's abilities relative to those needed to be an effective president or had emotional reactions to her and her candidacy, then it is reasonable to envisage that such factors influenced citizens' behavior as voters. Furthermore, if elections and hiring decisions are analogous, implicit attitudes research sheds light on gender discrimination in the employment context. As such, contemporary Title VII scholarship and certain aspects of the 2008 presidential election may reciprocally illuminate one another.

By likening the 2008 presidential election to personnel selection, we consider broadly whether Clinton would have a viable claim against the American people for sex-based employment discrimination under Title VII. Specifically, this article provides three parallels: 1) the role of gender in politics; 2) the role of gender under Title VII; and 3) the distinction between conscious/explicit and unconscious/implicit gender biases and their roles within politics and employment discrimination law. Part I of this article discusses women's political participation as both voters and candidates and reflects on the role of sexism in these political processes. Part II draws upon political science research to investigate voting behavior in elections with female candidates, and considers the potential role of sexism and gender bias in Clinton's campaign. Part III further explores unconscious gender biases and their influence on employment discrimination and extrapolates from jurisprudence in this area to make inferences about whether Clinton could file a successful Title VII claim for implicit gender bias in her quest to become President of the United States.

#### I. THE INFLUENCE OF SEXISM ON WOMEN'S POLITICAL PARTICIPATION AND POWER

As discussed in Parks and Rachlinski's *A Better Metric*, women have long been disenfranchised in the political arena.<sup>7</sup> Dating as far back as the late 1700s, few women—and ultimately only free white

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HANDBOOK OF SOCIAL PSYCHOLOGY 690, 690-91 (Gardner Lindzey & Elliot Aronson eds., Random House 3d ed. 1985).

5. Paul R. Sackett & Filip Lievens, *Personnel Selection*, 59 ANN. REV. PSYCHOL. 419, 429-30 (2008).

6. Gregory S. Parks & Jeffrey J. Rachlinski, *A Better Metric: The Role of Unconscious Race and Gender Bias in the 2008 Presidential Race* 32-33, 35-38 (Cornell Legal Studies Research Paper Series, Research Paper No. 08-007, 2008), available at <http://ssrn.com/abstract=1102704>.

7. *Id.*

men—were allowed to vote.<sup>8</sup> When it came time to agitate for women's right to vote, it was not the major political parties of the day that fought for women.<sup>9</sup> Rather, it was middle- and upper-class women.<sup>10</sup> After Congress ratified the Fifteenth Amendment, southern white men opposed female suffrage out of fear that it would increase the number of black voters.<sup>11</sup> Opponents also argued that voting "was not a right but [rather] a privilege," and that women were virtually represented by men.<sup>12</sup>

During its evolution, "[t]he women's suffrage movement witnessed three stages."<sup>13</sup> The first stage began in 1848 when the Women's Rights Convention, with an emphasis on political rights, adopted its declaration.<sup>14</sup> During the second stage, which was bolstered by the Civil War, Elizabeth Cady Stanton and Susan B. Anthony led the Women's National Loyalty League, which "backed Senator [Charles] Sumner's insistence that the [Civil War] be a battle for . . . universal emancipation."<sup>15</sup> When Congress refused to send the states an amendment, analogous to the Fifteenth Amendment but in respect to gender and voting, suffrage leaders focused on the Fourteenth Amendment, which they believed protected a woman's right to vote.<sup>16</sup> During the final stage, in and around 1869, women founded the National Woman Suffrage Association—to pressure Congress to pass a constitutional amendment that would enfranchise women—and the American Woman Suffrage Association, which focused its efforts on constitutional conventions and state legislatures.<sup>17</sup> In 1890, these organizations combined, forming the National American Woman Suffrage Association (NAWSA).<sup>18</sup> It was due to the efforts of NAWSA and other women's organizations that Congress ratified the Nineteenth Amendment, which gave women the right to vote.<sup>19</sup>

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8. *Id.* at 6 (citing DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* 117-18 (2004)).

9. *Id.* (citing DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* 119 (2004)).

10. DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* 120 (2004).

11. Parks & Rachlinski, *supra* note 6, at 7 (citing STEPHENSON, *supra* note 10, at 117-22).

12. *Id.* (citing STEPHENSON, *supra* note 10, at 121).

13. *Id.* at 7.

14. *Id.* (citing STEPHENSON, *supra* note 10, at 125-27).

15. STEPHENSON, *supra* note 10, at 127.

16. *Id.* at 129.

17. *Id.* at 131-32.

18. Parks & Rachlinski, *supra* note 6, at 7 (citing STEPHENSON, *supra* note 10, at 125, 131-33).

19. *Id.* at 7 (citing STEPHENSON, *supra* note 10, at 125-33, 182).

The efforts of women suffragists had a slow but critical impact on women’s political power in the United States. From 1917—when the first woman joined Congress<sup>20</sup>—until the early 1990s, few women were elected to Congress.<sup>21</sup> In 1993, however, women nearly doubled their congressional ranks from thirty-four to fifty-five.<sup>22</sup> As of the 110th Congress (2007-2009), the number stood at ninety-four,<sup>23</sup> which shows that gender still matters to voters, including women, who comprise fifty-four percent of the electorate.<sup>24</sup> It is the change in law, but far slower change in a potential outcome of the law, which underscores the potential that individual attitudes have to effectuate change in human behavior. The point being, “the law can only truly make a difference if underlying discriminatory attitudes change as well.”<sup>25</sup>

## II. COULD HILLARY CLINTON FILE A SUCCESSFUL TITLE VII CLAIM FOR EXPLICIT SEXISM?

It is no surprise that a political candidate’s gender has long predicted electability.<sup>26</sup> This article argues that politics is analogous to the employment context. In both, an individual is presumably seeking a position, often in competition with others, and is at the mercy of those who must decide to elect (in the political context) or hire (in the employment context) that individual.<sup>27</sup> If such an analogy is apropos, then Title VII is instructive in how one might examine the 2008 presidential election—under Title VII, employers may not discriminate because of an applicant’s sex.<sup>28</sup> In its *Price Waterhouse v. Hopkins*

20. *I’m No Lady, I’m a Woman of Congress: Women Pioneers on Capital Hill, 1917-1934*, WOMEN IN CONGRESS, <http://womenincongress.house.gov/historical-essays/essay.html?intID=2> (last visited Jan. 31, 2011).

21. Parks & Rachlinski, *supra* note 6, at 7.

22. *Women Representatives and Senators by Congress, 1917-Present: 102nd Congress*, WOMEN IN CONGRESS, <http://womenincongress.house.gov/historical-data/representatives-senators-by-congress.html?congress=102> (last visited Jan. 31, 2011); *Women Representatives and Senators by Congress, 1917-Present: 103rd Congress*, WOMEN IN CONGRESS, <http://womenincongress.house.gov/historical-data/representatives-senators-by-congress.html?congress=103> (last visited Jan. 31, 2011).

23. *Women Representatives and Senators by Congress, 1917-Present: 110th Congress*, WOMEN IN CONGRESS, <http://womenincongress.house.gov/historical-data/representatives-senators-by-congress.html?congress=110> (last visited Jan. 31, 2011).

24. See Kathleen Q. Seelye & Dalia Sussman, *Clinton Has Support of Women But Faces Skepticism, Poll Says*, N.Y. TIMES, July 20, 2007, at A1 (noting that fifty-four percent of the electorate was female in 2007).

25. Laura Bacon, Note, *Godinez v. Sullivan-Lackey: Creating a Meaningful Choice for Housing Choice Voucher Holders*, 55 DEPAUL L. REV. 1273, 1275 (2006).

26. See Parks & Rachlinski, *supra* note 6, at 32-33.

27. See Jim Acosta et al., *supra* note 1 (likening Clinton’s presidential campaign to a traditional hiring decision).

28. 42 U.S.C. § 2000e-2(a)(1) (2006).

decision, the Supreme Court clarified what constitutes sex discrimination under Title VII.<sup>29</sup> “[W]hen a plaintiff . . . proves that her gender played a motivating part in an employment decision, the defendant may avoid . . . liability only by proving . . . it would have made the same decision even if it had not taken the plaintiff’s gender into account.”<sup>30</sup> In deciding *Price Waterhouse*, the Court looked to gender-stereotyping language used by company partners and representatives during their partnership selection process.<sup>31</sup>

An expert witness, psychologist Dr. Susan Fiske, “testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping.”<sup>32</sup> Dr. Fiske predicated her analysis on “the overtly sex-based comments of partners” and their “gender-neutral remarks” that “were intensely critical of [plaintiff-respondent].”<sup>33</sup> According to Dr. Fiske, given that plaintiff-respondent was “the only woman in the pool of candidates”<sup>34</sup> and the evaluations’ subjectivity, the highly critical remarks were probative of gender bias.<sup>35</sup> The Supreme Court found that in previous years when evaluating partner candidates at Price Waterhouse, partners favored those who maintained their femininity over those who did not.<sup>36</sup>

Ultimately, the Supreme Court held that sex-stereotyped remarks in the employment context are not automatic proof of gender discrimination.<sup>37</sup> Where, however, the employee demonstrates that the employer relied on gender in making its decision, stereotyped remarks can be “evidence that gender played a part” in the hiring decision.<sup>38</sup> It also placed the burden on the employer to show that it had a legitimate reason for an employment decision where there is both a possible legitimate and discriminatory motive.<sup>39</sup>

#### A. Sexism and the Electability of Women Candidates

As Parks and Rachlinski have noted, “sex-role stereotyping . . . has hampered women’s ability to be considered as serious candidates for elected office.”<sup>40</sup> This is in part due to gender stereotyping, which

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29. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

30. *Id.*

31. *Id.* at 235.

32. *Id.*

33. *Id.*

34. *Id.* at 236.

35. *Price Waterhouse*, 490 U.S. at 236.

36. *Id.*

37. *Id.* at 258.

38. *Id.* at 251 (emphasis in original).

39. *Id.* at 252. “The employer . . . must show that its legitimate reason, standing alone, would have induced it to make the same decision.” *Id.*

40. Parks & Rachlinski, *supra* note 6, at 32 (citing KATHLEEN A. DOLAN, VOTING FOR WOMEN: HOW THE PUBLIC EVALUATES WOMEN CANDIDATES 8-9, 59-67 (2004)).

continues to pervade American electoral politics.<sup>41</sup> Even beyond voter behavior, women's lack of traction as political candidates also has to do with political parties' gate-keeping activities, as party leaders are aware of gender stereotypes and the electoral chances of women vis-à-vis men.<sup>42</sup> It is not only men whose voting decisions are influenced by gender; women's are as well, with women supporting female candidates more than male candidates.<sup>43</sup> While there is evidence of the influence of gender on voting behavior, the political outcomes of such gender effects have been mixed. For example, research shows that once on the ballot, women have been as successful as men at gaining elected office.<sup>44</sup> In addition, reviews of U.S. House of Representatives elections revealed no significant differences in the success of male versus female candidates.<sup>45</sup> One conclusion might be that the role of sexism in political processes has substantially diminished in recent years. The results of research on sexism and the electability of female candidates may also reflect the types of positions for which women have primarily run. Because few women have pursued a major-party presidential nomination,<sup>46</sup> we have little insight into the effects of

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41. *Id.* (citing RICHARD LOGAN FOX, GENDER DYNAMICS IN CONGRESSIONAL ELECTIONS 173-75 (1997); Deborah Alexander & Kristi Andersen, *Gender as a Factor in the Attribution of Leadership Traits*, 46 POL. RES. Q. 527 (1993); David Niven, *Party Elites and Women Candidates: The Shape of Bias*, 19 WOMEN & POL. 57 (1998); Kira Sanbonmatsu, *Gender Stereotypes and Vote Choice*, 46 AM. J. POL. SCI. 20, 28-30 (2002)). For example, women candidates who demonstrate stereotypically female characteristics are at a disadvantage, particularly in terms of male voters. Leonie Huddy & Nayda Terkildsen, *The Consequences of Gender Stereotypes for Women Candidates at Different Levels and Types of Office*, 46 POL. RES. Q. 503, 517-18 (1993). Moreover, when contemplating who to elect for President, voters who view terrorism, homeland security, and U.S. involvement in Iraq as the most important problems facing the U.S. believe that a man will do a better job of handling such issues. Erika Falk & Kate Kenski, *Issue Saliency and Gender Stereotypes: Support for Women as Presidents in Times of War and Terrorism*, 87 SOC. SCI. Q. 1, 12 (2006).

42. Parks & Rachlinski, *supra* note 6, at 33 (citing KIRA SANBONMATSU, WHERE WOMEN RUN: GENDER & PARTY IN THE AMERICAN STATES 2-3, 22, 26-30, 37-86, 97-115, 118 (2006)).

43. *Id.* at 33 (citing KATHLEEN A. DOLAN, VOTING FOR WOMEN: HOW THE PUBLIC EVALUATES WOMEN CANDIDATES 92, 101 (2004); Craig Leonard Brians, *Women for Women?: Gender and Party Bias in Voting for Female Candidates*, 33 AM. POL. RES. 357, 359 (2005); Paul S. Herrnson et al., *Women Running "as Women": Candidate's Gender, Campaign Issues, and Voter Targeting Strategies*, 65 J. POL. 244, 249-50 (2003); Eric Plutzer & John F. Zipp, *Identity Politics, Partisanship, and Voting for Women Candidates*, 60 PUB. OPINION Q. 30, 40 (1996)).

44. Leonie Huddy & Theresa Capelos, *Gender Stereotyping and Candidate Evaluation: Good News and Bad News for Women Politicians*, in THE SOCIAL PSYCHOLOGY OF POLITICS 29, 30 (Victor C. Ottati et al. eds., 2002).

45. RICHARD A. SELTZER ET AL., SEX AS A POLITICAL VARIABLE: WOMEN AS CANDIDATES AND VOTERS IN U.S. ELECTIONS 79, 82-83 (1997); Alice H. Eagly et al., *Experimental Tests of an Attitudinal Theory of the Gender Gap in Voting*, 29 PERSONALITY & SOC. PSYCHOL. BULL., 1245, 1256 (2003).

46. Sean Alfano, *The Quest to Become Ms. President: Female Politicians Discuss the Prospects of a Woman Leader*, CBSNEWS.COM, Feb. 5, 2006, <http://www.cbsnews.com/stories/2006/02/05/Sunday/main1281736.shtml?tag=contentMain;contentBody>.

sexism on female candidates' qualifications for, and ability to succeed in, the position of President of the United States. Further, because gender may play a stronger role when determining a person's fitness for specific roles,<sup>47</sup> consideration of the relationship between gender and electability at higher levels is needed. Research suggests that men are favored over women when vying for authority positions, such as military officerships, given that such positions tend to be traditionally occupied by male incumbents and therefore are male-dominated.<sup>48</sup> "Individuals may be comforted by male leadership for the simple fact that they are accustomed to viewing men as authority figures and women as subordinates."<sup>49</sup> Therefore, in examining the 2008 presidential race, there are factors that suggest that Clinton would have a case against the American people for sex-based employment discrimination if the race had been a job interview.

### *B. Sexism and the Clinton Campaign*

Hillary Clinton first entered national consciousness in 1992 after her husband, Bill Clinton, became a candidate for the Democratic Party's presidential nomination.<sup>50</sup> After President Clinton won the nomination and the election, and subsequently assumed office, Mrs. Clinton was a trailblazer and an unconventional First Lady in many ways—becoming the first to (1) hold a post-graduate degree and professional career, (2) have an office in the West Wing of the White House, and (3) be a visible policy-maker in her husband's administration.<sup>51</sup> "Hillary Clinton was arguably the most openly empowered First Lady in American history, save perhaps for Eleanor Roosevelt."<sup>52</sup> Although she was a polarizing figure in American politics for nearly a decade and a half,<sup>53</sup> she was enormously popular in New York,

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47. See Eugenia Proctor Gerdes & Jane Hutson Kelman, *Sex Discrimination: Effects of Sex-Role Incongruence, Evaluator Sex, and Stereotypes*, 2 BASIC & APPLIED SOC. PSYCHOL. 219, 224 (1981) (explaining study results indicating that evaluators are influenced by traditional sex roles as well as the gender of candidates).

48. Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 7 (1992); Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1315, 1325 (2000).

49. Rudman & Kilianski, *supra* note 48, at 1325.

50. John F. Harris & Ann Devroy, *Her Way Versus the Washington Way: Ambition and Suspicion in the First Year Are Redounding on Hillary Rodham Clinton*, WASH. POST, Feb. 9, 1996, at A1.

51. Parks & Rachlinski, *supra* note 6, at 34 (citing Christopher Hanson, *Clinton Invites the People In: President Opens the White House to Ordinary Citizens*, SEATTLE POST-INTELLIGENCER, Jan. 22, 1993, at A1; Harris & Devroy, *supra* note 51, at A1; Jasmin K. Williams, *Hillary Rodham Clinton*, N.Y. POST, Oct. 30, 2006, at 28).

52. Parks & Rachlinski, *supra* note 6, at 34.

53. See Nicholas D. Kristof, *Who Is More Electable?*, N.Y. TIMES, Feb. 7, 2008, at A31 (noting fear that Clinton's political history—since her husband's 1992 election—would keep

winning a landslide U.S. Senate re-election in 2006.<sup>54</sup> Clinton's 2008 presidential run put to the test Americans' willingness to elect a woman as president, and poll data boded well for her candidacy.<sup>55</sup>

Calling into question her candidacy was, in part, the result of an immense dislike of her held by many political conservatives.<sup>56</sup> Part of their animus likely stemmed from the fact that Clinton was deemed to be "polarizing."<sup>57</sup> It may have also resulted from an attitude among some that Clinton failed to conform to or respect normative wife-and-mother behavior.<sup>58</sup> For example, Clinton is famous for noting that, as First Lady, she did not want to "stay at home, bake cookies and give teas."<sup>59</sup>

Accordingly, while poll data should have provided the Clinton campaign with signs of optimism, it should have also been foreboding. On one hand, some women voters paid more attention to the presidential race and were more likely to vote because of Clinton's candidacy.<sup>60</sup> While 80% of Americans told Gallup pollsters in a November 2007 poll that they expected female voters to be the deciding factor in Clinton's election to the presidency, 77% of women polled reported that they had not made up their minds.<sup>61</sup> On the other hand, polls

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her from winning votes).

54. Patrick Healy, *In a Field of Heavy Hitters No Sure Thing*, N.Y. TIMES, Jan. 21, 2007, at 27.

55. See Parks & Rachlinski, *supra* note 6, at 35 (describing polling data that was favorable for Clinton) (citing Bonnie Erbe Scripps, *Will Women Vote for Women?*, DESERT NEWS, Jan. 28, 2007, at G04; Andrea Sarvaday Feldhahn, *Does Sen. Hillary Clinton's Gender Hurt Her Chances to be Elected President?*, KNOXVILLE NEWS SENTINEL, Nov. 18, 2007, at 79). Moreover, in a general election match-up with then-leading GOP contender Rudy Giuliani, Clinton's lead was partially credited to women voters. Alex Spillius, *Hillary Drawing Increasing Support from Women in Blow to Giuliani*, DAILY TELEGRAPH, Nov. 2, 2007, at 21. Furthermore, while women held more positive views of "all of the leading Democratic candidates" than did men, "winning the support of women . . . [was] especially important to Mrs. Clinton," because women constituted fifty-four percent of voters in the 2004 presidential election. Seelye & Sussman, *supra* note 24, at A1.

56. Marianne Means, *Hillary Clinton is Battle-Ready*, SEATTLE POST-INTELLIGENCER, Oct. 21, 2007, at G4.

57. *Id.*

58. Carol Marin, *Michelle Obama Standing by Her Man*, CHI. SUN-TIMES, Feb. 20, 2008, at 25.

59. *Id.*

60. Parks & Rachlinski, *supra* note 6, at 36. In a Lifetime Networks poll during the 2008 campaign, twenty percent of women "said they were more likely to vote because Senator Clinton [was] running." *Id.* (citing Ann McFeatters, *Just How Strong is Hillary Clinton's Sisterhood?*, VENTURA COUNTY STAR, Nov. 12, 2007, at YY). Twenty-five percent of women noted that they paid more attention to campaign news "simply because [Clinton was] running." *Id.*

61. Ann McFeatters, *Just How Strong is Hillary Clinton's Sisterhood?*, VENTURA COUNTY STAR, Nov. 12, 2007, at YY.

consistently revealed a “gender gap, even among Democratic voters,” with Clinton receiving less support from men than from women.<sup>62</sup>

As Parks and Rachlinski articulated, Clinton’s response to a question raised in a New Hampshire diner<sup>63</sup> demonstrated how gender role perceptions might influence voter attitudes. Clinton’s teary-eyed response to a concerned voter’s question in regard to how Clinton managed to keep pace during the long primary season,<sup>64</sup> “might have signaled a kind of kinship” between her and her female supporters.<sup>65</sup> This is no surprise. Even though overt emotional displays by women risk playing into the stereotype that they lack the toughness to handle difficult situations,<sup>66</sup> Clinton’s expressiveness might have worked—winning her New Hampshire precisely because it helped her connect even more with women voters.<sup>67</sup>

While views regarding gender roles may have negatively influenced some voter perceptions of Clinton’s electability, such views may have also had concurrent positive effects. Consistent with former President Clinton’s announcement during his first run for the presidency, then-Senator Clinton may have allayed some concerns among voters with her two-for-the-price-of-one proposal.<sup>68</sup> In a June 3, 2007 CNN debate, she said her husband would serve in a roving ambassador’s role during her administration.<sup>69</sup> Although there was concern among some Americans about having her husband’s influence back

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62. Parks & Rachlinski, *supra* note 6, at 37. In a July 2007 poll of likely Democratic caucus-goers, conducted by the University of Iowa, “Clinton had 30 percent support among women and only 18 percent among men.” Matt Stearns, *Campaign 2008; Clinton Failing to Make Inroads with Male Voters: Democrats’ Lead Candidate Fighting Wide Gender Gap*, HOUS. CHRON., Aug. 26, 2007, at A4; *see also* Jerry Zremski, *New Women Voters Could Put Clinton in the White House; The Gender Card May Be Her Edge*, BUFFALO NEWS, Nov. 25, 2007, at A1 (reporting that a Zogby International poll indicated that Senator Clinton’s lead over Senator Obama in November “was entirely due to her support from women”). In contrast, Obama received twenty-one percent equally from men and women. Stearns, *supra* note 62, at A4. In the same poll, thirty percent of women strongly indicated that Clinton was the strongest Democratic candidate; nearly half that percentage of men felt similarly. *Id.* Thirty-two percent of women strongly believed that Clinton was electable, while less than half of that percentage of men felt similarly. *Id.*

63. Parks & Rachlinski, *supra* note 6, at 38.

64. *Id.*

65. *Id.* (citing Chris Rovzar & Jessica Pressler, *Hillary Clinton: Minority Candidate*, DAILY INTELLIGENCER (Jan. 9, 2008, 3:15PM), [http://nymag.com/daily/intel/2008/01/hillary\\_clinton\\_minority\\_candi.html?imw=Y](http://nymag.com/daily/intel/2008/01/hillary_clinton_minority_candi.html?imw=Y)).

66. *Id.*

67. *Id.* (citing Michael Fauntroy, *Don’t Overplay the Bradley Effect*, HUFFINGTON POST, (Jan. 11, 2008), [http://www.huffingtonpost.com/michael-fauntroy-phd/dont-overplay-the-bradl\\_b\\_80810.html](http://www.huffingtonpost.com/michael-fauntroy-phd/dont-overplay-the-bradl_b_80810.html)).

68. David Broder, *What of a Dual Presidency if Hillary Clinton Wins?*, KAN. CITY STAR, Nov. 19, 2007, at B9.

69. Robin Toner & Jeff Zeleny, *Iraq is the Flash Point as Eight Democratic Rivals Clash*, N.Y. TIMES, June 4, 2007, at A14.

in the executive office, male voters may have felt sufficiently at ease with a male presence in the White House to vote for her.<sup>70</sup>

Within the traditional Title VII paradigm, Clinton appeared to experience sex discrimination. First, popular T-shirts and bumper stickers were sold in reference to Clinton with phrases like "Bros Before Hoes,"<sup>71</sup> "How Do We Beat the Bitch,"<sup>72</sup> and "Life's a Bitch: Don't Vote For One!"<sup>73</sup> Actor and rapper Ludacris, a candid Obama supporter, called Clinton a "bitch" in a 2008-released song—prompting a rebuke from Obama.<sup>74</sup> In the employment context, women who are subjected to vulgar and offensive epithets like "whore" and "bitch" can establish a sexual harassment claim, even if gender-neutral reasons motivated the abuse.<sup>75</sup> Clinton's campaign was also subject to a number of gender-role-based remarks. For example, when she campaigned at a New Hampshire high school a man yelled from the audience, "Iron my shirt!"<sup>76</sup> There were also T-shirts and bumper stickers with a silhouette of a woman vacuuming and the phrase "Hillary '08" depicted on them.<sup>77</sup> Arguably, such statements and images are mere isolated remarks which provide little useful insight into the pervasiveness of gender-biased attitudes. Nonetheless, gender stereotyping is evidence of sex discrimination in the workplace,<sup>78</sup> particularly where women are defined by domestic roles.<sup>79</sup> However, in employment discrimination cases where plaintiffs—in order to demonstrate

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70. Camille Paglia, *She Won't Go Easy*, SALON.COM (May 14, 2008, 7:00 AM), <http://www.salon.com/opinion/paglia/2008/05/14/tarantella/index.html>.

71. *Bros Before Hoes Dark T-Shirt*, CAFEPRESS SHOP, [http://www.cafepress.com/+bros\\_before\\_hoes\\_dark\\_tshirt,218487144](http://www.cafepress.com/+bros_before_hoes_dark_tshirt,218487144) (last visited Jan. 31, 2011).

72. *How Do We Beat the Bitch?*, CAFEPRESS SHOP, <http://shop.cafepress.com/design/23630617> (last visited Jan. 31, 2011).

73. *Life's a Bitch Don't Vote for One—Funny Bumper Stickers*, AMAZON ONLINE STORE, <http://www.amazon.com/Lifes-bitch-dont-vote-one/dp/B000ZW27QI> (last visited Jan. 31, 2011).

74. John Horowitz, *Clinton Supporters Demand Obama Denounce Ludacris*, OBSERVER.COM (July 30, 2008, 2:37 PM), <http://www.observer.com/2008/politics/clinton-supporters-demand-obama-denounce-ludacris>; *Some Say Ludacris Song Won't Damage Obama in November*, AUGUSTA CHRON., Aug. 4, 2008, at B6.

75. *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000-01 (10th Cir. 1996); *see also Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 964 (8th Cir. 1993) (noting that "[a] female worker need not be propositioned, touched offensively, or harassed by sexual innuendo" in order for a sexual harassment claim to lie and holding that names such as "bitch," "slut," and "cunt" directed to a female employee amount to harassment based on her sex); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("[T]he pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.").

76. Sarah Wheaton, *'Iron my Shirt,' THE CAUCUS BLOG* (Jan. 7, 2008, 7:44 PM), <http://the.caucus.blogs.nytimes.com/2008/01/07/iron-my-shirt/>.

77. *Hillary '08 T-Shirts and Clothing*, CAFEPRESS SHOP, <http://shop.cafepress.com/design/25416564> (last visited Jan. 31, 2011).

78. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

79. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004).

pretext—produce evidence of comments made by a non-decision-maker or decision-maker unrelated to the employment action, courts may dismiss such “stray remarks.”<sup>80</sup> Some circuits, however, reject this “stray remarks” doctrine.<sup>81</sup> The Supreme Court, in its *Reeves v. Sanderson Plumbing Products, Inc.* decision, suggested that even where stray remarks are not made in the context of the employment decision in question, they are still probative in assessing discriminatory animus, potentially supporting a plaintiff’s argument of pretext.<sup>82</sup>

Blatant and express attitudes about Clinton’s gender played a role in the 2008 presidential race.<sup>83</sup> Contrary to public opinion, however, gender’s influence by-and-large benefitted Clinton. This is evidenced by the results of the twenty-nine primaries for which there were exit polls, in which a higher percentage of individuals voted for Clinton in fourteen of those states.<sup>84</sup> In those fourteen states, voters indicated that gender influenced their votes.<sup>85</sup> Conversely, Obama prevailed in only four of the states whose voters indicated that the candidates’ gender influenced their votes.<sup>86</sup> This analysis excludes Illinois, as this was a predictable win for Obama, and New York and Arkansas, as predictable wins for Clinton. Interestingly, the four states in which Obama prevailed were states with a high percentage of blacks in their populations.<sup>87</sup>

### III. COULD HILLARY CLINTON FILE A SUCCESSFUL TITLE VII CLAIM FOR IMPLICIT GENDER BIAS?

When people expressly indicate their attitudes, beliefs, and thought processes, many times they are inaccurate because individ-

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80. See *McMillan v. Mass. Soc’y for Prevention of Cruelty to Animals*, 140 F.3d 288, 301 (1st Cir. 1998) (providing two examples of courts declining to give weight to what they determined to be “stray remarks”); *Bright v. Standard Register Co.*, 66 F.3d 171, 173 (8th Cir. 1995).

81. See *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 770-71 (7th Cir. 2006) (stating that admission of “stray remarks” is permissible in some cases); *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 922-23 (8th Cir. 2000) (stating that “stray remarks” are not irrelevant); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000) (noting that “stray remarks” are relevant when “it may be possible to infer that decision makers were influenced” by the remarks) (quoting *Hunt v. City of Markham*, 219 F.3d 649, 652-53 (7th Cir. 2000)).

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

83. See *supra* text accompanying notes 50-56 (providing examples of the blatantly gender-based expressions of anti-Clinton sentiment).

84. *Parks & Roberson*, *supra* note 1, at 44.

85. *Id.*

86. *Id.*

87. See *id.* at 42-43 (noting that Alabama, Georgia, North Carolina and Mississippi have black populations of thirty percent or more).

uals sometimes lie when a factual portrayal of their beliefs would be offensive to others.<sup>88</sup> Additionally, more often than not people are wholly unaware of what lies within their own minds, as "an intuitive, gut reaction against a candidate can dictate choice. The rational account only follows later, and provides a fully accurate account of the decision."<sup>89</sup> What may explain this is the fact that people rely on parallel and distinct cognitive systems.<sup>90</sup> Comparatively, they are rapid versus slow, intuitive versus deductive, and unconscious versus conscious.<sup>91</sup> Whereas the rapid system dictates choice, for example, the slow system lags behind, searching for logical reasons for the choice that at least hints at the accessible parts of memory.<sup>92</sup> Voting seems to fit within this decision-making paradigm, where "intuition and emotion play significant roles in voter choice."<sup>93</sup> It is no surprise, then, that political advertisements are designed to manipulate emotionally-driven decision-making,<sup>94</sup> and often have that intended effect.<sup>95</sup>

#### A. *Implicit Bias: A Definition*

Psychology research highlights the influence of unconscious cognitions about gender on judgment and decision-making.<sup>96</sup> They operate outside of an individual's conscious awareness, are largely uncontrollable,<sup>97</sup> and may conflict with expressly-held egalitarian values

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88. Parks & Rachlinski, *supra* note 6, at 40 (citing Timothy D. Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports about the Effects of Stimuli on Evaluations and Behavior*, 41 SOC. PSYCHOL. 118, 121-23, 125, 127 (1978)) ("People's reports of their cognitive processes are often not consistent with their judgments.")

89. *Id.*

90. *Id.*

91. *Id.* (citing Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6-9 (2007)).

92. *Id.* (citing Timothy D. Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports about the Effects of Stimuli on Evaluations and Behavior*, 41 SOC. PSYCHOL. 118, 125, 127 (1978)).

93. *See id.* (citing DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007)) (discussing data from several presidential campaigns suggesting that voters rely on emotion in making decisions).

94. Parks & Rachlinski, *supra* note 6, at 40 (citing Ted Brader, *Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotions*, 49 AM. J. POL. SCI. 388, 393-97 (2005)).

95. *Id.* (citing William G. Christ, *Voter Preference and Emotion: Using Emotional Response to Classify Decided and Undecided Voters*, 15 J. APPLIED SOC. PSYCHOL. 237, 250 (1985); George Marcus & Michael MacKuen, *Anxiety, Enthusiasm, and the Vote: The Emotional Underpinnings of Learning and Involvement During Presidential Campaigns*, 87 AM. POL. SCI. REV. 672, 677-78 (1993)).

96. *See* Parks & Roberson, *supra* note 1, at 24-25 (citations omitted) (reviewing the research on implicit bias related to gender, and its affect on employment evaluations).

97. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006). "The very existence of implicit bias poses a challenge to legal theory and practice . . . because they can produce behavior that diverges from person's avowed or endorsed beliefs or principles." *Id.*

or beliefs.<sup>98</sup> Furthermore, implicit attitudes may influence evaluations of others in the voting context.<sup>99</sup>

Within the social and behavioral sciences, the typical “method of attitude measurement [has been] the collection of self-reports” that reflect individuals’ explicit attitudes.<sup>100</sup> For example, when researchers want to ascertain subjects’ attitudes toward someone or something, they usually ask participants to select one of several responses or to use a rating scale.<sup>101</sup> The drawback in using these methods is that sometimes research respondents’ answers to questions and measures can be highly dependent on the context, e.g., who asks and how they ask.<sup>102</sup> As such, it is presumed that research participants are unaware of the relationship between these measures of automatic attitudes and the attitudes they are employed to ascertain.<sup>103</sup> Indirect measures also seem to minimize respondents’ strategic responding incentives and attitudes.<sup>104</sup>

One popular measure of automatic attitudes is the Implicit Association Test (IAT), one of the most widely-used measures of implicit attitudes and biases.<sup>105</sup> The IAT is based on the assumption that response times will be quicker for categories that are consistent with individual attitudes.<sup>106</sup> For example, to assess implicit gender attitudes, the IAT pairs male and female names with career and family words and assesses respondents’ reaction times on association-matched (e.g., “Sally” and “Children”) and association-unmatched (e.g., “Sally” and “Corporation”) pairs.<sup>107</sup> The difference in average reaction times provides a measure of respondents’ association between the two

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98. See Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Age 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 56-57 (2006) (finding that explicit racial bias dissipates with age, while implicit racial bias remains constant).

99. Parks & Roberson, *supra* note 1, at 25-27 (citations omitted) (reviewing implicit bias in relation to prejudice and discrimination).

100. Bernd Wittenbrink & Norbert Schwarz, *Introduction to IMPLICIT MEASURES OF ATTITUDES* 1, 1-2 (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

101. *Id.* at 2.

102. SEYMOUR SUDMAN ET AL., THINKING ABOUT ANSWERS: THE APPLICATION OF COGNITIVE PROCESSES TO SURVEY METHODOLOGY 80 (1995); see ROGER TOURANGEAU ET AL., THE PSYCHOLOGY OF SURVEY RESPONSE 197 (2000) (“As survey researchers have demonstrated repeatedly, the same question often produces quite different answers, depending on the context . . .”).

103. Wittenbrink & Schwarz, *supra* note 100, at 3, 8.

104. *Id.* at 3.

105. See Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 431 (2007) (noting that techniques that assess response times are the most widely used methods for ascertaining implicit attitudes).

106. *Id.*

107. Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RESEARCH, AND PRACTICE 101, 108-09 (2002).

pairs of concepts.<sup>108</sup> Thus, a person with strong attitudes toward traditional gender roles would more quickly categorize stimuli consistent with such attitudes, such as pairing female names with family words rather than pairing female names with career words.<sup>109</sup>

*B. Implicit Gender Bias, Title VII, and the Clinton Campaign*

The American legal system struggles with the distinguishing explicit from unconscious bias.<sup>110</sup> For example, an employer who makes it clear that he does not believe women are appropriate for a particular job would easily fall within the law's prohibition against discrimination in the workplace.<sup>111</sup> Unconscious bias, on the other hand, is more elusive and difficult to detect.<sup>112</sup> Just because an individual holds automatic gender biases that operate to disadvantage women does not mean that individual is aware of these biases.<sup>113</sup> Even so, there is a good chance that the same individual might evaluate male job candidates more favorably than female job candidates without conscious awareness of such behavior.<sup>114</sup>

Linda Hamilton Krieger, in her early assessment of unconscious bias's role in employment discrimination, articulated three broad ideas: (1) stereotyping is a natural phenomena, and what underlies it is how people categorize and process information;<sup>115</sup> (2) people unintentionally stereotype out-group members;<sup>116</sup> and (3) stereotypes are automatic, i.e., unconscious.<sup>117</sup> In her application of these principles to employment discrimination law, Krieger made four points. The first was that Title VII leaves little room for the role of unintentional discrimination,<sup>118</sup> but rather requires proof of differential treatment resulting from purposeful or intentional discrimination.<sup>119</sup> The second

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108. *Id.* at 104.

109. *Id.* at 109.

110. Parks & Rachlinski, *supra* note 6, at 42 (citations omitted) ("Judges, legislators, and reformers have long struggled with the difference between explicit and unconscious bias.").

111. *Id.*

112. *Id.*

113. *Id.* at 42-43.

114. *Id.* at 43.

115. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-88 (1995) (citing W. Edgar Vinacke, *Stereotypes as Social Concepts*, 45 J. SOC. PSYCHOL. 229, 229 (1957)).

116. *Id.* at 1188.

117. *Id.*

118. *Id.* at 1166-67.

119. Parks & Rachlinski, *supra* note 6, at 43 n.337(citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516 (1993)) ("[The plaintiff has] the ultimate burden of persuading the court that she has been the victim of intentional discrimination." (alteration in original)). Few cases have acknowledged the role of unconscious gender stereotyping. See, e.g., *Sweeney v. Bd. of Trs.*, 604 F.2d 106, 113 n.12 (1st Cir. 1979) (affirming judgment for plaintiff because the district court reasonably concluded that the decision not to promote her was

focuses on the assumption that there is a dichotomy of rationality on one hand and discriminatory intent or motive on the other,<sup>120</sup> while such an assumption makes it difficult to prove intentional employment discrimination.<sup>121</sup> The third focuses on the fact that disparate treatment<sup>122</sup> jurisprudence fails to account for the fact that an employer may be wholly “unaware of the effect of an employee’s [gender] on the [employer’s] decision making process.”<sup>123</sup> Krieger’s fourth and final point focuses on the assumptions that employers are sufficiently introspective, allowing them to discern the motivations behind their employment-related decisions, and that non-biased employers comply with Title VII while biased ones do not.<sup>124</sup> In light of data such as this, at least some courts have begun to consider the role of unconscious bias in Title VII cases.<sup>125</sup>

The social scientific literature underscores the reality of unconscious gender bias and stereotyping, showing that people make a host of automatic assumptions and evaluations of women. For example, women are automatically perceived as more caring and interdependent, but less ambitious and competitive than men.<sup>126</sup> Women are evaluated as less self-reliant and less aggressive than men,<sup>127</sup> and status is less readily misattributed to unknown women than to unknown men.<sup>128</sup> Males are more strongly associated with status and power,<sup>129</sup>

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“determined by a subtle, if unexpressed, bias against women faculty”).

120. Krieger, *supra* note 115, at 1167 (“[D]isparate treatment analysis assumes that, unless they harbor discriminatory intent or motive, decisionmakers will act objectively and judge rationally.”).

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

122. In order to prove disparate treatment, a plaintiff must first present a prima facie case of discrimination. *Texas Dep’t Of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 n.6 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The defendant then bears the burden of producing a legitimate and nondiscriminatory rationale for its decision to engage in the action that the plaintiff has identified as discriminatory. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 254-55; *McDonnell Douglas*, 411 U.S. at 802. The plaintiff can prevail only if it proves that the defendant’s proffered reason was not the true reason for the decision, but merely “a pretext for discrimination.” *Hicks*, 509 U.S. at 515 (citing *Burdine*, 450 U.S. at 253); *Burdine*, 450 U.S. at 254-56.

123. Krieger, *supra* note 115, at 1167.

124. *Id.*

125. *See Parks & Rachlinski, supra* note 6, at 45-46 nn.359-60, 362 (citations omitted) (reviewing the limited case law).

126. Marianne Schmid Mast, Note, *Men Are Hierarchical, Women Are Egalitarian: An Implicit Gender Stereotype*, 63 SWISS J. PSYCHOL. 107, 110 (2004).

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

128. *See Mahzarin R. Banaji & Anthony G. Greenwald, Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 185-86, 189-93 (1996) (attributing “fame” more strongly to unknown male than to unknown female names).

129. Laurie A. Rudman et al., *Implicit Self-Concept and Evaluative Implicit Gender*

and males in leadership roles are evaluated more favorably than their female counterparts.<sup>130</sup> Moreover, attitudes about gender and power influence career expectancies. For example, men are perceived to be more closely aligned with science-based careers while women are more closely aligned with education- or humanities-based careers.<sup>131</sup>

Based on the results of such psychological research, as well as research demonstrating the influence of unconscious bias on voting,<sup>132</sup> it is possible that unconscious bias affected Clinton's candidacy in the race for President of the United States. Clinton perceived these unconscious biases, articulating in her campaign concession speech, "like millions of women, I know there are still barriers and biases out there, often unconscious . . . ."<sup>133</sup> She may have been correct, in light of comments made by media pundits such as Mike Barnicle, Chris Matthews, John Neffinger, and Mark Rudov. For example, Barnicle contended that she, "look[ed] like everyone's first wife standing outside a probate court."<sup>134</sup> Chris Matthews argued that:

The reason she's a U.S. senator, the reason she's a candidate for president, the reason she may be a front-runner is her husband messed around. That's how she got to be senator of New York . . . . She didn't win there on her merit . . . . She won because everybody felt, "My God, this woman stood up under humiliation," right?<sup>135</sup>

Neffinger stated, "[w]henver she raises her voice, there's a danger that she starts to sound a little bit shrill."<sup>136</sup> And Rudov opined, "[w]hen Barack Obama speaks, men hear, 'Take off for the future.' And when Hillary Clinton speaks, men hear, 'Take out the garbage.'"<sup>137</sup> Though there is no indication that these commentators

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*Stereotypes: Self and Ingroup Share Desirable Traits*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1164, 1167-68 (2001).

130. Rudman & Kilianski, *supra* note 48, at 1319-23.

131. Nosek et al., *supra* note 107, at 101, 107-08 (2002); Michael J. White & Gwendolen B. White, *Implicit and Explicit Occupational Gender Stereotypes*, 55 SEX ROLES 259, 263-64 (2006).

132. Parks & Roberson, *supra* note 1, at 25-27.

133. Adam Nagourney & Mark Leibovich, *Clinton Ends Campaign with Clear Call to Elect Obama*, N.Y. TIMES, June 8, 2008, at 1, 31 (quoting Senator Hillary Clinton, Concession Speech at the 2008 Presidential Democratic Primary (June 7, 2008)).

134. Katharine Q. Seelye & Julie Bosman, *Critics and News Executives Split Over Sexism in Clinton Coverage*, N.Y. TIMES, June, 13, 2008, at A1 (quoting Mike Barnicle).

135. Bill Maxwell, *Why Hillary Stood by Bill*, AUGUSTA CHRON., Feb. 16, 2008, at A08 (quoting Chris Matthews).

136. *What's Been Said About Clinton*, N.Y. TIMES, June 13, 2008, at A24 (quoting John Neffinger, *Hardball with Chris Matthews* (MSNBC television broadcast Nov. 16, 2007)).

137. *Your World with Neil Cavuto* (Fox News television broadcast Jan. 4, 2008), available at <http://mediamatters.org/research/200801050004>.

harbored any overt sexist attitudes towards or about Clinton, their stray remarks are probative of their possible implicit unconscious gender bias.<sup>138</sup>

The above examples provide some evidence of the implicit biases about gender that existed during the 2008 presidential campaign. Contrary to most cases of gender-based stereotyping,<sup>139</sup> attitudes towards Clinton were not favorable in content. Although female candidates are typically viewed as more compassionate, honest, warm, and expressive than men,<sup>140</sup> such characteristics were not attributed to Clinton. Interestingly, however, traditionally male characteristics, such as competence, decisiveness and strength,<sup>141</sup> were also not attributed to her. Instead, Clinton was challenged to deal with a “dual” gender bias, i.e., being characterized by unfavorable, stereotypical female traits, while simultaneously not being characterized by favorable, stereotypical male traits.

While the evidence that Clinton’s campaign suffered from implicit gender bias is not robust, there is evidence that such biases may have been amplified by political conservatism, which has been shown to be associated with unconscious in-group bias.<sup>142</sup> Such effects should not be surprising given that “[o]ne major criterion continually reappears in distinguishing left from right: attitudes toward equality. The left favours greater equality, while the right sees society as inevitably hierarchical.”<sup>143</sup> As such, female Democratic candidates fare better among more liberal voters, and male Democratic candidates

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

139. John T. Jost & Aaron C. Kay, *Exposure to Benevolent Sexism and Complementary Gender Stereotypes: Consequences for Specific and Diffuse Forms of System Justification*, 88 J. PERSONALITY & SOC. PSYCHOL. 498, 498 (2005).

140. KATHLEEN A. DOLAN, VOTING FOR WOMEN: HOW THE PUBLIC EVALUATES WOMEN CANDIDATES 8 (2004).

141. *Id.*

142. Cf. William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1332, 1336 (2004) (examining the relationship between political ideologies and implicit prejudices); Greenwald & Krieger, *supra* note 97, at 958 (charting the difference between implicit and explicit prejudices); John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 902 (2004) (examining the interaction between group membership and political ideology to predict implicit and explicit attitudes); Brian Nosek, *The Politics of Intergroup Attitudes*, Presentation at Duke University’s The Psychology of Voting and Election Campaigns (Oct. 20, 2006), available at <http://www.electionstudies.org/conferences/2006Duke/transcripts/Nosek.pdf> (arguing that implicit biases are relevant to political views).

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

fare better among more conservative voters.<sup>144</sup> Thus, one might predict that Clinton fared much worse than Obama among more right-leaning Democrats. Here, we use proxies to gauge political conservatism among Democratic primary voters. Although age, education, and socioeconomic status have long predicted political orientation, with those who are older,<sup>145</sup> less educated,<sup>146</sup> and poorer<sup>147</sup> being more politically conservative, statistics from the 2008 presidential election highlight contrary patterns. Specifically, “those who voted for Senator Clinton . . . tended to be older, poorer, and less educated than Senator Obama’s supporters.”<sup>148</sup>

#### CODA

Hillary Clinton’s historic campaign not only elevated the issues of sexism and unconscious gender bias to the national stage, it accomplished several other things as well. It opened the door to a comparative look at sexism and unconscious gender bias on one hand and racism and unconscious race bias on the other. In turn, it also raised the issue of reverse gender and race discrimination. Furthermore, her failed bid at the presidency and her inability to shatter this nation’s highest glass ceiling, likely left open the opportunity for Governor Sarah Palin to achieve that feat.<sup>149</sup> In her effort to do so, Governor Palin’s (and Senator John McCain’s) campaign cries of sexism<sup>150</sup> raises the question of where—on the Left or the Right—the largest reservoir of sexism resides. Additionally, it begs the question as to the role of the “gender card” and how it may help or hinder the advancement of women.

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144. Monika L. McDermott, *Voting Cues in Low-Information Elections: Candidate Gender as a Social Information Variable in Contemporary United States Elections*, 41 AM. J. POL. SCI. 270, 278 (1997).

145. Francis D. Glamser, *The Importance of Age to Conservative Opinions: A Multivariate Analysis*, 29 J. GERONTOLOGY 549, 551-52 (1974).

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

147. Napier & Jost, *supra* note 146, at 612.

148. Parks & Roberson, *supra* note 1, at 34.

149. *See, e.g.*, Rick Klein, *Palin on Possible 2012 Run: It Will Be ‘To Win It,’* ABCNEWS.COM, THE NOTE BLOG (Nov. 10, 2010, 9:52 AM), <http://blogs.abcnews.com/thenote/2010/11/palin-on-possible-2012-run-it-will-be-to-win-it.html> (noting Palin’s potential 2012 bid for the presidency).

150. *See, e.g.*, Julie Mason, *Palin Cries Sexism, Let’s Review the Evidence*, WASH. EXAMINER, BELTWAY CONFIDENTIAL BLOG (Nov. 17, 2009, 12:28 PM), <http://www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Palin-cries-sexism----lets-review-the-evidence-70285867.html> (discussing Palin’s claim that *Newsweek*’s recent use of a photo depicting her in running clothes was sexist).

First, Clinton's supporters were angry, primarily with the media, over the pervasive sexism that they saw.<sup>151</sup> Even Geraldine Ferraro, former vice presidential candidate, was convinced that "sexism impacted [Senator] Clinton's campaign . . ."<sup>152</sup> It is difficult, however, to discern just how disadvantaged Clinton was because of her sex without ascertaining just how much she benefited because of her race. In fact, there is a lingering question that political pundits and commentators have raised but have been unwilling to tackle: are Americans "more sexist or more racist?"<sup>153</sup> Despite the boldness of Gloria Steinem's New York Times op-ed, *Women Are Never Front-Runners*, even she was unwilling to tackle the issue despite pronouncing that "[g]ender is probably the most restricting force in American life . . ."<sup>154</sup> Though sexism and racism are arguably twin halves of the same oppression,<sup>155</sup> they are not the same. In fact, where researchers analyze race/ethnicity and gender together, with particular regards to stereotyping, race/ethnicity provides more predictive power.<sup>156</sup> Historically, within the domain of politics and the pursuit of political empowerment, black men gained the right to vote a full fifty years before women.<sup>157</sup> It is doubtful that white men extended this right to black men because they saw black men as their equals more so than white women. First, after ratification of the Fifteenth Amendment, southern whites opposed women's suffrage out of fear that it would double the number of black voters.<sup>158</sup> Second, (white) women, unlike blacks, did not experience nearly 100 years of efforts to subvert their right to vote once they obtained it.<sup>159</sup> Even in the

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151. E. J. Dionne, Jr., *Look What They've Done to Her*, WASH. POST, May 30, 2008, at A13.

152. Geraldine A. Ferraro, *Healing the Wounds of Democrats' Sexism*, BOS. GLOBE, May 30, 2008, at A15.

153. Benjamin Wallace-Wells, *Americans Are Too Racist for Barack. Americans Are Too Sexist for Hillary. Discuss*, WASH. POST, Nov. 12, 2006, at B2.

154. Gloria Steinem, *Women Are Never Front-Runners*, N.Y. TIMES, Jan. 8, 2008, at A23 ("I'm not advocating a competition for who has it the toughest.").

155. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-72 (1991) ("Racism and sexism are interlocking, mutually-reinforcing components of a system of dominance rooted in patriarchy.").

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

157. Compare DAVID MICHAEL HUDSON, ALONG RACIAL LINES: CONSEQUENCES OF THE 1965 VOTING RIGHTS ACT 15 (Peter Lang ed., 1998), with STEPHENSON, *supra* note 10, at 182, 185 (stating that black men gained the right to vote before women, and describing the fear white men had that this would lead to female suffrage).

158. STEPHENSON, *supra* note 10, at 122.

159. See HUDSON, *supra* note 157, at 15 (noting successes of black candidates and the rapid growth of black voter registration); V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 555-643 (Alfred A. Knopf ed., 1949) (discussing literacy tests, poll taxes, and white primaries).

modern political era, there is no equivalent to the “Bradley Effect” for women politicians the way there is for black politicians.<sup>160</sup> During the Democratic primaries, with regard to explicit biases, Clinton not only benefitted from her gender,<sup>161</sup> but also from her race.<sup>162</sup> In states where voters indicated that race influenced their voting decisions, Clinton prevailed in sixteen states, compared to twelve states for Obama.<sup>163</sup> When we subtract those states that Clinton and Obama would likely have won given their prior affiliations—“Arkansas and New York for Clinton and Illinois for Obama—Senator Clinton still benefits.”<sup>164</sup> Further, moving to an analysis of unconscious bias, this benefit is still evident.<sup>165</sup> The same proxies used to predict political conservatism and subsequently unconscious gender bias, also predict unconscious race bias.<sup>166</sup> In essence, some of those who voted for Clinton found a way to move beyond their unconscious gender bias—but not their unconscious race bias—to vote for her. The converse cannot be said to the same degree. This, at least in part, has to do with the fact that unconscious gender and race bias are different in both kind and degree. For instance, unconscious race bias functions such that whites prefer whites over blacks.<sup>167</sup> In addition, while individuals harbor unconscious gender stereotypes,<sup>168</sup> women prefer women while men show no preference either way.<sup>169</sup> Comparatively, 71.5% of whites, 67.5% of Asian Americans, and 60.5% of Hispanics have a preference for whites over blacks.<sup>170</sup> Interestingly, researchers Rory McVeigh and Juliana Sobolewski also discovered that occupational racial and gender segregation are greater in red (Republican) counties than blue

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160. The “Bradley Effect” has come to define black politician electoral losses, or wins by smaller margins than expected, when wins are expected. See Patrick Reddy, *Does McCall Have a Chance?: Yes, He Does, but Black Candidates for Top State Offices Face an Uphill Climb*, BUFFALO NEWS, Jan. 20, 2002, at H1 (explaining the origin of the term and its meaning).

161. Parks & Roberson, *supra* note 1, at 12-15, 18-19, 39. The Bradley Effect is attributed to white voters lying to pollsters about who they are likely to vote for in elections where one candidate is black and the other is white.

162. *Id.* at 5, 7, 10, 33.

163. *Id.* at 42-44.

164. *Id.* at 14.

165. See *supra* notes 142-48 and accompanying text (stating that both unconscious race and gender bias can be predicted by political conservatism).

166. *Id.*

167. Greenwald & Krieger, *supra* note 97, at 956.

168. See *supra* notes 126-31 and accompanying text (stating that individuals harbor subconscious gender stereotypes).

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

170. Greenwald & Krieger, *supra* note 97, at 957-58.

(Democratic) counties,<sup>171</sup> which may support the notion that unconscious gender and racial bias increase the further right one goes on the political spectrum.

Second, in understanding voter support for both Clinton and Obama, one must acknowledge not only those who would reject them based on gender or race, but also those who would support them based on these demographic variables. This allows for an argument of reverse discrimination. Courts have traditionally found reverse race discrimination actionable under Title VII.<sup>172</sup> Some voters' preference for Obama based, at least in part, on his race would not likely stand muster under Title VII, but it illustrates that some Americans are stretching to reach for an egalitarian racial ideal. Non-white voters' support for Obama suggests that at least some portion of those who harbor unconscious racial bias against blacks have moved beyond the status quo and are actually voting against their own unconscious race biases. With regard to black voters' overwhelming support of Obama,<sup>173</sup> their voting behavior can be understood in light of their unconscious racial biases. Studies indicate that like whites, blacks demonstrate an alarming degree of anti-black/pro-white implicit bias. For example, in an Internet-based study, participants expressed a notable preference for whites over blacks.<sup>174</sup> Additionally, by age thirteen, white children have developed a strong in-group preference on the IAT, but black children have not.<sup>175</sup> Black adults show variability in implicit racial preferences and overall, blacks show a preference for whites over blacks.<sup>176</sup> Specifically, about 65% of blacks exhibit implicit bias in favor of whites.<sup>177</sup>

Third, Clinton's campaign also set the stage for two aspects of the McCain-Palin campaign. At the outset of their campaign, Senator McCain, Governor Palin and members of their campaign were outraged by perceived sexism directed at Palin.<sup>178</sup> The irony however,

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171. Rory McVeigh & Juliana M. Sobolewski, *Red Counties, Blue Counties, and Occupational Segregation by Sex and Race*, 113 AM. J. SOC. 446, 474-78 (2007).

172. *Reed v. AirTran Airways*, 531 F. Supp. 2d. 660, 668 n.11 (D. Md. 2008).

173. Parks & Roberson, *supra* note 1, at 20.

174. Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV; What We Know (So Far) about the Method*, in IMPLICIT MEASURES OF ATTITUDES 59, 66 (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

175. Baron & Banaji, *supra* note 97, at 55.

176. Clarence Vincent Spicer, *Effects of Self-Stereotyping and Stereotype Threat on Intellectual Performance* 64 (1999) (unpublished Ph.D. dissertation, University of Kentucky) (on file with William T. Young Library, University of Kentucky).

177. Greenwald & Krieger, *supra* note 97, at 957-58; John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 895 (2004).

178. Ron Fournier, *Analysis: McCain Camp Plays Sexism Card for Palin*, USA TODAY Sept. 3, 2008, [http://www.usatoday.com/news/politics/2008-09-03-2751994221\\_x.htm](http://www.usatoday.com/news/politics/2008-09-03-2751994221_x.htm).

is that political conservatism, vis-à-vis political liberalism, is more closely aligned with sexism and possibly unconscious gender bias.<sup>179</sup> Part of the concern stemmed from pundits and commentators questioning how Governor Palin would balance motherhood and the Vice Presidency, which is consistent with social science research suggesting that people discriminate against women based on parental status<sup>180</sup> and these biases may be unconscious.<sup>181</sup> Courts have held that discrimination against employees for having family obligations is actionable,<sup>182</sup> and legal scholars have made the connection between "family responsibility discrimination" and sex discrimination.<sup>183</sup> Gender biases that result from political conservatism, however, were evident in both Clinton's and Palin's campaigns. For example during a campaign event in South Carolina a voter asked Senator McCain, in reference to Clinton, "[h]ow do we beat the bitch?"<sup>184</sup> Though Senator McCain did not personally use that language, he failed to challenge

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179. See *supra* notes 142-44 and accompanying text (explaining that liberalism is more closely aligned with sexism).

180. Research suggests that when women are viewed through the lens of motherhood and housework, people view them as lacking in confidence and commitment. Studies demonstrate that compared to businesswomen, housewives are rated as low in competence. Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 701, 712, 715 (2004); Thomas Ekes, *Paternalistic and Envious Gender Stereotypes: Testing Predictions from the Stereotype Content Model*, 47 SEX ROLES 99, 102 (2002); Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 880, 882, 887, 892, 897 (2002); Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCHOL. 109, 111-13 (2001).

181. See Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 402-04, 439-40 (2003) (finding that it is assumed that women cannot adequately balance being a good mother and good employee).

182. See *Gallina v. Mintz*, 123 F. App'x 558, 560, 563 (4th Cir. 2005) (holding that the employer discriminated against an employee for being a mother); *Knussman v. Maryland*, 272 F.3d 625, 638-39 (4th Cir. 2001) (holding that the employer discriminated against a male employee where it denied the plaintiff leave to care for his daughter); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1042-43, 1045 (7th Cir. 1999) (holding that an employer discriminated against an employee for needing to spend time with her children).

183. Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1285-86, 1289-92, 1296 (2008) (citations omitted); Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1362, 1382 (2008); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1391, 1396, 1398-99 (2008); see Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRd": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1313 (2008) (discussing employment discrimination based on family obligation).

184. Steve Chapman, *To McCain, the Truth Is Expendable*, CHI. TRIB., Sept. 14, 2008, at 7.

it,<sup>185</sup> and courts have found such language probative in analyzing claims of sex discrimination in the workplace.<sup>186</sup> In addition to such sexist language associated with Senator McCain and his campaign, it is important to examine his behavior toward Governor Palin. Critics blasted his campaign for sequestering his running mate, and attributed his paternalistic behavior as sexist.<sup>187</sup> Courts have similarly found that gender paternalism is inconsistent with anti-discrimination laws.<sup>188</sup>

Finally, critics accused the McCain-Palin campaign of demonstrating faux outrage at alleged slights toward Governor Palin.<sup>189</sup> In fact, some critics went so far as to charge the McCain campaign with using “sexism” as a political talisman to ward off media analysis of Governor Palin, and to blunt any critique lodged by the Obama campaign that could loosely be tied to Governor Palin.<sup>190</sup> If this critique was accurate, the McCain campaign did a tremendous disservice to women because, when “warnings are provided too often, their information content becomes even lower and frequent false alarms render them ineffective because of the ‘cry-wolf’ effect.”<sup>191</sup> Under Title VII, courts are critical of plaintiffs who have a “proven tendency to cry ‘wolf’ . . . when no wolf is about . . . .”<sup>192</sup> Generally, bias reduction through interpersonal confrontation has the effect of inducing irritation and anger toward the confronter.<sup>193</sup> In essence, individuals may be shamed, not only into guilt, but also into anger and aggression.<sup>194</sup>

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185. *Id.*

186. See cases cited *supra* note 75 (stating that comments such as, “[h]ow do we beat the bitch” are probative in sex discrimination cases in the employment context).

187. Katharine Q. Seelye, *Seeking Sarah Palin*, N.Y. TIMES, Sept. 25, 2008, at 24.

188. See *Ocheltree v. Scollon Prod., Inc.*, 335 F.3d 325, 342-43 n.6 (4th Cir. 2003) (“I reject the notion that female workers are in need of ‘the protection of a preferential standard.’”) (quoting *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 593 (5th Cir. 1995)); *Radtke v. Everett*, 501 N.W.2d 155, 167 (Mich. 1993) (“The belief that women are . . . in need of a more protective standard . . . degrades women and is repugnant to the very ideals of equality that [employment discrimination law] is intended to protect.”).

189. See Chapman, *supra* note 183 (contending that McCain’s campaign lied when it claimed sexism “when [Senator] Obama scoffed at the idea that the GOP ticket offered real change from President Bush, saying, ‘You can put lipstick on a pig—it’s still a pig’”).

190. Fournier, *supra* note 178.

191. Jason D. Papastavrou & Mark R. Lehto, *Improving the Effectiveness of Warnings by Increasing the Appropriateness of their Information Content: Some Hypotheses About Human Compliance*, 21 SAFETY SCI. 175, 175 (1996) (discussing how abusing the “race card” causes a lack of believability in discrimination complaints).

192. *McDowell v. Moore*, 635 F. Supp. 280, 283 (W.D.N.C. 1986) (granting the defendants attorney’s fees in a Title VII action due to frivolity of the plaintiff’s complaint).

193. Alexander M. Czopp et al., *Standing Up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 786-87, 791 (2006) (explaining that bias reduction can induce irritation and anger towards the confronter).

194. June Price Tangney et al., *Shamed into Anger?: The Relation of Shame and Guilt to Anger and Self-Reported Aggression*, 62 J. PERSONALITY & SOC. PSYCHOL. 669, 670 (1992).

This is particularly so when racism is at issue and not so much with regards to sexism.<sup>195</sup> Nonetheless, the more the "gender card" is played, whether in the domain of politics or employment, the more insulting it will be to accused but guiltless individuals, and the less effective legitimate cries of sexism will become.<sup>196</sup>

#### CONCLUSION

Overall, the 2008 presidential election represents an interesting context in which to explore issues of sexism and gender bias, employment discrimination, and the intersection of gender and race in employment outcomes. Further, at the center of it all stood Senator Hillary Clinton, who navigated the peaks and pitfalls resulting from the American public's gender-related opinions, attitudes and voting behavior. While her 2008 bid for the U.S. presidency was not successful, her candidacy provides an opportunity for interrogation about the role of gender in American life and in the law. Further, it reveals the palpability of such biases within political contexts.

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195. See Alexander M. Czopp & Margo J. Monteith, *Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 532, 536-37 (2003) (showing that more individuals are shamed by guilt, anger, and aggression when dealing with racism than with sexism).

196. See Papastavrou & Lehto, *supra* note 191, at 175 (explaining the danger of the "cry wolf" effect); see also McDowell, 635 F. Supp. at 283 (noting that the more the "gender card" is used, the less effective and legitimate it becomes).