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THE NTH DECREE: EXAMINING INTRARACIAL USE OF THE N-WORD IN EMPLOYMENT DISCRIMINATION CASES

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In 2012, rap moguls Jay-Z and Kanye West won a Grammy for their hit song "Ni**as[1] in Paris."[2] In April 2013, Grammy award-winning music artist Rihanna posted a photo on Instagram of herself posing with a black[3] toddler; she captioned it "My lil nigga."[4] A few months later, former NBA star Charles Barkley commented, "I use the N-

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1. Throughout the article, the authors sometimes spell out the N-word for the purpose of clarity, but this does not reflect the daily language or personal views of the authors. The authors have generally indicated use of the word "nigger" as "ni**er" and use of the term "nigga" as "ni**a" unless doing so would confuse the reader. Additionally, the authors refer to both "ni**er" and "ni**a" collectively as the N-word, despite some individuals' beliefs that the two words have distinct meanings. To be clear, the authors limit their thesis exclusively to cases involving use of the N-word in the workplace. They do not comment on use of the N-word in other contexts, such as among friends in social settings or in music lyrics.

2. There is nothing novel about Jay-Z and West's choice of title. Throughout the nineteenth and twentieth centuries, songs such as "De Nigga Gal's Dream" and "Who's Dat Nigga Dar A-Peepin?" were popular and socially acceptable at the time. RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 6 (2002).

3. Throughout this article, the authors refer to members of the black community as "black" for the sake of clarity and consistency, although they recognize that individuals self-identify in various ways, such as African-American. *See* Martha S. Jones, *What's in a Name? "Mixed," "Biracial," "Black,"* CNN LIVING (Feb. 19, 2014, 8:42 AM), http://www.cnn.com/2014/02/19/living/biracial-black-identity-answers/ (observing the various terms with which members of the biracial community have self-identified through the years).

4. Ernest Owens, *Rihanna, the N-Word and Black Social Media Hypocrisy*, HUFFPOST BLACK VOICES (Apr. 23, 2013, 8:37 PM), http://www.huffingtonpost.com/ernest-owens/rihanna-the-nword-and-bla_b_3167484.html (urging the black community to reach a "consensus" regarding use of the N-word).

word. I'm going to continue to use the N-word . . . . [W]hat I do with my black friends is not up to white America . . . ."[5]

Yet that same year, juries in New York and Alabama concluded that intraracial use of the N-word is sufficient, under certain circumstances, to create a racially hostile work environment. In *Johnson* v. *Strive East Harlem Employment Group*, black supervisor Rob Carmona referred to Brandi Johnson, a black employee, as a "ni**a" multiple times in a single conversation.[6] Although Mr. Carmona stated that he did not intend the term to be derogatory, a jury in the Southern District of New York determined that his use of the N-word was unlawful, regardless of his race, his personal understanding of the word, or his alleged intent in using it. Similarly, in *Weatherly v. Alabama State University*, three former university employees alleged that a supervisor frequently used the N-word at the workplace, including comments like "ni**a shit" and "ni**a bus line."[7] A jury concluded that the remarks created a racially hostile work environment, and the Eleventh Circuit affirmed.[8] But how can the same word that is included in the title of a Grammy-winning song create a hostile work environment when used by a black supervisor toward a black employee? This question highlights the continuing confusion and controversy arising from the black community's attempts to bring new meaning to an old and infamous word.

While some members of the black community, including well-known comedians, athletes, rappers, and entertainers, publicly embrace use of the N-word by and among blacks as a term of endearment, others, such as Oprah Winfrey, still view it exclusively as a tool of racial oppression.[9] Harvard Law Professor Randall Kennedy ob-

5. NBA ON TNT: BARKLEY ON GRIFFIN (TNT television broadcast Nov. 14, 2013) [hereinafter BARKLEY BROADCAST]; *see also* Billy Haisley, *Charles Barkley on Using "Nigga": White America Doesn't Get To Decide*, DEADSPIN (Nov. 15, 2013, 5:23 PM), http://deadspin.com/charles-barkley-on-using-nigga-white-america-doesnt-1465263583. One has to wonder whether fellow black athletes Michael Jordan and Tiger Woods share Mr. Barkley's viewpoint. NBA player Michael Jordan was suspended as a child for hitting a white girl who called him the N-word during a fight over a seat on a school bus. KENNEDY, *supra* note 2, at 22. When Tiger Woods was in kindergarten, older students tied him up and called him the N-word. *Id.* In 1974, black comedian Richard Pryor's comedy skit—"That Nigger's Crazy"—won a Grammy for Best Comedy Recording. *Id.* at 39. Mr. Pryor is credited with introducing the N-word into stand-up comedy routines. *Id.* Decades later, black comedian Chris Rock began one of his signature skits by saying "I love black people, but I hate ni**ers." *Id.* at 41.

6. 990 F. Supp. 2d 435, 442 (S.D.N.Y. 2014).

7. 728 F.3d 1263, 1266 (11th Cir. 2013).

8. *Id.*

9. *See* KENNEDY, *supra* note 2, at 162–63; *see also* Joe Morton, *The N'word as Sculpture*, TWITTER (Mar. 2, 2014, 5:52 PM), excerpts *available at* http://rolandmartinreports.com/blog/2014/03/joe-morton-the-n-word-as-sculpture/ ("The N-word has been burned into the psyche of black

served that the N-word "is and has long been the most socially consequential racial insult. . . . [But today] when African Americans are speaking to each other, 'nigger,'and especially its more genial cousin, 'nigga' can be an affectionate greeting, a compliment, or a term of respect."[10] In 2007, rapper Nas wanted to title his new album "Niggas" until pressure from his record label and civil rights activists convinced him otherwise.[11] During a 2009 television interview with Jay-Z, Oprah Winfrey explained that to her, the N-word "carries such a sense of hatred and degradation, [that when she hears the word she] always think[s] . . . about black men who were lynched and that's the last word they heard."[12] Jay-Z disagreed, opining, "People give words power. . . . [O]ur generation . . . took the power out of that word. We turned a word that was very ugly and hurtful into a term of endearment . . . ."[13]

But if members of the black community cannot reach a consensus on proper use of the N-word, how can courts and juries be expected to determine whether its intraracial use is sufficient to create a racially hostile work environment, and how should that determination be made? Should the race of the speaker and target of the speech be taken into account in determining the existence of a racially hostile work environment? In the alternative, if our legal system presumes that the N-word is per se racially offensive, regardless of the speaker's race and intent in using the word, does that restore power to a hurtful word that an empowered new generation of black Americans has stripped of its old meaning and refashioned into a term of endearment and solidarity?

Although strikingly different opinions on use of the N-word have provoked much debate, the conclusions reached in *Johnson* and *Weatherly*—that intraracial use of the N-word can create a racially

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folk in this country not unlike the numbers branded on the bodies of living Jews in concentration camps . . . .").

10. Steve Bogira, *A Tough Lesson About the N-Word*, CHI. READER, Jan. 22, 2013, at 14, 15, *available at* http://www.chicagoreader.com/chicago/teacher-lincoln-brown-sues-cps-over-nword/Content?oid=8556801 (last visited Mar. 5, 2014) (quoting Professor Randall Kennedy).

11. *See* Catherine Donaldson-Evans, *Record Label Denies Rap Star Nas' Claim of Forthcoming Album Called "Nigga,"* FOXNEWS.COM (Oct. 16, 2007), http://www.foxnews.com/story/2007/10/16/record-label-denies-rap-star-nas-claim-forthcoming-album-called-nigga/. As of the date of this publication, the album remains untitled.

12. *The Oprah Winfrey Show: Jay-Z on the N-Word*, (syndicated television broadcast Sept. 24, 2009), *available at* http://www.oprah.com/oprahshow/Jay-Z-on-the-N-word-Video [hereinafter *Jay-Z Video*]; *see also* Crystal Wright, *When Is It Ever OK To Call the President the N-Word?*, CNN (July 8, 2014, 6:41 PM), http://www.cnn.com/2014/07/08/opinion/wright-obama-n-word (criticizing West View News for publishing a story with the headline "The Nigger in the White House" and describing the N-word as "reprehensible").

13. *Jay-Z Video*, *supra* note 12.

hostile work environment—are correct because they comport with the longstanding legal recognition of intraracial, same-sex, and third-party associative employment discrimination. The shameful historical legacy of the N-word underscores the extent to which a reasonable person of any race would likely object to its use at the workplace, even if the speaker is black. Furthermore, social science research indicates that black individuals' implicit antiblack biases may lead to ill-intended use of the N-word against other blacks. Finally, applying the same objective standard to intraracial and interracial use of the N-word, regardless of the speaker's intent, promotes fairness, consistency, and judicial efficiency.

A. The N-Word Controversy

Few words in the English language are more deeply embedded in the nation's conscience than the N-word. Although it has been around for centuries, its meaning remains anything but black and white. The N-word originates from *niger*, the Latin word for the color black, but by the nineteenth century, it had become a familiar racial slur.[14] Indeed, an 1837 treatise discussing the condition of blacks in America described the N-word as "an [o]pprobrious term, employed to impose contempt upon [blacks] as an inferior race . . . [with the] purpose to injure."[15]

Cinematic portrayals underscore this commonly held belief. For example, Lee Daniels' 2013 film *The Butler* examines the life of Cecil Gaines, a black butler who served several American presidents. In one poignant scene, young Cecil tells an older black mentor and expert butler, Mr. Maynard, that Cecil would make a good "house ni**er." Mr. Maynard instantly slaps Cecil, explaining that the N-word is "a white man's word . . . filled with hate."[16]

Many members of the black community share this view. In July 2007, the National Association for the Advancement of Colored People (NAACP) held a symbolic funeral for the N-word at a historically

14. KENNEDY, *supra* note 2, at 4–5.

15. *Id.* at 5 (second alteration in original) (quoting HOSEA EASTON, A TREATISE ON THE INTELLECTUAL CHARACTER, AND CIVIL AND POLITICAL CONDITION OF THE COLORED PEOPLE OF THE UNITED STATES; AND THE PREJUDICE EXERCISED TOWARDS THEM 40 (1837)) (internal quotation marks omitted).

16. LEE DANIELS' THE BUTLER (The Weinstein Company 2013); *see also Lee Daniels' The Butler Quotes: Clunky but Earnest*, MOVIEQUOTESANDMORE.COM, http://www.moviequotesandmore.com/the-butler-quotes.html (last visited Feb. 25, 2014).

black cemetery in Detroit.[17] Reverend Wendell Anthony explained, "We are committed to ending hate—word and talk. It doesn't do anyone any good, whether it's a journalist on TV or a rapper on the radio."[18] Likewise, the late poet Maya Angelou described the N-word as "dangerous and vulgar" and took issue when the rapper Common featured her reciting poetry on a track that also included the N-word.[19] Other members of the black community have discouraged use of the N-word and blame rap music for popularizig it. During the infamous O.J. Simpson trial, black prosecutor Christopher Darden described the N-word as the "filthiest, dirtiest, nastiest word in the English language."[20]

Not surprisingly, the N-word has long been the subject of controversy in locker rooms, classrooms, and courtrooms across America. In an April 22, 1947 game against the Philadelphia Phillies, Major League Baseball's first black player, Jackie Robinson, was asked, "Hey, ni**er, why don't you go back to the cotton field where you belong?"[21] Nearly thirty years later in 1973, black right fielder Hank Aaron received increasingly vicious hate mail the closer he came to breaking Babe Ruth's home run record.[22]

Fast forward to November 2013, when black Los Angeles Clippers player Matt Barnes tweeted about his black teammates: "I love my teammates like family, but I'm DONE standing up for these [ni**as]!"[23] Although Mr. Barnes was criticized for his use of the N-word, former NBA player Charles Barkley came to his defense on national television, remarking "I use the N-word. I'm going to continue to use the N-word . . . . White America don't [sic] get to dictate how me and Shaq talk to each other."[24]

From the basketball court to the classroom, the N-word has sparked controversy. In 2011, a University of Connecticut student filed a complaint against a teaching assistant who used the N-word during an an-

17. Nadra Kareem Nittle, *Famous Blacks Who've Spoken Out Against the N-Word*, ABOUT.COM, http://racerelations.about.com/od/diversitymatters/a/Black-Public-Figures-Who-Ve-Spoken-Out-Against-The-N-Word.htm (last visited Feb. 22, 2014).

18. *Id.*

19. *Id.*

20. KENNEDY, *supra* note 2, at 108.

21. *Id.* at 19.

22. *Id.* at 24–25. One letter stated, "Dear Mr. Nigger, I hope you don't break the Babe's record. How can I tell my kids that a nigger did it?" *Id.* at 24.

23. Cindy Boren, *Matt Barnes Apologizes for Tweet About Clippers Teammates (Updated)*, WASH. POST EARLY LEAD (Nov. 14, 2013, 8:44 AM), http://www.washingtonpost.com/blogs/early-lead/wp/2013/11/14/matt-barnes-tweets-n-word-in-frustration-with-clippers/.

24. BARKLEY BROADCAST, *supra* note 5; *see also* Billy Haisley, *supra* note 5. "Shaq" refers to former NBA player Shaquille O'Neal.

thropology lesson examining the demeaning effect of a racial slur.[25] That same year, an Alabama publishing company feared controversy when it decided to substitute "slave" for the N-word in Mark Twain's classic, *Huckleberry Finn*.[26] Perhaps "[t]he omnipresence of race-based attitudes and experiences in the lives of black Americans causes even nonviolent events to be interpreted as degrading, threatening, and offensive."[27]

The N-word has also long been the subject of legal controversy. The first recorded use of the N-word in a legal proceeding occurred in *Blywe v. United States*, an 1871 case involving two white men accused of murdering several members of a black family.[28] During a 1932 trial in Atlanta, Georgia, a hostile witness used the N-word to refer to a young black defendant.[29] When his black defense attorney asked the white judge to intervene because the N-word was "objectionable, prejudicial, and insulting," the judge responded, "I don't know whether it is or not. . . . However, I'll instruct the witness to call [the defendant] 'darky,' which is a term of endearment."[30]

Times may have changed, but the meaning often associated with the N-word has not. In *Spriggs v. Diamond Autoglass*, the Fourth Circuit characterized the N-word as "pure anathema to African Americans."[31] As of July 2001, the racial slur "kike" appeared in 84 cases, "wetback" in 50, "gook" in 90, "honky" in 286, and "nigger" in 4,219.[32] As of February 2014, the racial slur "kike" appeared in 105 federal cases, "wetback" in 334, "gook" in 113, "honky" in 105, and "nigger" in 5,162.[33] Perhaps nowhere has use of the N-word been more hotly debated than in the context of race-based hostile work environment claims involving use of the N-word at the workplace.

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25. Purbita Saha, *T.A. Defends Use of N-Word in Class*, DAILY CAMPUS (Apr. 25, 2011), http://www.dailycampus.com/news/t-a-defends-use-of-n-word-in-class-1.2206419#.UwzXQP1RZBU.

26. Marc Schultz, *Upcoming NewSouth "Huck Finn" Eliminates the "N" Word*, PUBLISHERS WKLY., Jan. 3, 2011, at 6, *available at* http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/45645-upcoming-newsouth-huck-finn-eliminates-the-n-word.html. The original manuscript reportedly uses the N-word an astonishing 219 times. *Id.* at 8.

27. Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1516, *vacated in part*, 765 F. Supp. 1529, 1530–32 (D. Me. 1991).

28. KENNEDY, *supra* note 2, at 33.

29. *Id.* at 17.

30. *Id.*

31. *Id.* at 98 (quoting Spriggs v. Diamond Auto Glass, 242 F.3d 179, 185 (4th Cir. 2001)).

32. *Id.* at 32.

33. Westlaw searches performed on February 16, 2014.

B. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits a covered employer from discriminating against a covered employee or applicant with respect to the "compensation, terms, conditions, or privileges of employment" because of race, color, religion, sex, or national origin.[34] Congress intended Title VII to "strike at the entire spectrum of disparate treatment . . . in employment."[35]

To prevail in a racially hostile work environment claim, a plaintiff must demonstrate that the harassing conduct (1) occurred because of race; (2) was unwelcome; (3) was sufficiently severe or pervasive to alter the terms and conditions of employment or to create an abusive work environment; and (4) would have been considered objectively hostile by a reasonable person.[36] A court will also consider the totality of the circumstances in determining whether the conduct at issue constitutes harassment.[37] By way of illustration, a plaintiff might allege that her supervisor often referred to her as the N-word, that coworkers frequently circulated racist jokes at the workplace, and that her complaints about the aforementioned behavior elicited no response.

Rogers v. EEOC appears to be the first case to recognize a cause of action based upon a racially hostile work environment.[38] There, the United States Court of Appeals for the Fifth Circuit held that a Hispanic complainant can establish a Title VII violation by demonstrating that her employer created a hostile work environment for employees by giving discriminatory service to Hispanic clientele.[39] The Fifth Circuit determined that Title VII includes "within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[40] However, it cautioned that "mere utterance of an ethnic or racial epithet which engenders offensive

34. 42 U.S.C. § 2000e-2(a)(1) (2012). Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person," with certain exclusions. 42 U.S.C. § 12111(5)(a).

35. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (internal quotation marks omitted).

36. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). The harassment need not implicate economic benefits such as termination. *Meritor*, 477 U.S. at 64. In determining severity, an isolated incident may be sufficient if it is egregious. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

37. *Id.* at 787–88.

38. 454 F.2d 234, 238 (5th Cir. 1971) (as of August 2014).

39. *Id.* at 236–38.

40. *Id.* at 238.

feelings in an employee" is insufficient to prevail in a claim because Title VII does not create a general civility code for the workplace.[41]

The Fifth Circuit may have had the first word on what constitutes a racially hostile work environment, but it certainly did not have the last. In 2013, courts in New York and Alabama upheld jury verdicts in favor of black employees who claimed that their black supervisors' use of the N-word at the workplace created a racially hostile work environment.[42] As will be discussed in more detail below, these outcomes are correct because they comport with well-settled employment discrimination law recognizing the realities of in-group discrimination, account for the effects of implicit race bias, and promote fairness, consistency, and judicial efficiency.

1. Johnson v. Strive

On June 7, 2012, former Affiliate Services Coordinator Brandi Johnson, a black female, filed a complaint in the Southern District of New York against her New York City-based nonprofit employer, Strive East Harlem Employment Group (Strive), an employment agency, and against three of her former supervisors: Chief Operating Officer and Chief Financial Officer Lisa Stein, a white female; Phil Weinberg, a white male; and Strive's founder, Rob Carmona.[43] Although Ms. Johnson described Mr. Carmona as Hispanic-American, Mr. Carmona self-identified as a "black man of Latino descent."[44] Ms. Johnson alleged, *inter alia*, hostile work environment harassment, discrimination, and retaliation on the basis of race and sex under Title VII, Section 1981 of the Civil Rights Act of 1866, and the New York City Human Rights Law.[45]

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41. *Id.*

42. *See* Johnson v. Strive E. Harlem Emp't Grp., 990 F. Supp. 2d 435 (S.D.N.Y. 2014); Weatherly v. Ala. State Univ., 728 F.3d 1263 (11th Cir. 2013).

43. Complaint at 1–3, Johnson v. Strive E. Harlem Emp't Grp., 990 F. Supp. 2d 435 (S.D.N.Y. 2014); Chris Opfer, *NYC Jury Awards $280,000 to Black Worker Based on Hispanic Boss's N-Word Insults*, DAILY LAB. REP. (BNA), Sept. 4, 2013, at A-15.

44. *Johnson*, 990 F. Supp. 2d at 441 (describing Mr. Carmona as "a dark-skinned Puerto Rican male"); Trial Transcript at 376:13–15, Johnson v. Strive E. Harlem Emp't Grp., 990 F. Supp. 2d 435 (S.D.N.Y. 2014); Complaint, *supra* note 43, at 3.

45. Complaint, *supra* note 43, at 1, 9–10. Ms. Johnson originally brought claims under Title VII but filed an amended complaint omitting those claims after realizing that she had failed to exhaust her administrative remedies as required by statute. Given the focus of our article, we largely omit discussion of Ms. Johnson's related claims of retaliation, punitive damages, and sex discrimination. *Id.* at 16–17.

Ms. Johnson's race discrimination claims arose primarily from the following March 14, 2012 conversation[46] between her and Mr. Carmona:

> Mr. Carmona: [Y]ou [(Johnson)] and her [(another black female)] are just alike. . . . [B]oth smart, but both of y'all are really knuckleheads. . . . Smart as shit, but dumb as shit . . . . [Y]ou know what it is? Both of you are ni**ers. . . . [A]nd I'm not . . . using the term "ni**er" derogatory [sic], 'cause sometimes it's good to know when to act like a ni**er. But y'all act like ni**ers all the time.
> Ms. Johnson: I am really offended by that. I don't think that I do. . . . I don't believe I do. I think, in my time here, I have grown.
> ***
> Mr. Carmona: Brandi, you and her act like ni**ers. And ni**ers let their feelings rule them. . . . Both of you are very bright . . . if you ever got a hold of your brightness, in a substantive way, you'd go to the top. . . . But y'all act like ni**ers. . . .
> Ms. Johnson: Well, for the record, I beg to differ. But I'm 'a [sic] leave it alone.
> ***
> Ms. Johnson: But, for me, honestly, I would appreciate, next time, pull me into the office and tell me that. Don't tell me that in front of people, 'cause I—I was very offended [when you said in front of other people] "Y'all are just alike." Rob, I'm—I don't think I'm like her.
> ***
> Mr. Carmona: And—and, uh, why is it—why are you making such a big deal about it?
> Ms. Johnson: Because . . . I'm trying my best to—to improve on me. . . . [A]nd I don't want to be constantly compared to somebody who is not improving on them. Honestly.
> ***
> Mr. Carmona: Both very bright, but both of y'all act like ni**ers at inappropriate times.
> Ms. Johnson: I disagree, but okay.[47]

Ms. Johnson testified that as a result of Mr. Carmona's remarks, she felt "offended," "degraded," "disrespected," and "embarrassed."[48] She further claimed that no actions were taken in response to her complaints about Mr. Carmona's behavior.[49]

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46. *Johnson*, 990 F. Supp. 2d at 441–42.

47. Memorandum of Law in Support of Defendants' Post-Trial Motions at 4–5, Johnson v. Strive E. Harlem Emp't Grp., 990 F. Supp. 2d 435 (S.D.N.Y. 2014) [hereinafter Defendants' Post-Trial Motions].

48. Trial Transcript, *supra* note 44, at 65:18–21.

49. Complaint, *supra* note 43, at 6. Trial testimony indicated that Mr. Carmona yelled at and directed foul language toward members of both sexes and all races. Trial Transcript, *supra* note 47, at 50:13–23, 231:10–13, 236:13–37:15, 387:7–388:3, 457:20–21, 488:14–23; Defendants' Post-Trial Motions, *supra* note 47, at 4.

Ms. Johnson sued, and four days later, Strive terminated her.[50] A five-day trial commenced on August 26, 2013.[51] The jury concluded that Mr. Carmona's behavior created a hostile work environment and that Strive terminated Ms. Johnson in retaliation for complaining about Mr. Carmona's behavior.[52]

Notably, the jury reached this conclusion even though Mr. Carmona self-identified as a black male of Latino descent and claimed that he was not using the N-word in a derogatory way.[53] The defendants emphasized that the March 2012 conversation was the only time Mr. Carmona referred to Ms. Johnson as the N-word, and that she had not heard him use that word to refer to anyone else.[54] Furthermore, although Ms. Johnson did not recall using the N-word at the office,[55] at least some witness testimony indicated that Ms. Johnson did use the N-word in everyday conversation, albeit not at work.[56] Furthermore, Mr. Carmona stated during the conversation that he did not intend

50. Amended Complaint at 8, Johnson v. Strive E. Harlem Emp't Grp., 990 F. Supp. 2d 45 (S.D.N.Y. 2014). Ms. Johnson claimed that her termination resulted from retaliation, *id.*, but the defendants argued that she was terminated because her position was fully funded by a grant that was expiring. Defendants' Post-Trial Motions, *supra* note 47, at 7 (citing Trial Transcript, *supra* note 44, at 73:16–18, 134:16–21, 354:10–13, 486:6–13).

51. *Johnson*, 990 F. Supp. 2d at 441.

52. *Id.* at 443; *see also* Opfer, *supra* note 43, at A-15. The jury reached this conclusion despite the defendants' contentions that neither Mr. Weinberg nor Ms. Stein subjected Ms. Johnson to discrimination, Mr. Weinberg decided to terminate Ms. Johnson without Mr. Carmona's influence, and Mr. Carmona did not make discriminatory remarks relating to Ms. Johnson's termination. Trial Transcript, *supra* note 44, at 404:13–16, 506:21–508:8; Defendants' Post Trial-Motions, *supra* note 47, at 11 & n.18. The defendants also emphasized that Mr. Carmona assisted in hiring Ms. Johnson; thus, the same-actor inference cuts against a finding of race discrimination. Defendants' Post-Trial Motions, *supra* note 47, at 11 n.18. The defendants further claimed that the "evidence demonstrated that Mr. Carmona engaged in such behavior towards individuals of all races." *Id.* at 13 (citing Trial Transcript, *supra* note 44, at 50:19, 387:7–388:3, 488:14–23). However, the plaintiff's counsel countered that Ms. Johnson, Ms. Stein, and Mr. Carmona testified to Mr. Carmona's influence and power to hire, fire, and discipline Ms. Johnson. Memorandum of Law in Opposition to Defendants' Post Trial Motions at 5, Johnson v. Strive E. Harlem Emp't Grp., 990 F. Supp. 2d 435 (S.D.N.Y. 2014) [hereinafter Plaintiff's Post-Trial Opposition] (citing Trial Transcript, *supra* note 44, at 95:7–8, 234:2–19, 315:2–14). According to Ms. Johnson, "Ms. Stein testified extensively about 'considering' whether to terminate Plaintiff and indicating that it was Mr. Carmona who 'saved' Ms. Johnson's job." *Id.* at 5 n.1 (citing Trial Transcript, *supra* note 44, at 315:5–14).

53. Trial Transcript, *supra* note 44, at 376:13–15; Complaint, *supra* note 43, at 3; Defendants' Post-Trial Motions, *supra* note 47, at 4.

54. Trial Transcript, *supra* note 44, at 67:5–9, 127:5–11; *see also* Defendants' Post-Trial Motions, *supra* note 47, at 14.

55. Trial Transcript, *supra* note 44, at 92:20–93:24, 147:12–148:22.

56. *Johnson*, 990 F. Supp. 2d at 443; Trial Transcript, *supra* note 44, at 90:9–93:24, 147:12–148:22, 235:1–18, 399:13–18.

the N-word to be demeaning.[57] The defendants argued that Ms. Johnson's reaction suggested that she was offended at her comparison to another black female, Leticia Thomas, and not by Mr. Carmona's use of the N-word.[58] After all, when Mr. Carmona asked Ms. Johnson why she was "making such a big deal about it," she responded, "I'm trying my best . . . to improve on me. And . . . I don't want to be constantly compared to somebody who is not improving on them. Honestly."[59] According to the defendants, Mr. Carmona's isolated use of the N-word was not sufficiently severe or pervasive,[60] even though Mr. Carmona admitted to using the N-word to describe Ms. Johnson and Ms. Thomas in prior conversations with Ms. Thomas and other employees.[61] Ms. Johnson also contended that Mr. Carmona made remarks about black women and their tendencies to "get in the way of themselves."[62] In the end, the jury concluded that Mr. Carmona's racial self-identification, his expressed intent in using the word, and Ms. Johnson's use of the word outside the workplace did not excuse Mr. Carmona's use of the N-word at the office in reference to an employee.[63]

2. Weatherly v. Alabama State University

While jurors in New York were assessing Strive's liability, the United States Court of Appeals for the Eleventh Circuit grappled with the same question: whether intraracial use of the N-word creates a racially hostile work environment. Despite the fact that New York and Alabama could not be more culturally distinct, especially with regard to each state's historical stance on racial equality, both juries reached the same conclusion: the same legal standard applies to interracial and intraracial use of the N-word.[64] Put differently, the mere

57. Trial Transcript, *supra* note 44, at 127:12–15; Defendants' Post-Trial Motions, *supra* note 47, at 13 ("I'm not . . . using the term 'ni**er' derogatory [sic], 'cause sometimes it's good to know when to act like a ni**er.").

58. Defendants' Post-Trial Motions, *supra* note 47, at 5.

59. *Id.*

60. *Id.* at 14 n.21 (citing Adam v. Glen Cove Sch., No. 06-CV-1200, 2008 U.S. Dist. LEXIS 13039, at *37–42 (E.D.N.Y. Feb. 21, 2008)); *see also* Dorrilus v. St. Rose's Home, 234 F. Supp. 2d 326, 335 (S.D.N.Y. 2002); Francis v. Chem. Banking Corp., 62 F. Supp. 2d 948, 958–60 (E.D.N.Y. 1999).

61. Plaintiff's Post-Trial Opposition, *supra* note 52, at 10 (citing Trial Transcript, *supra* note 44, at 398:3–10).

62. *Id.*; *see also* Johnson v. Strive E. Harlem Emp't Grp., 990 F. Supp. 2d 435, 442 (S.D.N.Y. 2014).

63. *See Johnson*, 990 F. Supp. 2d at 447 (holding, *inter alia*, that there was sufficient evidence to support a jury verdict of race discrimination).

64. *Id*. at 446; Weatherly v. Ala. State Univ., 728 F.3d 1263, 1269 (11th Cir. 2013).

fact that a supervisor self-identifies as black does not mean that her use of the N-word in reference to black employees is lawful.

In *Weatherly v. Alabama State University*,[65] a group of former employees—Jacqueline Weatherly, Lydia Burkhalter, and Cynthia Williams (collectively, the Employees)—sued Alabama State University (ASU) in the District Court for the Middle District of Alabama, alleging race and sex discrimination in violation of Title VII.[66] The Employees claimed that Dr. John Knight, Special Assistant to the President, Acting President, Chief Operating Officer, and a member of the state legislature, and LaVonette Bartley, ASU's Associate Executive Director in the Office of the Special Assistant to the President, subjected them to discrimination, a hostile work environment, and retaliation.[67]

According to Ms. Weatherly, Ms. Bartley regularly used the N-word at the office, once even commenting that she was "sick and tired of this ni**er shit."[68] Ms. Weatherly complained about Ms. Bartley's remarks, but when Human Resources took no action, she transferred to a different department.[69] Ms. Bartley also allegedly directed terms, such as "ni**er," "ni**a," "ni**a shit," "fat bitch," and "white bitch" at Ms. Burkhalter, other coworkers, and even Ms. Burkhalther's seven-year-old son.[70] Ms. Bartley also commented, "I'm sick of this ni**a shit. These stupid bitches can't do anything right. And they ain't nothing but some ni**as."[71] When Ms. Burkhalter's complaints elicited no response, she filed a charge with the Equal Employment Opportunity Commission (EEOC) and was terminated shortly thereafter.[72] According to Ms. Williams, Ms. Bartley "consistently" referred to her as a "ni**er" and "bitch" and made racially charged comments, such as "talk to the ni**er side of the hand because the white side does not want to hear it" and "we got to dress professional;

65. 728 F.3d at 1266–70. Specifically, the Eleventh Circuit held that the district court's failure to reraise the issue of severance sua sponte was not reviewable for abuse of discretion, that denial of a motion to sever the Employees' claims was not an abuse of discretion, that the Eleventh Circuit lacked jurisdiction to hear the defendant's appeal of the district court's denial of its motion for judgment as a matter of law and for a new trial, that evidence established that the employees attempted to mitigate damages as required to support an award of front pay, and that the defendant waived its unclean hands claim. *Id.* at 1270–74.

66. *Id.* at 1266–68.

67. *Id.* at 1266.

68. *Id.*

69. *Id.* at 1266–67.

70. *Id.* at 1267.

71. *Weatherly*, 728 F.3d at 1267.

72. *Id.* at 1267–68. ASU claimed that Ms. Burkhalter was fired for taking a sick day and abandoning her job. *Id.* at 1268.

we don't dress like ni**ers."[73] Though Dr. Knight warned Ms. Williams not to speak to the EEOC regarding any discrimination allegations, she complained about Ms. Bartley's conduct, and ASU terminated her.[74]

The Employees sued ASU on March 4, 2010, alleging, *inter alia*, a racially hostile work environment.[75] After the district court denied ASU's motion to sever the Employees' claims, a consolidated trial commenced on February 8, 2012.[76] ASU moved for judgment as a matter of law as to each claim but was denied.[77] Among other things, the jury concluded that the Employees had experienced a race-based hostile work environment.[78] The district court entered final judgment on May 25, 2012, awarding over $1 million in damages.[79] ASU appealed, but the Eleventh Circuit affirmed.[80]

The outcomes in *Johnson* and *Weatherly* may surprise members of the black community who consider intraracial use of the N-word acceptable and even empowering, but as discussed in more detail below, the conclusions in both cases are entirely consistent with the spirit and purpose of Title VII and other antidiscrimination statutes, which have long recognized in-group discrimination.

C. In-Group Discrimination

It is well settled that members of a protected group can discriminate against other members of the same group. In *Castaneda v. Partida,* the Supreme Court of the United States concluded that a prima facie showing of discrimination against Mexican-Americans in a county's grand jury selection could not be rebutted merely by showing that Mexican-Americans held a "governing majority" of elective offices in the county.[81] According to Justice Harry Blackmun, "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."[82] Furthermore, in his concurring opinion, Justice Thurgood Marshall rejected the assumption that

73. *Id.*
74. *Id.* at 1268. Ms. Williams made at least two other unsuccessful attempts to complain. *Id.*
75. *Id.* at 1268.
76. *Id.* at 1268–69.
77. *Weatherly*, 728 F.3d at 1269.
78. *Id.*
79. *Id.*
80. *Id.* at 1269, 1274.
81. 430 U.S. 482, 499 (1977).
82. *Id.*

> *all* members of *all* minority groups[ ] have an "inclination to assure fairness" to other members of their group. . . . [Such] assumptions about human nature, plausible as they may sound, fly in the face of a great deal of social science theory and research. Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.[83]

The Supreme Court subsequently extended this reasoning to the employment discrimination context. In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that same-sex sexual harassment is actionable under Title VII.[84] There, Joseph Oncale worked as a roustabout on an oil platform in the Gulf of Mexico.[85] Several members of Mr. Oncale's eight-man crew subjected him to sex-related insults and actions, including insinuations that he was a homosexual, physical assaults, and threats of rape.[86] When Sundowner ignored Mr. Oncale's complaints, he resigned, requesting that his pink slip indicate he "voluntarily left due to sexual harassment and verbal abuse."[87] Mr. Oncale sued Sundowner in the U.S. District Court for the Eastern District of Louisiana, but the district court held that his claim was not actionable because he and his alleged harassers were members of the same sex.[88] The Fifth Circuit affirmed.[89]

The Supreme Court reversed, holding that same-sex sexual harassment is actionable even when the harassing conduct occurs between members of the same sex and is not motivated by sexual desire.[90] The Supreme Court observed that Title VII prohibits discrimination "because of sex" and rejected a "conclusive presumption that an employer will not discriminate against members of his own race."[91] The Supreme Court did not observe anything in Title VII's plain language or in any precedent interpreting it that would support a categorical exclusion of in-group harassment.[92] Although same-sex sexual harassment was "not the principal evil" that prompted Title VII's enact-

83. *Id.* at 503 (Marshall, J., concurring).
84. 523 U.S. 75, 82 (1998).
85. *Id.* at 76–77.
86. *Id.* at 77.
87. *Id.* (internal quotation marks omitted).
88. *Id.*
89. *Id.*
90. *Oncale*, 523 U.S. at 79–80.
91. *Id.* at 78 (citing Castaneda v. Partida, 430 U.S. 482, 499 (1977)).
92. *Id.* at 79.

ment, statutes often stretch "beyond the principal evil to cover reasonably comparable evils."[93] The Supreme Court did not fear that recognizing same-sex harassment would open the floodgates to Title VII litigation or transform Title VII into an onerous civility code.[94]

The outcomes in *Johnson* and *Weatherly* are consistent with the longstanding recognition of in-group discrimination, because in both cases, the juries refused to presume that the supervisor did not harass or discriminate against the employee or employees on the basis of race merely because the supervisor and the employee or employees were both black.[95] In other words, there is no legal presumption that intraracial use of the N-word is insufficient to create a racially hostile work environment.

D. Third-Party Associative Discrimination

The outcomes in *Johnson* and *Weatherly* also comport with precedent acknowledging the evils of third-party associative discrimination. Third-party associative discrimination occurs when an individual is discriminated against because of her association with another group or individual, specifically those protected under Title VII.[96] In other words, a person is discriminated against not because of the group to which she belongs, but rather because of her association with a protected group or its members.

A plaintiff alleging third-party associative discrimination must establish that the discrimination resulted from her association with a member of a protected group. By way of illustration, consider the following: John Doe is a white male who is married to Jane, a black female. John applies for a job at XYZ Corporation (XYZ) for which he is well qualified. However, the interviewer at XYZ who has hiring and firing authority denies John the position because the interviewer does not approve of John's interracial marriage. John sues XYZ under Title VII for unlawful failure to hire because of race. Although XYZ did not discriminate against John because of *his* race, it did discriminate against him because of his interracial romantic association with

93. *Id.*

94. *Id.* at 80.

95. Johnson v. Strive E. Harlem Emp't Grp., 900 F. Supp. 2d 435, 441 (S.D.N.Y. 2014); Weatherly v. Ala. State Univ., 728 F.3d 1263, 1266 (11th Cir. 2013).

96. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012); *see also* Mark W. Honeycutt II & Van D. Turner, Jr., Comment, *Third-Party Associative Discrimination Under Title VII*, 68 TENN. L. REV. 913, 913 (2001). Historically, nonblacks who associated with or assisted blacks, such as Freedom Riders, had a common label of their own: "ni**er lovers." KENNEDY, *supra* note 2, at 25–26.

Jane, a black female. In this scenario, John has been a victim of third-party associative discrimination.

A plaintiff alleging third-party associative discrimination may have difficulty establishing a prima facie case of discrimination. Some courts have denied third-party associative discrimination claims for lack of standing because one could argue that the discrimination is based on the race of a third party—here, Jane—rather than the race of the plaintiff.[97] These courts reason that permitting third-party associative discrimination claims contravenes the plain language of Title VII, which prohibits discrimination because of "such individual's race, color, religion, sex, or national origin," not that of a third party.[98] The minority approach rigidly adheres to a strict interpretation of Title VII without considering that a broader interpretation may better effectuate the statute's spirit and purpose.[99]

However, most courts do recognize that while the statutory language of Title VII does not explicitly prohibit third-party associative discrimination, denying such claims for lack of standing contravenes the law's spirit and purpose—that is, deterring discrimination and creating equal employment opportunities for protected groups.[100] As the Fifth Circuit explained in *Culpepper v. Reynolds Metal Co*.,

> Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.[101]

The Eleventh Circuit elaborated on this reasoning in *Parr v. Woodmen of the World Life Insurance Co*., a case involving an otherwise qualified white male who was purportedly denied employment because of his marriage to a black woman.[102] There, the Eleventh Circuit explained that when a plaintiff alleges that she has been discriminated against because of a third-party association, she is, by

97. Honeycutt & Turner, *supra* note 96, at 919–20 (citing Ripp v. Dobbs House, Inc., 366 F. Supp. 205, 208–09 (N.D. Ala. 1973)); *see also* Adams v. Governor's Comm. on Postsecondary Educ., No. C80-624A, 1981 WL 27101, at *2–3 (N.D. Ga. Sept. 3, 1981); Honeycutt & Turner, *supra* note 96, at 921 (noting the defendants' unsuccessful argument that the white plaintiff did not have standing under a theory of third-party associative discrimination in *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975)).

98. Honeycutt & Turner, *supra* note 96, at 915–16 (quoting 42 U.S.C. § 2000e-2(a) (1994)).

99. *Id.* at 914.

100. *Id.* at 916.

101. 421 F.2d 888, 891 (5th Cir. 1970).

102. 791 F.2d 888, 889 (11th Cir. 1986).

definition, alleging that she has been discriminated against because of race, and she need not specify that in her complaint.[103]

Other circuits have followed suit, prohibiting discrimination resulting from interracial romantic associations. In *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, a white female sued Wal-Mart Stores, Inc. (Walmart), alleging discrimination due to her romantic relationship with a black male employee.[104] The Fifth Circuit concluded that Walmart discriminated against the plaintiff "because of [her] race (white)" due to her interracial relationship, and that Title VII prohibits such discrimination.[105] It further determined that Walmart's proffered reason for terminating the plaintiff—that she "shopped the clock"—was a mere pretext for discriminating on the basis of her interracial relationship.[106] Likewise, in *Ross v. Douglas County*, a black prison guard successfully sued his employer after his black supervisor called him the N-word and "black boy" and referred to his white wife as "whitey."[107] The court rejected the defendant's argument that, as a matter of law, a black person could not subject another black person to a racially hostile work environment, relying on Justice Thurgood Marshall's conclusion in *Castaneda* that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."[108]

In *Ellis v. United Parcel Service, Inc.*, a black employee alleged that a black female supervisor had discriminated against him because he dated and subsequently married a white coworker.[109] The Employee Relations Manager, a black female, purportedly made multiple negative remarks about the plaintiff's interracial relationship to the plaintiff and his direct supervisor, who was also a black female.[110] The Seventh Circuit neither presumed that a black supervisor would not discriminate against a fellow black person because of race, nor concluded that an employer cannot be held liable for Title VII discrimination when it discriminates against an employee because the employee is involved in an interracial romantic relationship. Instead, the court held that Ellis did not demonstrate that he was treated worse than

103. *Id.* at 892.

104. 156 F.3d 581, 586 (5th Cir. 1998).

105. *Id.* at 588–89 (alteration in original) (internal quotation marks omitted).

106. *Id.* at 590–91.

107. 234 F.3d 391, 393 (8th Cir. 2000).

108. *Id.* at 396 (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)).

109. 523 F.3d 823, 824–25 (7th Cir. 2008).

110. *Id.* at 824–25.

similarly situated employees who violated the nonfraternization policy and were subject to the same decision maker.[111]

Several federal appellate courts, including the Second, Third, and Sixth Circuits, have even extended protection to nonromantic interracial associations. For example, in *DeMatteis v. Eastman Kodak Co*., a white male alleged that he was forced to retire early because he sold his home to a black person.[112] The Second Circuit held that the plaintiff had standing to sue because he had been discriminated against for "vindicating the right of a black fellow-employee 'to make . . . [a] contract . . .' similar to that which whites in the neighborhood have freely been able to make."[113] Likewise, in *Sperling v. United States*,[114] a white union grievance representative claimed that the U.S. Army denied him a promotion because he successfully represented a black employee.[115] In denying the government's motion to dismiss, the court concluded that Title VII should not be so narrowly construed as to preclude Mr. Sperling's claim simply because the discrimination resulted from his association with a black man, rather than from Mr. Sperling's own race.[116]

In sum, the outcomes in *Johnson* and *Weatherly* are consistent with the longstanding recognition of third-party associative discrimination. This legal doctrine underscores that in the employment context, individuals of the same racial background may be on opposite ends of racial discrimination in the employment setting—one discriminating and the other being the victim of discrimination.

E. Selecting the Proper Standard

A workplace "permeated with 'discriminatory intimidation, ridicule, and insult'" sufficiently severe or pervasive to alter the conditions of the victim's employment can create a hostile work

111. *Id.* at 826–28.

112. 511 F.2d 306, 307, 309 (2d Cir. 1975) (involving a § 1981 claim of third-party associative discrimination).

113. *Id.* at 312 (alteration in original) (citing Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969)) (holding that "a white person who has been 'punished for trying to vindicate the rights of (non-white) minorities . . .' has standing to sue").

114. 515 F.2d 465 (3d Cir. 1975).

115. *Id.* at 467–68 ("Sperling claims that he was denied a promotion to a GS-13 position in November, 1968, in retaliation for his successful representation, as union grievance delegate, of the black . . . employee.").

116. *Id.* at 484. Title VII also prohibits covered employers from retaliating against an applicant or employee with respect to any aspect of employment because the individual filed an EEOC Charge, complained of discrimination to the employer, or participated in an employment discrimination proceeding, such as an EEOC investigation. 42 U.S.C. § 2000e-3(a) (2012).

environment.[117] To prevail on a racially hostile work environment claim, the plaintiff must establish, *inter alia*, that a "reasonable person" would have found the conduct "hostile or abusive."[118] The *Merriam-Webster Dictionary* describes the N-word as "perhaps the most offensive and inflammatory racial slur" in the English language.[119] It is no surprise that given the N-word's dark history, many, if not most, courts have concluded that a reasonable person of any race would find its use at the workplace objectionable.

The United States Supreme Court has repeatedly made clear that in the context of a hostile environment claim, the objective severity of harassment is determined from the perspective of a "reasonable person."[120] For example, in *Harris v. Forklift Systems*, the Supreme Court observed that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a *reasonable person* would find hostile or abusive—is beyond Title VII's purview."[121] The Supreme Court further outlined a nonexhaustive list of factors, such as the frequency of the discriminatory conduct, that could be examined to determine the severity and pervasiveness of the conduct. Significantly, that list omits the race of the speaker, instead focusing exclusively on the experience and perspective of the target of the speech.[122]

Naturally, some lower courts have relied on the Supreme Court's use of the "reasonable person standard" to explicitly reject the view that the objective severity of the harassment should be determined from the perspective of a particular group, e.g., a "reasonable African-American" or a "reasonable Jew."[123] As the Second Circuit has explained:

> Title VII seeks to protect those that are the targets of such conduct, and it is their perspective, not that of bystanders or the speaker, that is pertinent. Second, this standard makes clear that triers of fact are not to determine whether some ethnic or gender groups are more

117. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (affirming the standard articulated in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66–67 (1986)).

118. *Id.* at 21.

119. KENNEDY, *supra* note 2, at 133–35.

120. *Harris*, 510 U.S. at 21; *see also Meritor*, 477 U.S. 57.

121. *Harris*, 510 U.S. at 21 (emphasis added).

122. *Id.* at 23 (discussing the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it reasonably interfered with the plaintiff's work, and what psychological harm, if any, it caused).

123. Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 436 & n.3 (2d Cir. 1999) (citation omitted) ("Richardson's allegations should thus be evaluated to determine whether a reasonable person who is the target of discrimination would find the working conditions so severe or pervasive as to alter the terms and conditions of employment for the worse."), *abrogated on other grounds by* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

> thin-skinned than others. Such an inquiry would at best concern largely indeterminate and fluid matters varying according to location, time, and current events. It might also lead to evidence, argument, and deliberations regarding supposed group characteristics and to undesirable, even ugly, jury and courtroom scenes.[124]

Taken together, this well-settled precedent suggests that whether a hostile environment exists hinges on the experience of the target of the speech, not the race or perspective of the speaker. The longstanding recognition that the reasonable person standard is the proper basis for determining whether unwelcome conduct is sufficiently pervasive and severe to create a hostile work environment also provides additional support for the assertion that *Johnson* and *Weatherly* were correctly decided.[125] After all, the shameful historical legacy of the N-word underscores the extent to which a reasonable person of any race would likely object to its use at the workplace, even if the speaker is black.

Despite its relatively innocent origin, the N-word had become a common racial slur by the nineteenth century.[126] To persons of all races, the N-word evokes a history of racial violence, brutality, and subordination. Times may have changed, but to many Americans, the negative connotation of the N-word has not. For example, to media mogul Oprah Winfrey, the N-word still evokes images of racially motivated lynchings.[127] In *The Butler*, a black character describes the N-word as "a white man's word . . . filled with hate."[128] As mentioned earlier, the NAACP literally buried the N-word at a historically black cemetery to symbolize the NAACP's commitment to end hate.[129] Prominent members of the black community, including the late Maya Angelou, have publicly criticized use of the N-word and decried it as a racial slur.[130] Even nonblacks immersed in black culture (i.e., rap artists, spoken word artists, and racialized comedians) rarely use the word.[131] Indeed, the N-word is such a powerful insult that its reach

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124. *Id.* at 436 n.3.

125. *See* Delph v. Dr. Pepper Bottling Co. of Paragould, Inc., 130 F.3d 349, 357 (8th Cir. 1997) (requiring plaintiff to show that he was "subjected to a racially hostile workplace environment a reasonable person would find intolerable, and that he did find it intolerable").

126. KENNEDY, *supra* note 2, at 4–5.

127. *Jay-Z Video*, *supra* note 12.

128. LEE DANIELS' THE BUTLER, *supra* note 16; *see also Lee Daniels' The Butler Quotes*, *supra* note 16.

129. Nittle, *supra* note 17.

130. *Id.*

131. Gregory S. Parks & Shayne E. Jones, *"Nigger": A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law*, 98 J. CRIM. L. & CRIMINOLOGY 1305, 1306, 1310, 1321 (2008).

has spread beyond the black community to become a tool to denigrate other racial and ethnic groups at home and abroad.[132]

The N-word has been described as "the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry,"[133] and countless judicial opinions reflect this view.[134] In *Rodgers v. Western-Southern Life Insurance Company*, the Seventh Circuit opined that "no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an *unambiguously* racial epithet such as '[ni**er]' by a supervisor in the presence of his subordinates."[135] Likewise, in *McGinest v. GTE Service Corp.*, the Ninth Circuit concluded that use of the N-word in reference to a black employee and the prevalence of racially charged graffiti at the workplace were "significant exacerbating factors in evaluating the severity of the racial hostility."[136]

To many individuals both inside and outside the black community, use of the N-word is debasing. It is like the age-old joke: "What do you call a black man with a Ph.D.?" The response being: "a ni**er,"[137] which reflects how dehumanizing and reductionist the word can be. Not surprisingly, the Honorable Andre M. Davis of the United States Court of Appeals for the Fourth Circuit penned a 2008 opinion piece in the *Baltimore Sun* to a man who called him a "ni**er" while he was a federal district court judge.[138] After being called the N-word by a pedestrian, Judge Davis wrote, "[Y]ou gave me a quite unexpected but not altogether unforeseeable flashback. In the shared journey of Americans to attain a society marked by mutual respect for the differences among us, one needn't travel far to be reminded how far we have to travel."[139]

Outside the employment discrimination context, plaintiffs have argued that use of the N-word is outrageous conduct sufficient to intentionally inflict emotional distress, and that its use by an attorney or

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132. *See* KENNEDY, *supra* note 2, at 27 (noting that Arabs are often labeled "sand ni**ers" while the Irish are called the "ni**ers" of Europe).

133. Swinton v. Potomac Corp., 270 F.3d 794, 817 (9th Cir. 2001) (alteration in original) (internal quotation marks omitted).

134. *See, e.g.*, *id.*; NLRB v. Foundry Div. of Alcon Indus., Inc., 260 F.3d 631, 635 n.5 (6th Cir. 2001) ("That the word '[ni**er]' is a slur is not debatable.").

135. 12 F.3d 668, 675 (7th Cir. 1993) (emphasis added) (citations omitted) (internal quotation marks omitted).

136. 360 F.3d 1103, 1116 (9th Cir. 2004).

137. Alfredo Mirandé, *Alfredo's Caribbean Adventure: LatCrit Theory, Narratives, and the Politics of Exclusion*, 26 CHICANO-LATINO L. REV. 207, 235 (2006).

138. Andre M. Davis, Op-Ed, *To the Man Who Called Me N-Word*, BALT. SUN, May 9, 2008, at 27A.

139. *Id.*

juror, standing alone, is sufficiently prejudicial to warrant a mistrial.[140] They have also argued that the word's use is so offensive that a target of the N-word who kills the speaker should have a count of first-degree murder reduced to second-degree murder on grounds of provocation.[141] Not surprisingly, many Americans of all races find the N-word patently offensive and inappropriate in virtually any setting, especially in the workplace.[142] Some have even pushed to abolish the word from the English language.[143]

Despite guidance from the Supreme Court providing that objective severity should be determined from the perspective of a reasonable person in the plaintiff's position, some courts have considered a standard that takes into account the plaintiff's race, national origin, sex, and other protected characteristics.[144] For example, in *Watkins v. Bowden*, a black female brought race- and sex-based hostile work environment claims against her previous employers, alleging that they allowed conversations about African-American hair and sexuality at the workplace.[145] The plaintiff sought a jury instruction to determine whether a "reasonable African American or woman" would have considered the work environment to be hostile.[146] The district court considered her argument but ultimately denied her request, applying a reasonable person standard instead.[147]

Likewise, in *Richardson v. New York State Department of Correctional Service*, a black female sued her employer, alleging that she was subject to a racially hostile environment in violation of Title VII.[148] Coworkers allegedly referred to Ms. Richardson as the N-word, and supervisors used the N-word in her presence.[149] Like in *Watkins*, the Second Circuit applied a reasonable person standard to determine the objective severity of the harassment, reasoning that although the perspective of the target is pertinent to the evaluation and Title VII aims to protect the target of offensive conduct, it is not the court's duty to

140. KENNEDY, *supra* note 2, at 58–59, 62, 64–67, 81–83, 106–07 (observing that although such challenges are made, they are unlikely to prevail).

141. Id. at 72–73.

142. *See id.* at 127.

143. *Id.* at 137.

144. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1115 (9th Cir. 2004).

145. 105 F.3d 1344, 1346, 1350–51 (11th Cir. 1997).

146. *Id.* at 1355–56.

147. *Id* at 1356; *see also* Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996).

148. 180 F.3d 426, 432 (2d Cir. 1999). The race of the employers and coworkers were not disclosed in the case.

149. *Id*. at 439.

determine whether some members of ethnic or other groups are more impervious to insult than others.[150]

These rulings comport with *Johnson* and *Weatherly* because, in both cases, the juries did not determine that a black supervisor's use of the N-word was acceptable merely because the supervisor spoke the words from the perspective of a black person. Nor did the juries determine the objective severity of the harassment from the perspective of a reasonable black person merely because the speakers and targets of the speech were both black. Instead, in both cases, the jurors applied a reasonable person standard to conclude that intraracial use of the N-word created a racially hostile work environment in violation of Title VII, regardless of the fact that the speaker and target were black.[151]

Although most courts continue to apply a reasonable person standard when determining the objective severity of harassment in hostile work environment cases, in 2004, the Ninth Circuit appeared to apply a reasonable "African-American man" standard to deny summary judgment in part in a case involving allegations of race discrimination and a hostile work environment.[152] In that case, George McGinest, a black employee, sued GTE Service Corporation (GTE) under Title VII for creation of a racially hostile work environment, failure to promote due to race, and retaliation.[153] Among other things, Mr. McGinest's coordinator allegedly called Mr. McGinest a "stupid ni**ger" and remarked that Mr. McGinest "should stay in Long Beach . . . with your kind."[154] Another supervisor purportedly remarked, "The other colored guy who used to work here would jump when I said it."[155] A coworker reportedly stated that she would retire before she worked "for a [b]lack man."[156] Coworkers allegedly called a white employee who was friends with black employees "Aunt Jemima" and "mammy," but the employee who spoke the slurs characterized them as "teasing nickname[s]."[157] Graffiti, including the N-

150. *Id*. at 436 n.3.

151. Johnson v. Strive E. Harlem Emp't Grp., 900 F. Supp. 2d 435, 445 (S.D.N.Y. 2014); Weatherly v. Ala. State Univ., 728 F.3d 1263, 1266 (11th Cir. 2013).

152. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1106–07, 1112 (9th Cir. 2004). The court affirmed the grant of summary judgment as to the plaintiff's retaliation claim. *Id*. at 1125.

153. *Id.* at 1106.

154. *Id.* at 1109 (internal quotation marks omitted).

155. *Id.* at 1109–10.

156. *Id.* at 1110 (internal quotation marks omitted).

157. *Id.; see also* Jones v. City of Overland Park, Nos. 92–2163–KHV, 92–2162–KHV, 1994 WL 583153, at *2–3 (D. Kan. Aug. 15, 1994) (acknowledging that the "Aunt Jemima" remark is relevant in determining the existence of a racially hostile environment).

word and the phrase "white is right," appeared on the walls of the men's restroom, and weeks passed before it was removed.[158]

In determining whether to grant GTE's motion for summary judgment, the court explained that "McGinest must show the existence of a genuine factual dispute as to 1) whether a *reasonable African-American man* would find the workplace so objectively and subjectively racially hostile as to create an abusive working environment; and 2) whether GTE failed to take adequate remedial and disciplinary action."[159] Put differently, "allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff."[160]

Courts adopting a "reasonable black person" standard may rely on *Oncale* to argue that the Supreme Court refashioned the "reasonable person standard" articulated in *Harris* to take into account other relevant factors including the victim's ethnicity, sex, or race.[161] *Harris* referred to "an environment that a reasonable person would find hostile or abusive."[162] In *Oncale,* however, the Supreme Court stated that "the objective severity of harassment should be judged from the perspective of *a reasonable person in the plaintiff's position, considering 'all the circumstances.'*"[163] Some courts have construed "in the plaintiff's position, considering all the circumstances" to permit use of a customized standard based on the characteristics of the plaintiff, including race. Yet even that language does not definitively suggest that the race of the *target* of the speaker should be dispositive in determining whether use of the N-word constitutes race discrimination, and *Oncale* involved same-sex harassment, not race discrimination.

To justify this interpretation, some argue that racially motivated comments or actions that seem innocent or minimally offensive to someone outside the targeted group could be perceived as abusive from the perspective of a plaintiff who is a member of the group. Indeed, "[t]he omnipresence of race-based attitudes and experiences in the lives of black Americans [may cause] even nonviolent events to be interpreted as degrading, threatening, and offensive."[164] Courts

158. *McGinest*, 360 F.3d at 1110–11.

159. *Id.* at 1112 (citing Steiner v. Showboat Operating Co., 25 F.3d 1459, 1462–63 (9th Cir. 1994)) (emphasis added).

160. *Id.* at 1115.

161. *See, e.g.*, *id.* at 1115 n.8.

162. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

163. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (emphasis added) (quoting *Harris*, 510 U.S. at 23).

164. Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1516 (noting that "instances of racial violence or threatened violence which might appear to white observers as mere 'pranks' are, to

adopting the reasonable black person standard have also observed that consideration of the existence and severity of discrimination from the perspective of a reasonable person of the plaintiff's race better recognizes forms of discrimination that are real and hurtful but could easily be missed if considered solely from the perspective of someone of a different race than the plaintiff.[165]

Adoption of the reasonable black person standard is especially pertinent when one considers that some black individuals use the N-word as a term of solidarity or affection. According to Professor Clarence Major, the N-word used by one black person to refer to another is a "racial term with undertones of warmth and goodwill."[166] In a 2009 interview, black rapper Jay-Z explained, "People give words power. . . . [O]ur generation . . . took the power out of that word. We turned a word that was very ugly and hurtful into a term of endearment . . . ."[167] Similarly, in *Nigger in the Window*, Helen Jackson Lee observes that the N-word is a "piece-of-clay word that you could shape . . . to express your feelings."[168] Professor Randall Kennedy observes that blacks who use the N-word do not care if it makes members of other races or even other blacks uncomfortable; rather, they "care principally, perhaps exclusively, about what they themselves think, desire, and enjoy."[169] According to author Bruce A. Jacobs, "To proclaim oneself a [ni**er] is to declare to the disapproving mainstream, 'You can't fire me. I quit.' . . . To growl that one is a [ni**a] is a seductive gesture . . . that can feel bitterly empowering."[170] Perhaps for this reason, Professor Mari Matsuda argues that to disallow intraracial use of the N-word further victimizes blacks by "misunderstanding their linguistic and cultural norms."[171]

Although these points are well taken, they do not justify application of a different and certainly no less onerous standard in race-based hostile environment cases arising from intraracial use of the N-word. To prevail on a hostile work environment claim, the plaintiff must also

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black observers, evidence of threatening, pervasive attitudes"), *vacated in part on other grounds,* 765 F. Supp. 1529, 1532 (D. Me. 1991); *see also id.* (discussing "racial jokes, comments or nonviolent conduct which white observers are . . . more likely to dismiss as non-threatening isolated incidents"); Dickerson v. New Jersey, 767 F. Supp. 605, 616 (D.N.J. 1991) ("The mere mention of the KKK invokes a long and violent history sufficient to detrimentally affect *any* reasonable person of the same race as the plaintiff.").

165. *See, e.g.*, *Harris*, 765 F. Supp. at 1516.

166. KENNEDY, *supra* note 2, at 36–37.

167. *Jay-Z Video*, *supra* note 12.

168. KENNEDY, *supra* note 2, at 38.

169. *Id.* at 171.

170. *Id.* at 49.

171. *Id.* at 160.

show that the conduct or speech was unwelcome and that she subjectively perceived it as abusive.[172] Concerns regarding whether the target of the speech was subjectively offended by the speech even though it was intraracial are more properly addressed when assessing whether the conduct was subjectively unwelcome, not when evaluating the objective severity of the alleged harassment.

Furthermore, although the *Oncale* Court stated that the "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" it elaborated that in same-sex harassment cases, "all the circumstances" means "consideration of the social context in which particular behavior occurs and is experienced by its target."[173] The *Oncale* Court illustrated this point by observing that a football player's work environment differs substantially from that of a coach's secretary working in an office.[174] Thus, while the coach smacking a player's buttocks as he enters the field might not rise to the level of a Title VII violation, the same behavior toward the coach's secretary would certainly be inappropriate at the office.[175] It is undisputed that behavior and language that may be acceptable in rap lyrics, on the field, or in the locker room may not always acceptable at the office. As the Supreme Court explained:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[176]

Notably, nowhere does the Court mention the race of the speaker nor the target of the speech. Nor did the Supreme Court explicitly include race, sex, or ethnicity in the "constellation of surrounding circumstances."[177]

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172. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 23 (1993).

173. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

174. *Id.*

175. *Id. But see* Tim Daniels, *NFL Expected To Create 15-Yard Penalty for Use of Racial Slur*, BLEACHER REPORT (Feb. 22, 2014), http://bleacherreport.com/articles/1970032-nfl-expected-to-create-15-yard-penalty-for-use-of-racial-slur?utm_source=cnn.com&utm_medium=referral&utm_campaign=editorial&hpt=hp_t2 (contemplating imposition of a fifteen-yard penalty for use of racial slur during the game and complete ejection for subsequent use of a racial slur).

176. *Oncale*, 523 U.S. at 81–82.

177. *Id.*

To be clear, we do not suggest that courts should entirely ignore the "constellation of surrounding circumstances" when assessing whether a work environment is hostile. To the contrary, appropriate sensitivity to the social context of the alleged harassment will enable courts and juries to recognize conduct that a reasonable person in the plaintiff's position would find severely hostile or abusive.[178] The inclusion of details regarding the context of the speech, such as where and when the alleged harassing marks were made, may ensure that a jury considers "whether the conduct would be offensive to a reasonable person in the plaintiff's position . . . and may help ensure that the jury view[s] the conduct from the plaintiff's perspective."[179] However, the standards controlling what might be acceptable in society at large do not necessarily correspond to what is legally permissible in the workplace.[180]

Infusion of race into assessments of the objective severity of race-based harassment "may perpetuate negative stereotypes or insert into the case prejudicial or inflammatory material that has no relevance to the plaintiff's experience."[181] However, "[t]he purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment."[182]

Finally, although white supremacists originally used the N-word to denigrate blacks, evidence suggests that now some members of the black community still use the word to insult members of their own race.[183] Thus, the word could still create a racially hostile work environment even if judged from a reasonable black person's perspective. For example, a black person may refer to another black person as the N-word to denote laziness, bad behavior, lack of intelligence, or other negative traits.[184] As a result, even this intraracial use connotes inferiority, insult, and may cause offense.[185] Given the N-word's long and

178. Muzzy v. Cahillane Motors, Inc., 749 N.E.2d. 691, 695–96 (Mass. 2001) (quoting *Oncale* and discussing the pros and cons of giving a reasonable person instruction in a specific context that includes the plaintiff's attributes).

179. *Id.* at 696.

180. Torres v. Pisano, 116 F.3d 625, 632 n.7 ("What *is,* is not always what is right, and reasonable people can take justifiable offense at comments that the vulgar among us, even if they are a majority, would consider acceptable.").

181. *Muzzy*, 749 N.E.2d at 696.

182. King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994).

183. KENNEDY, *supra* note 2, at 45–46.

184. *Id.*

185. *Id*.

negative history, it is unsurprising that a reasonable person of any race could find its use at the workplace offensive.

F. The Automaticity of Race Bias and Use of the N-Word

Conventional wisdom and even "naïve" psychological conceptions of human thought and social behavior[186] place great weight on accessible thoughts and conscious intentions as informing expressly held beliefs and volitional behavior.[187] An express belief is one that is consciously endorsed, and a conscious intention to act exists when the actor purposefully engages in behavior for some specific reason.[188] The challenge to such an assessment is that it has long been known that social influences operating within interview and research settings can lead individuals to inaccurately describe their explicit beliefs.[189] Furthermore, people's explanations of their behavior sometimes consist of a mere groping for answers, thus producing often improbable answers.[190]

Contrary to the notion that human thoughts and behaviors are purely accessible and volitional, the vast and growing body of research on implicit social cognition suggests that individuals lack both absolute awareness of their own thoughts and the ability to control behaviors that flow from those thoughts. Such mental processes include implicit memory,[191] implicit perception,[192] implicit attitudes,[193] im-

186. Terence Horgan & James Woodward, *Folk Psychology Is Here To Stay*, *in* MIND AND COGNITION: AN ANTHOLOGY 419 (William G. Lycan et al. eds., 2008).

187. Paulo Sousa, *On Folk Conceptions of Mind, Agency, and Morality*, 6 J. COGNITION & CULTURE 1, 1 (2006).

188. *Id.* at 22.

189. Martin T. Orne, *On the Social Psychology of the Psychological Experiment: With Particular Reference to Demand Characteristics and Their Implications*, 17 AM. PSYCHOLOGIST 776, 776–77 (1962); *see also* Stephen J. Weber & Thomas D. Cook, *Subject Effects in Laboratory Research: An Examination of Subject Roles, Demand Characteristics, and Valid Inference*, 77 PSYCHOL. BULL. 273, 273–74 (1972).

190. Orne, *supra* note 189, at 778–79.

191. Daniel L. Schacter, *Implicit Memory: History and Current Status*, 13 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 501, 501 (1987).

192. John F. Kihlstrom et al., *Implicit Perception*, *in* PERCEPTION WITHOUT AWARENESS: COGNITIVE, CLINICAL, AND SOCIAL PERSPECTIVES 17, 19 (Robert F. Bornstein & Thane S. Pittman eds., 1992).

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

plicit stereotypes,[194] implicit self-esteem,[195] and implicit self-concept.[196]

Implicit memory research from the 1980s led to the development of measures to assess other implicit mental phenomena, including implicit attitudes and implicit stereotypes. An attitude is a hypothetical construct that represents the degree to which an individual likes or dislikes or acts favorably or unfavorably toward someone or something.[197] People may also be ambivalent about a person, a group of people, or an object, such that they are imbued with both positive and negative attitudes about the object in question. Attitudes are implicit when they lie outside of conscious awareness. Professors Anthony G. Greenwald and Mahzarin R. Banaji define implicit attitudes as "introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects."[198] Implicit attitudes are of greatest interest when they are different from explicit attitudes about the same category of individuals or things. Such discrepancies, referred to as "dissociations," are often observed in attitudes toward stigmatized groups, such as groups defined by age, disability, ethnicity, sex, religion, sexual orientation, and race.[199]

On the other hand, a social stereotype is a mental association made between, for example, a social group and a trait.[200] Such an association may or may not be grounded in a statistical reality. If the association is grounded in empirical reality, group members who are the subject of the mental association will be more likely to display the associated trait than members of other groups.[201] Implicitly, such stereotypes are "the introspectively unidentified (or inaccurately identi-

194. Laurie A. Rudman et al., *Implicit Self-Concept and Evaluative Implicit Gender Stereotypes: Self and Ingroup Share Desirable Traits*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1164, 1164 (2001).

195. Anthony G. Greenwald & Shelly D. Farnham, *Using the Implicit Association Test To Measure Self-Esteem and Self-Concept*, 79 J. PERSONALITY & SOC. PSYCHOL. 1022, 1022 (2000).

196. Rudman et al., *supra* note 194. As used herein, "implicit" connotes a lack of explicit or express access to memory, perception, attitudes, and the like.

197. *See* Alice H. Eagly & Shelly Chaiken, *Attitude Structure and Function*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 269, 269–71 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

198. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 8 (1995).

199. Michael A. Olson & Russell H. Fazio*, Implicit and Explicit Measures of Attitudes: The Perspective of the MODE Model*, *in* ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 19, 19–64 (Richard E. Petty et al. eds., 2009).

200. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

201. *Id.*

fied) traces of past experience that mediate attributions of qualities to members of a social category."[202]

A bias reflects a preference for a particular group or category over another group or category. Accordingly, within biases, there are opposite sides to the same coin—favorable and unfavorable categorizations of comparative groups. For example, in-group bias designates favoritism toward one's own group or groups.[203] Not surprisingly, implicit attitudes and stereotypes may result in discriminatory biases.[204] These biases are called "implicit biases," which may diverge from an individual's express beliefs and result in behavior inconsistent with the individual's intended behavior.

Within the social and behavioral sciences, the typical method of attitude measurement has been the collection of self-reports, which reflect an individual's explicit attitudes. For example, when researchers want to ascertain subjects' attitudes toward something, they usually ask participants to select one of several given responses, or to complete a rating scale.[205] The drawback in using these methods is that some respondents may be unwilling or unable to report their attitudes in an unbiased or accurate manner.[206] Moreover, research respondents' answers are context dependent—e.g., who asks the question and how it is asked.[207]

These concerns gave rise to the creation of research measures that indirectly gauge attitudes. Presumably, research participants are unaware of the relationship between these measures and the attitudes they are employed to ascertain. Indirect measures also seem to minimize respondents' strategic responding.[208] Accordingly, these measures have evolved from projective tests[209] to a wide variety of contemporary techniques, which fall into three general categories: (1)

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202. *Id.*

203. Luigi Castelli et al., *Implicit Ingroup Metafavoritism: Subtle Preference for Ingroup Members Displaying Ingroup Bias*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 807, 807 (2008).

204. Greenwald & Krieger, *supra* note 200, at 951.

205. Brian A. Nosek, *Moderators of the Relationship Between Implicit and Explicit Evaluation*, 134 J. EXPERIMENTAL PSYCHOL.: GEN. 565, 570 (2005).

206. *Id.* at 568 ("People might be unwilling to report an evaluative response that comes to mind because (a) they do not others to know about it, or (b) the feeling is unwanted in the sense that it is not endorsed or accepted as one's evaluation.").

207. *See generally* ROGER TOURANGEAU ET AL., THE PSYCHOLOGY OF SURVEY RESPONSE (2000); SEYMOUR SUDMAN ET AL., THINKING ABOUT ANSWERS: THE APPLICATION OF COGNITIVE PROCESSES TO SURVEY METHODOLOGY (1995).

208. Bernd Wittenbrink & Norbert Schwarz, *Introduction*, *in* IMPLICIT MEASURES OF ATTITUDES 1 (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

209. Howard M. Prohansky, *A Projective Method for the Study of Attitudes*, 38 J. ABNORMAL & SOC. PSYCHOL. 393, 393–94 (1943).

reaction time measures;[210] (2) language measures;[211] and (3) psychophysiological measures.[212] An exhaustive account of the variety of implicit measures exceeds the scope of this article.[213] However, among the most typically used measures are subliminal priming and the Implicit Association Test (IAT).[214]

Cognitive psychology research into subliminal priming indicates that exposure to a concept facilitates the later recognition of related concepts.[215] As Professors Bernd Wittenbrink and Norbert Schwarz explain, "A common explanation for this phenomenon holds that exposure to the initial concept (the prime) activates semantically related concepts in memory, thus reducing the time needed for their identification."[216]

Researchers have developed various priming procedures to measure attitudes derived from the seminal work of Professors David E. Meyer and Roger W. Schvaneveldt.[217] In two different experiments, subjects were simultaneously presented with two strings of letters, one string displayed visually above the other.[218] In the first experiment, participants responded "yes" if both strings were words; otherwise they responded "no."[219] In the second experiment, participants responded "same" if the two strings were either both words or both nonwords; otherwise they responded "different."[220] Participants responded "yes" or "same" for pairs of commonly associated words more quickly than they did for pairs of unassociated words.[221]

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210. Greenwald et al., *supra* note 198, at 5.

211. Anne Maas et al., *Linguistic Intergroup Bias: Evidence for In-Group Protective Motivation*, 71 J. PERSONALITY & SOC. PSYCHOL. 512, 512–13 (1996).

212. Tiffany A. Ito & John T. Cacioppo, *Attitudes as Mental and Neural States of Readiness: Using Physiological Measures to Study Implicit Attitudes*, *in* IMPLICIT MEASURES OF ATTITUDES 125, 125–26 (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

213. For a more in-depth review of the implicit measurement literature, see IMPLICIT MEASURES OF ATTITUDES (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

214. *See generally* S.T. Murphy & R.B. Zajonc, *Affect, Cognition, and Awareness: Affective Priming with Optimal and Suboptimal Stimulus Exposure*, 64 J. PERSONALITY & SOC. PSYCHOL. 723 (1993); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998).

215. James H. Neely, *Semantic Priming Effects in Visual Word Recognition: A Selective Review of Current Findings and Theories*, *in* BASIC PROCESSES IN READING: VISUAL WORD RECOGNITION 264, 264 (Derek Besner & Glyn W. Humphreys eds., 1991).

216. Wittenbrink & Schwarz, *supra* note 208, at 5.

217. David E. Meyers & Roger W. Schvaneveldt, *Facilitation in Recognizing Pairs of Words: Evidence of a Dependence Between Retrieval Operations*, 90 J. EXPERIMENTAL PSYCHOL. 227, 231–32 (1971).

218. *Id.* at 227.

219. *Id.*

220. *Id.*

221. *Id.* at 229.

"Same" responses were slowest for nonword pairs. "No" responses were faster when the top string in the display was a nonword, whereas "different" responses came more quickly when the top string was a word.[222] As has been demonstrated in countless replication studies, participants make such decisions more quickly when the prime[223] and target string share some semantic relationship.[224] So, in theory, the prime activates semantically related concepts in long-term memory, resulting in faster recognition of and response to related targets.[225]

Professor Russell H. Fazio and his colleagues believed that such a priming technique could be extended to attitudes.[226] To test this, they subliminally presented an object to participants in the study, and then tested the extent to which that object would evoke positive or negative attitudes later.[227] Professor Fazio and his colleagues found greater facilitation "when positively valued primes were followed by positive targets and when negatively valued primes were followed by negative targets than when the prime-target pairs were incongruent in valence."[228]

Almost a decade later, Professor Fazio and his colleagues extended this technique to racial attitudes.[229] Specifically, they used black and white faces as primes, and adjectives with positive or negative connotations, for example, "good" and "bad."[230] Participants had to push keys labeled either "good" or "bad" as quickly as possible.[231] White participants' reaction times to the "good" words were faster following presentation of white faces.[232] Their reaction times to the "bad"

222. *Id.* at 231–32.

223. In the evaluative priming method, subjects classify each of a series of target words based on the target word's evaluative meaning, with each target word immediately preceded by a to-be-ignored prime word. Prime-target evaluative congruence facilitates responding to the target, producing variation in response latencies that can be used to measure automatic evaluation of the prime category. Greenwald et al., *supra* note 214, at 1477.

224. Meyers & Schvaneveldt, *supra* note 217, at 232–33.

225. James H. Neely, *Semantic Priming and Retrieval from Lexical Memory: Roles of Inhibitionless Spreading Activation and Limited-Capacity Attention*, 106 J. EXPERIMENTAL PSYCHOL.: GEN. 226, 226 (1977).

226. *See* Russell H. Fazio et al., *On the Automatic Activation of Attitudes*, 50 J. PERSONALITY & SOC. PSYCHOL. 229 (1986).

227. Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1013 (1995).

228. Russell H. Fazio et al., *On the Automatic Activation of Attitudes*, 50 J. PERSONALITY & SOC. PSYCHOL. 229, 235 (1986).

229. Fazio et al., *supra* note 227, at 1013.

230. *Id.* at 1015.

231. *Id.*

232. *Id.* at 1016.

words were quicker when those words followed the presentation of black faces.[233]

Building upon Professor Fazio's work, the IAT has become the dominant attitude measure employed to circumvent strategic responding or responding that merely reflects a lack of insight on the part of respondents.[234] The IAT assesses the ease with which individuals associate various categories based on reaction times.[235] Accordingly, the IAT permits an inference about attitudes because it is generally easier to respond quickly to items from two categories that are cognitively associated with each other.[236] The most widely used IAT (the Race IAT) assesses implicit attitudes toward blacks vis-à-vis whites.[237]

In the Race IAT, study participants first practice distinguishing black and white faces by responding to images of faces by pressing a computer key on the left side of the keyboard for one racial category and on the right side of the keyboard for another racial category.[238] Participants next practice distinguishing positive adjectives words from negative adjectives in a manner similar to that used for distinguishing black and white faces.[239] The next two tasks, given in a randomly determined order, use all four categories (black faces, white faces, positive adjectives, and negative adjectives).[240] One task requires one response, for example, pressing a left-side key, when the respondent sees black faces or positive words, whereas white faces and negative words call for the other response, for example, pressing a right-side key.[241] In the remaining task, white faces share a response with positive words and black faces with negative words.[242] For American respondents who take the Race IAT, response speeds are often faster when white faces are paired with positive words.[243] This finding supports the conclusion that white-positive is a stronger association than black-positive (and conversely, white-negative is a weaker association than black-negative). In the context of racial bias, these results suggest an implicit attitudinal preference for whites over

233. *Id.* at 1013.

234. Greenwald et al., *supra* note 214, at 1464.

235. *Id.*

236. *Id.* at 1464–65.

237. Greenwald & Krieger, *supra* note 200, at 952.

238. Fazio et al., *supra* note 227, at 1015.

239. *Id.*

240. *Id.* at 1016.

241. *Id.*

242. *Id.*

243. Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES., & PRAC. 101, 105 (2002).

blacks.[244] The IAT's general method can be, and has been, adapted to measure a wide variety of group-valence and group-trait associations underlying attitudes and stereotypes.[245]

Implicit attitudes are unremarkable in the sense that people harbor them with respect to a wide variety of things. One study found that people hold implicit attitudes about things as simple as yogurt brands, fast food restaurants, and soft drinks.[246] Certainly, in such a context, these implicit attitudes may predict behavior that may largely be deemed as inconsequential, at least with respect to any macro-level considerations.[247] However, group identities may provide for a heightened level of concern. For example, Americans tend to implicitly favor the United States over Japan and "American" over "Canadian."[248] Not surprisingly, they implicitly favor American places over foreign places.[249] They also implicitly favor thin people over obese people, and young people over old people.[250] Heterosexuals are favored over homosexuals, rich over poor, and Jews over Muslims—all implicitly.[251]

Research on implicit racial attitudes and bias—particularly research focused on blacks—is the most robust area of implicit attitudes and bias research.[252] As previously indicated, people's explicit and implicit attitudes are often not completely concordant.[253] This may be no more evident than when it comes to the hotbed issue of race. For example, research suggests that Latinos demonstrate a fairly limited explicit preference for whites (25.3% favor) over blacks (15.0% favor), with most showing no preference (59.7%).[254] However, at the implicit level, Latinos show a substantial preference for whites (60.5% favor) over blacks (10.2% favor), with far fewer showing preferential neutrality (29.2%) in comparison to their explicit preferences.[255]

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244. *See id.*

245. Greenwald & Krieger, *supra* note 200, at 952.

246. Dominika Maison et al., *Predictive Validity of the Implicit Association Test in Studies of Brands, Consumer Attitudes, and Behavior*, 14 J. CONSUMER PSYCHOL. 405, 405 (2005).

247. Malte Friese et al*., Implicit Consumer Preferences and Their Influences on Product Choice*, 23 PSYCHOL. & MARKETING 727, 736 (2006) (finding that participants who possessed incongruent explicit and implicit preferences in regard to generic food products and well-known food brands were more likely to choose the implicitly preferred brand when choices were made under time pressure).

248. Greenwald & Krieger, *supra* note 200, at 957.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 952.

253. *Id.* at 949.

254. Greenwald & Krieger, *supra* note 200, at 958.

255. *Id.*

Asians and Pacific Islanders exhibit more of an explicit preference for whites (32.9% favor) over blacks (9.6% favor), with only slightly fewer showing preferential neutrality (57.5%) as compared to Latinos.[256] However, at the implicit level, they demonstrate a substantial preference for whites (67.5% favor) over blacks (7.7% favor), with far fewer showing preferential neutrality (24.8%) when compared to their explicit preferences.[257] Whites show much more of an explicit preference for whites (40.7% favor) than blacks (3.4% favor), especially when compared to other racial groups, but still more than half (56.0%) show no preference.[258] Yet, at the implicit level, whites show a robust preference for whites (71.5% favor) over blacks (6.8% favor), with only 21.7% showing no preference.[259] In an Internet-based study conducted by Professor Brian A. Nosek and his colleagues, new data from three measures available to the public at a demonstration website[260] extended the existing evidence concerning implicit and explicit in-group and out-group bias among whites.[261] This study found that a larger percentage of whites express in-group favoritism on implicit measures (78.4%) than on explicit measures (51.1%).[262]

Research on blacks' implicit racial biases is striking for two reasons. First, like research on other racial groups, there is a lack of concordance between blacks' explicit and implicit racial attitudes.[263] Second, although blacks show an explicit preference for blacks (58.9%) over whites (4.8%), with 36.2% showing no preference, the same cannot be said implicitly.[264] At the implicit level, some research shows that blacks have no preference at all, with 34.1% favoring blacks, 32.4% favoring whites, and 33.6% showing no preference.[265]

Other research bolsters these findings. For example, among twelve- to fourteen-year-old blacks, Professor Andrew Scott Baron and his colleagues found that, at least by age thirteen, young blacks do not exhibit the in-group preference that has come to be the hallmark of

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Teaching Tolerance*, S. POVERTY L. CENTER, http://www.tolerance.org (last visited Feb. 24, 2014).

261. Nosek, *supra* note 243.

262. 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, 897 (2004).

263. Greenwald & Kriger, *supra* note 200, at 959–60.

264. *Id.* at 958.

265. *Id.*

whites.[266] Professor C. Vincent Spicer found that among black adults, there is considerable variability in blacks' implicit racial preferences, though overall, blacks show a significant preference for whites over blacks.[267] A study by Professor Spicer and his colleagues demonstrates that between 50% and 65% of blacks exhibit implicit out-group bias in favor of whites.[268] Professor Lesile Ashburn-Nardo and her colleagues found that 60% of blacks show a pro-white implicit bias, although they express highly favorable in-group attitudes on explicit measures.[269] Professor Nosek and his colleagues' Internet-based study found that blacks show a significant preference for whites over blacks.[270] There, more blacks expressed in-group favoritism on explicit measures (65.4%) than on implicit measures (40.1%).[271] When attitudes are measured implicitly, 39.3% of blacks show out-group favoritism, which is about the same proportion that showed in-group favoritism.[272] In sum, blacks show strong in-group favoritism explicitly, but not implicitly.[273]

A proliferation of scholarship on employment discrimination highlights how implicit race bias may influence cognitive judgment and decision-making in the employment context. For example, Professors Eric Louis Uhlmann and Geoffrey L. Cohen found that job discrimination may occur when people redefine merit in a manner that fits the idiosyncratic credentials of individual applicants from desired groups.[274] Participants were assigned male and female applicants to gender-stereotypical jobs.[275] However, participants did not view male and female applicants as having different strengths and weaknesses.[276] Instead, they redefined the criteria for success at the job as requiring the precise credentials possessed by a candidate of the desired sex.[277]

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266. Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 57 (2006).

267. C. Vincent Spicer, Effects of Self-Stereotyping and Stereotype Threat on African Americans' Intellectual Performance (1999) (Ph.D. dissertation, University of Kentucky) (on file with William T. Young Library, University of Kentucky).

268. Jost et al., *supra* note 262, at 895.

269. Leslie Asburn-Nardo et al., *Black Americans' Implicit Racial Associations and Their Implications for Intergroup Judgment*, 21 SOC. COGNITION 61, 73 (2003).

270. Nosek et al., *supra* note 243, at 105–07.

271. *Id.* at 105–06.

272. *Id.*

273. Jost et al., *supra* note 262, at 897.

274. Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit To Justify Discrimination*, 16 PSYCHOL. SCI. 474, 474 (2005).

275. *Id.* at 475.

276. *Id.*

277. *Id*.

While this study focused on sex differences, the finding could be similarly applied to racial categories.

In a collection of studies, Professor Devah Pager concluded that having a criminal record affects the job prospects of blacks and whites differently.[278] In one study, twenty-three-year-old black and white male testers were matched based on physical appearance and self-presentational styles.[279] Characteristics that were not naturally identical between pairs, such as educational attainment and work experience, were made similar for purposes of the study.[280] Testers were divided into pairs, and one tester was to present himself as having a criminal record.[281] The testers then applied for entry-level positions requiring no previous work experience and no education greater than high school identified in the Sunday classified advertisement section of a large Midwestern city newspaper.[282] Professor Pager found that the negative effect of a criminal record was 40% greater for blacks than it was for whites.[283] In a similar follow-up study, Professor Pager found that while more than 60% of employers indicated a willingness to hire a black or white drug offender, only 17% of employers gave callbacks to white testers.[284] In contrast, less than a third of that percentage of employers gave black testers callbacks.[285]

In another noted study, Professors Marianne Bertrand and Sendhil Mullainathan sent fictitious résumés in response to classified advertisements in Chicago and Boston newspapers.[286] They manipulated perceived race by randomly assigning the résumés either a black-sounding name or a white-sounding name.[287] Employers were 50% more likely to invite individuals with white-sounding names for interviews.[288] They also found that for white-sounding names, higher quality résumés elicited 30% more callback invitations.[289] However, individuals with black-sounding names but higher quality resumes

278. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 938 (2003).

279. *Id.* at 947.

280. *Id.* at 949.

281. *Id.* at 947.

282. *Id.*

283. *Id.* at 959.

284. Devah Pager & Lincoln Quillian, *Walking the Talk?: What Employers Say Versus What They Do*, 70 AM. SOC. REV. 355, 362 (2005).

285. *Id.* at 363.

286. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 994 (2004).

287. *Id*. at 992.

288. *Id.*

289. *Id.* at 992–93.

elicited a far smaller increase in callbacks.[290] They also found that the degree of discrimination is uniform across occupations and, to a lesser extent, industries.[291] Professors Bertrand and Mullainathan found that even federal contractors and employers who described themselves as "equal opportunity employers" discriminate as much as other employers.[292]

While these studies do not employ the IAT and do not specifically focus on hostile work environment discrimination, they highlight the fact that employers and supervisors may often make employment decisions that are discriminatory and influenced by unconscious biases. In fact, the Bertrand and Mullainathan study utilizes an oft-employed priming technique to determine the extent to which explicit information that conjures up implicit imagery—for example, racialized names—influences judgment and decision making.[293] In fact, employers with self-perceptions as rational and fair in their hiring, promotion, and retention decision making, coupled with unconscious biases, actually have the tendency to increase employment discrimination.[294]

Two studies underscore how use of the N-word in the employment context can create a hostile work environment. In 1985, social psychologists Jeff Greenberg and Tom Pyszczynski asked black and white college students to judge a debate.[295] They planted individuals in the audience who, immediately after the debate, either referred to the black students as the N-word, criticized them in a nonracist manner, or said nothing.[296] Their study indicated that observers who overheard the insult were likelier to lower their evaluation of the black debaters.[297] This suggests that racial slurs "can indeed cue prejudiced behavior in those who are exposed."[298] In a more recent study, social psychologists Laurie Rudman and Richard Ashmore found that not only do implicit racial bias scores predict economic discrimination

290. *Id.* at 992.

291. *Id.*

292. Bertrand & Mullainathan, *supra* note 286, at 992.

293. *See* Sharon L. Segrest Purkiss et al., *Implicit Sources of Bias in Employment Interview Judgments and Decisions*, 101 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 152, 155 (2006).

294. Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 214 (2007).

295. Jeff Greenberg & Tom Pyszczynski, *The Effect of an Over-Heard Ethnic Slur on Evaluations of the Target*, 21 J. EXPERIMENTAL PSYCHOL. 61 (1985).

296. *Id.* at 64–65.

297. *Id.* at 65.

298. KENNEDY, *supra* note 2, at 60 (internal quotation marks omitted).

against black student organizations, but they also predict the use of racial slurs.[299]

The narrative concerning how implicit antiblack racial biases manifest themselves in behavior among black actors, as opposed to nonblack actors, has yet to be fully explored by social scientists. However, taken together, the existing body of research supports the outcomes in *Johnson* and *Weatherly* because it suggests that implicit race bias may result in discriminatory use of the N-word by and among blacks, thus creating a hostile work environment for employees on the receiving end of the word. Simply put, black supervisors may be just as likely as white supervisors to discriminate against black employees on the basis of race or to use the N-word at the workplace in a discriminatory way.

G. Promoting Fairness, Consistency, and Judicial Efficiency

Application of the same reasonable person standard to hostile work environment claims involving intraracial and interracial use of the N-word will also promote fairness. After all, whether or not nonblacks can and should use the N-word has been hotly debated. In a recent episode of Fox's television drama *Boston Public*, a white student calls a black friend the N-word, causing an offended black student to challenge the white student to a fight.[300] The students' white teacher leads a discussion about the N-word that is based on Professor Kennedy's controversial book, *Nigger*: *The Strange Career of a Troublesome Word*, and a black teacher asks that the white teacher be terminated for using the N-word.[301] Although this fictional example may seem somewhat extreme, it is not far from reality.

"Niggas in Paris" won a Grammy in 2012 and sold 436,000 copies in a week.[302] Yet white actress Gwyneth Paltrow came under fire for reportedly using "ni**as" in a tweet discussing the hit song.[303] Rihanna thought it was appropriate to publicly post a photo of herself with a black toddler captioned "My lil nigga."[304] Yet, when Latina

299. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 363 (2007).

300. Martin Kilson, *The N-Word as Therapy for Racists*, BLACK COMMENTATOR (June 27, 2002), http://www.blackcommentator.com/n_word.html.

301. *Is the "N-Word" Going Mainstream?*, ABC NEWS (Apr. 10, 2002), http://abcnews.go.com/2020/story?id=132632&page=1&singlePage=true.

302. *See* Paul Bright, *Op-Ed: Why Rappers Can Say the "N" Word, but Paula Deen Can't*, DIGITAL J. (July 1, 2013), http://digitaljournal.com/article/353504.

303. Sheila Marikar, *Gwyneth Paltrow References N-Word, Upsets Twitter*, ABC NEWS (June 5, 2012, 12:00 PM), http://abcnews.go.com/blogs/entertainment/2012/06/gwyneth-paltrow-references-n-word-upsets-twitter/.

304. Owens, *supra* note 4.

actress and singer Jennifer Lopez used the N-word in a remix of her hit song "I'm Real," civil rights activists demanded an apology, and a New York radio station threatened to boycott her music.[305] Likewise, after white Food Network star Paula Deen admitted to using the N-word in the past, her sponsors withdrew their support, signaling an end to her television career.[306] White television personality Bill Maher came to her defense, asking whether rap songs using the N-word should be banned.[307] Yet, at the 2007 Grammy Awards, songs containing the N-word, albeit all written or performed by black artists, were nominated for and won Best Rap Song, Best Rap Solo Performance, Best Rap Performance by a Duo or Group, and Best Rap Album.[308]

Such controversy over use of the N-word is not only confusing but also gives rise to concerns over fairness and consistency. After all, why is a word that is acceptable in a song title unacceptable in the workplace? As an editor of a University of North Carolina newspaper observed, to some, use of the N-word "creates an atmosphere of acceptance . . . if blacks themselves do it, why can't others[?]"[309] In response to Rihanna's post, one commentator observed, "The [N-word] is derogatory. If some cultures aren't allowed to say it, no[ ]one should."[310]

Whether the N-word can only ever mean one thing, or whether it is only appropriate when used by and among members of the black community, has long been the subject of scholarly and public debate. According to Professor Randall Kennedy, "words can be used in all sorts

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305. Nadra Kareem Nittle, *Celebrities Who've Sparked Controversy by Saying the N-Word*, ABOUT.COM, http://racerelations.about.com/od/hollywood/tp/Celebrities-Who-Ve-Sparked-Controversy-By-Saying-The-N-Word.htm (last visited Feb. 24, 2014).

306. Bright, *supra* note 302.

307. Boyce Watkins, Op-Ed, *Bill Maher Defends Paula Deen and Says She's No Worse Than a Rapper*, NEW PITTSBURG COURIER (June 23, 2013), http://newpittsburghcourieronline.com/2013/06/23/bill-maher-defends-paula-deen-and-says-she-s-no-worse-than-a-rapper/.

308. *Complete List of 2007 Grammy Winners*, PITTSBURGH POST-GAZETTE (Feb. 12, 2007, 12:00 AM), http://www.post-gazette.com/frontpage/2007/02/12/Complete-list-of-2007-Grammy-winners/stories/200702120117.

309. KENNEDY, *supra* note 2, at 162.

310. Owens, *supra* note 4.

> What is even worse is how we have gotten so obsessed with who can say it and who can't that we have forgotten the actual context of the N-word itself.
>
> . . . .
>
> So if we are to dismiss the N-word from social media usage and urge Rihanna to stop using it, we ought to as well. We have to discourage it in the lyrics to the music we listen to. We have to put our friends in check on Facebook and Twitter when they blurt it. We have to make remind ourselves why it's unacceptable in the first place.
>
> What isn't good for someone else shouldn't be good for us either.

Id.

of ways. We are the masters of words."[311] As such, he states that it is sometimes acceptable for white people to use the N-word.[312] For example, white author Carl Van Vechten named his book exploring the life of black people in Harlem *Nigger Heaven,* and white director Quentin Tarantino often uses the N-word in the screenplays of his award-winning films, such as *Pulp Fiction*.[313] Professor Kennedy argues that such uses are acceptable because they do not aim to oppress or demean the black community; instead, they intend to reflect the realities of the lives of black Americans and the way members of the black community speak and relate to one another.[314]

However, many members of the black community disagree. Some argue that white racists' historical use of the N-word to subordinate blacks, standing alone, disqualifies nonblacks from using the word.[315] A second theory posits that "equity earned through oppression grants cultural ownership rights"; put differently, blacks suffered through denigrating use of the N-word, so they have purchased the exclusive rights to "monopolize the slur's peculiar cultural capital."[316] Still others argue that nonblacks, even those who associate closely with members of the black community, will never have sufficient intimate knowledge of the N-word to ever be able to use it appropriately.[317] As Michael Dyson, Professor of African-American Studies at DePaul University, states bluntly, "Here's a rule of thumb for all white Americans . . . as to how to use the [N-word]—Never! See? So that's a general rule of thumb."[318] Likewise, black comedian Chris Rock's popular comedy album includes a skit in which a white man approaches him after a performance of his "I hate ni**ers" skit.[319] The white man appreciatively repeats some of Mr. Rock's N-word jokes, and the next sound you hear is the white man being punched.[320]

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311. *Is the "N-Word" Going Mainstream?*, *supra* note 301.

312. *Id.*

313. KENNEDY, *supra* note 2, at 128, 130–31.

314. *See id.* at 133.

315. *Id.* at 131. This does not resolve whether it is permissible for members of other minority groups, such as Native Americans, Asians, Jews, or Hispanics, who were not directly involved with slavery or other forms of black oppression to use the N-word. However, the strong reaction to Jennifer Lopez's use of the N-word suggests that her minority status as a Latina did not give her a pass; the threats to boycott her music only ended after a black rapper publicly came to her defense. *See* Nittle, *supra* note 305.

316. KENNEDY, *supra* note 2, at 131–32.

317. *Id.* at 132.

318. *Is the "N-Word" Going Mainstream?*, *supra* note 301.

319. KENNEDY, *supra* note 2, at 127.

320. *Id.*

Such visceral reactions to use of the N-word by nonblacks is more the rule than the exception. Operating under the often false assumption that nonblacks' use of the N-word can only ever mean one thing has led to what Professor Kennedy calls "troubling tendencies," such as blacks' "overeagerness to detect insult" and "overly harsh punishment[s] of those who use the N-word imprudently or even wrongly."[321] This not only poses fairness and consistency concerns, but could also prompt frivolous lawsuits that impede judicial efficiency.

For example, in 1993, Central Michigan University (CMU) fired a white basketball coach who stated that the team needed "to have more ni**ers on the team" during a locker room pep talk even though the coach asked the team members, both black and white, for permission to use the word and used it in a positive way to refer to players who were "fearless, mentally strong, and tough."[322] It is telling that no team member complained; instead, a student who had quit the team before the pep talk had occurred lodged the complaint that eventually resulted in the coach's termination.[323] Although his use of the N-word was indisputably unnecessary and ill-advised, would CMU have terminated a black coach that used the word in the exact same way?

In perhaps an even better illustration of these so-called "troubling tendencies," David Howard, a white director of a Washington, D.C. agency, was forced to resign after his subordinates mistook his use of the word "niggardly" as a racial slur.[324] It is beyond dispute that "niggardly" means "miserly" and is not a racial slur.[325] Yet in the public firestorm that ensued, that indisputable fact seemed lost on Mr. Howard's critics.[326] As columnist Tony Snow quipped, "David Howard got fired because some people in public employ were morons who a) didn't know the meaning of 'niggardly,' b) didn't know how to use a dictionary to discover the word's meaning[,] and c) actually demanded that he apologize for their ignorance."[327]

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321. *Id.* at 117.

322. *Id.* at 142–44.

323. *Id.* at 143.

324. *Id.* at 120, 177.

325. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 738 (11th ed. 2001).

326. KENNEDY, *supra* note 2, at 120–21.

327. *Id.* at 122. Interestingly enough, Mr. Howard's coworkers were not the only individuals to misconstrue the meaning of "niggardly." At the University of Wisconsin-Madison, a student allegedly stormed out of a class crying when the professor used the word during a Chaucer lecture even though he had previously explained the definition to the entire class. *Id.* at 123.

Unfortunately, these "troubling tendencies" have also found their way into the courtroom, arguably leading to frivolous litigation and "overly harsh punishments of those who use the N-word," even when the speaker lacked racist or otherwise malicious intent.[328] *Burlington v. News Corporation* highlights the problem that arises when people falsely assume that the N-word can only mean one thing.[329]

In *Burlington*, an award-winning white reporter sued News Corporation, Fox Television Stations, Inc., and Fox Television Stations of Philadelphia, Inc. for reverse discrimination because the defendants terminated him for using the N-word at a meeting of three black and six white employees.[330] Mr. Burlington sought to hold the defendants liable for the discriminatory animus of his coworkers under a theory of "subordinate bias liability."[331]

The incident occurred during a discussion of reporter Robin Taylor's story about the NAACP's symbolic burial of the N-word.[332] Although Ms. Taylor used the term "N-word" during her discussion of the story, when she finished, Mr. Burlington asked "Does this mean we can finally say the word 'ni**er?'"[333] When Ms. Taylor said she would not use the full word in her story, Mr. Burlington suggested that she either write "ni**er" or refer to it as the "racial epithet" instead of using the phrase the "N-word."[334] In response, a black employee, Nicole Wolfe, became visibly upset and exclaimed, "I can't believe you just said that!"[335] After the meeting, Mr. Burlington approached Ms. Wolfe to explain, but Ms. Wolfe would not speak with him.[336] Later, Joyce Evans, a black co-anchor who had not attended the meeting, told Mr. Burlington that he had upset some of his coworkers.[337] Mr. Burlington opted to individually approach his coworkers to explain his rationale.[338] Afterwards, Mr. Burlington spoke to Ms. Evans who allegedly stated that "[b]ecause you're white you

328. *Id.* at 117.

329. 759 F. Supp. 2d 580 (E.D. Pa. 2010).

330. *Id.* at 584–85, 589.

331. *Id.* at 599. Under this theory, which the Third Circuit has adopted, a company may be liable for a violation of Title VII even when racial animus did not motivate the ultimate decision-maker. *Id.*

332. *Id.* at 584–85.

333. *Id.* at 585.

334. *Id.*

335. *Burlington*, 759 F. Supp. 2d at 585.

336. *Id.*

337. *Id.*

338. *Id.*

can never understand what it's like to be called a ni**er and that you cannot use the word 'ni**er.'"[339] Ms. Evans denied saying this.[340]

Mr. Burlington's troubles were just getting started. He alleged that soon thereafter, he heard Ms. Evans telling other employees that people had been terminated for using the N-word.[341] On June 24, 2007, Ms. Evans told Assistant News Director Leslie Tyler, also black, that employees were upset about Mr. Burlington's remarks.[342] After speaking with several employees who had attended the meeting, Ms. Tyler discussed the situation with News Director Philip Metlin, who escalated the issue to General Manager Mike Renda, a white male.[343] Mr. Renda asked Ameena Ali to investigate Mr. Burlington's remarks, but when Ms. Ali asked Mr. Burlington to recount the incident, he used the N-word.[344] The meeting only lasted around five minutes but resulted in Mr. Burlington's suspension pending the investigation.[345] Ms. Ali spoke with Mr. Burlington's coworkers, but not Mr. Burlington.[346] When the investigation ended on July 3, 2007, the defendants issued Mr. Burlington a "Final Warning and Employee Assistance Program Referral," which described his actions as "unacceptable."[347] It also referred Mr. Burlington to sensitivity training and promised reinstatement if he complied with the training.[348]

On July 5, 2007, the *Philadelphia Daily News* published an article discussing Mr. Burlington's "'bizarre' and 'shocking' sermon" about the N-word as well as his suspension.[349] The *Philadelphia Tribune* and other media outlets picked up the story.[350] As a result, the station received requests from employees that they not be assigned to work with Mr. Burlington, as well as concerned calls from the National Association of Black Journalists and the Philadelphia Association of Black Journalists.[351] Although Mr. Burlington complied with the re-

339. *Id.*
340. *Id.*
341. *Burlington*, 759 F. Supp. 2d at 586.
342. *Id.*
343. *Id.* at 586–87. Notably, Mr. Burlington claimed that Ms. Evans only spoke to black attendees, but she claims she spoke to at least one white attendee. *Id.* at 586.
344. *Id.* at 587.
345. *Id.*
346. *Id.*
347. *Burlington*, 759 F. Supp. 2d at 857.
348. *Id.* at 588.
349. *Id.* (citing Dan Gross, *Fox's Tom Burlington Suspended*, PHILA. DAILY NEWS, July 5, 2007).
350. *Id.* Mr. Metlin testified that leaking the information would most likely have led to the termination of the leaker, but admitted that no investigation of the leak's source ever took place. *Id.* at 588.
351. *Id.* at 588–89.

quirements of the employee assistance program, the Station refused to put him back on the air or renew his contract.[352] Mr. Burlington sued, alleging discrimination, hostile work environment, and retaliation in violation of Title VII and other statutes.[353]

In denying in part the defendants' motion for summary judgment, the court observed that the meaning of the N-word varies in "color and content according to the circumstances and the time in which it is used."[354] In analyzing the historical and contemporary usage of the N-word, the court acknowledged that although the word has historically been used as a tool of oppression, it has more recently been utilized as a term of endearment within the black community.[355] The court correctly concluded that the defendants were not permitted to draw race-based distinctions between employees because doing so would contravene the spirit and purpose of Title VII.[356]

To prevail in his suit, Mr. Burlington had to show that he was qualified for his job and suffered an adverse employment action—in this case, suspension and nonrenewal of his contract—under circumstances giving rise to an inference that the adverse employment action occurred because of a protected trait—here, his race.[357] In the Third Circuit, a plaintiff may create an inference of discrimination by establishing "a causal nexus between the harm suffered and the plaintiff's membership in a protected class, from which a juror could infer, in light of common experience, that the defendant acted with discriminatory intent."[358]

To establish an inference of discrimination, Mr. Burlington pointed to three black comparators who spoke or wrote the N-word but whom the Station did not discipline.[359] For example, Mr. Burlington claimed that a black coworker, David Huddleston, once referred to the subject of a story as "one dumb ni**er."[360] The defendants countered that the aforementioned instance occurred when the station had a different manager,[361] and "where there are different decision makers, employ-

352. *Id.*

353. *Burlington*, 759 F. Supp. 2d at 590.

354. *Id.* at 596 (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)) (internal quotation marks omitted).

355. *Id.* at 596–97.

356. *Id.* at 597.

357. *Id.* at 592 (citing Warenecki v. City of Phila., No 10-1450, 2010 WL 4344558, at *5 (E.D. Pa. Nov. 3, 2010)).

358. *Id.* (quoting Anderson v. Wachovia Mortg. Corp., 621 F.3d 261, 275 (3d Cir. 2010)).

359. *Burlington*, 759 F. Supp. 2d at 593.

360. *Id.*

361. *Id.*

ees are not similarly situated."[362] Although the court noted the undeniable distinction between employment decisions made by different managers, it ultimately concluded that it was a "distinction without a difference"; the situations were "sufficiently similar to make Mr. Huddleston an appropriate comparator."[363] The court was not persuaded by the defendants' argument that the situations were not comparable because Mr. Huddleston's remark did not incite coworkers' complaints and negative publicity.[364] That argument only underscored Mr. Burlington's contention that the coworkers' reaction and the negative publicity that prompted his termination was a direct result of reverse racial discrimination.[365] The court observed that Mr. Renda was not offended by a black coworker's written account of the meeting even though the coworker wrote the N-word in all uppercase letters twice.[366] However, Mr. Burlington's use of the N-word during his retelling of the events at the meeting received a very different reaction. Indeed, Mr. Renda and Ms. Ali contended that for a white man like Mr. Burlington, use of the N-word was "inappropriate . . . [at] any time."[367] The court held that a reasonable jury could conclude that Mr. Renda's testimony demonstrated that the defendants were "unable to draw a principled, nonrace-based distinction between" the coworker's use of the word and Mr. Burlington's use of the word.[368] Thus, Mr. Burlington had met his burden on summary judgment.[369]

Under the *McDonnell-Douglas* framework, once a plaintiff has demonstrated a prima facie case of discrimination, the burden shifts to the defendant to proffer a legitimate, nondiscriminatory reason for the adverse employment action.[370] Here, the defendants attributed Mr. Burlington's suspension and termination to his use of the N-word at work and the complaints, embarrassment, and negative publicity that ensued.[371]

After a defendant articulates a legitimate, nondiscriminatory reason for an adverse employment action, the burden shifts back to the plaintiff to establish that the proffered reason is a mere pretext for discrim-

362. *Id.* (citing Goins v. EchoStar Commc'ns. Corp., 148 F. App'x 96, 98 (3d Cir. 2005) (per curiam) (nonprecedential)).

363. *Id.*

364. *Id.*

365. *Burlington*, 759 F. Supp. 2d at 594.

366. *Id.* at 594–95.

367. *Id.* at 595.

368. *Id.*

369. *Id.* (citing Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 369 (3d Cir. 2008)).

370. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

371. *Burlington*, 759 F. Supp. 2d at 595. The court accepted the proffered reasons and proceeded to the final step of the *McDonnell-Douglas* framework. *Id.* at 596.

ination.[372] To prevail, the plaintiff must "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action."[373] In *Burlington*, the court concluded that a reasonable jury, considering the totality of the circumstances, could find that an invidious discriminatory reason was more likely than not a motivating factor or determinative cause of Mr. Burlington's termination, or that the defendants' legitimate, nondiscriminatory reasons were not the real reasons for Mr. Burlington's termination.[374]

The *Burlington* court faced a difficult question: may an employer be held liable under Title VII for perpetuating the common societal convention that it is acceptable for blacks, but not whites, to say the N-word? In reaching its decision, the court acknowledged that historically, many whites had used the N-word to oppress or denigrate, while blacks had utilized the word in ironic, satirical ways or as a sign of affection.[375] Still, the court was not persuaded that the historical use of the N-word was "a justifiable reason for permitting the [station] to draw race-based distinctions between employees."[376] To the contrary, Title VII was enacted to counter social norms perpetuating race discrimination; thus, "[t]o conclude that the [station] may act in accordance with the social norm . . . would require a determination that this is a 'good' race-based social norm that justifies a departure from the text of Title VII."[377] The court determined that a triable issue of fact existed regarding whether coworkers "exhibiting discriminatory animus influenced or participated in the [station's] decision to terminate" Mr. Burlington.[378]

Perhaps for reasons of judicial efficiency, Professor Kennedy has argued that

> it is probably erroneous to conclude that the [N-word] itself *necessarily* furnishes proof of racial discrimination, even when the speaker is white and the target black. . . . [However,] [a]utomatic labeling of

372. *Id.*

373. *Id.* (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)) (internal quotation marks omitted).

374. *Id.*

375. *Id.* at 597.

376. *Id.*

377. *Burlington*, 759 F. Supp. 2d at 597.

378. *Id.* at 600 (quoting Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001)) (internal quotation marks omitted). The court declined to complete a mixed motive analysis since doing so would be redundant in light of conducting the *McDonnell-Douglas* analysis. *Id.*

> *ni**er* may be an efficient shorthand method for judicially assessing the N-word . . . . [which reflects the notion that] it is better to err on the side of overenforcement rather than underenforcement.[379]

Thus, application of a reasonable person standard in all instances involving use of the N-word at the workplace, regardless of the race of the speaker and target of the speech, will promote judicial efficiency and uniformity. In *Johnson* and *Weatherly*, that seems to be precisely what happened. Arguments regarding whether the target did not find the speech offensive because of the speaker's race are more properly considered in the "unwelcomeness" prong of the hostile work environment analysis. Therefore, application of the reasonable person standard to judge the objective severity of intraracial use of the N-word combats "troubling tendencies" and promotes fairness, consistency, and judicial efficiency.

H. Conclusion

When examining the implications of the N-word in race-based hostile environment claims, the reasonable person standard employed to determine the severity of the alleged harassment should be colorblind. For this reason, the outcomes in *Johnson* and *Weatherly* are correct because it is well settled that employment discrimination can occur between parties of the same race. Given the N-word's long history as a tool of oppression, racism, and denigration, it can reasonably be construed by members of all races as offensive, regardless of the speaker's and target's race. Implicit social cognition research underscores the argument that use of the N-word may flow from conscious or subconscious antiblack sentiment, even when used intraracially. Finally, applying the same legal standard to intraracial use of the N-word at the workplace promotes fairness, consistency, judicial efficiency, and hopefully, racial tolerance.

379. KENNEDY, *supra* note 2, at 95.