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RESPECTING LANGUAGE AS PART OF ETHNICITY: TITLE VII AND LANGUAGE DISCRIMINATION AT WORK

Carlo A. Pedrioli*

Language is the carrier and vessel of culture¹

I. INTRODUCTION

Shortly after Larry Whitten took over the Paragon Inn in Taos, New Mexico, he ordered his employees to refrain from speaking Spanish in his presence.² Additionally, Whitten instructed employees with Latin names to Anglicize their names at work.³ For instance, Martín was to become

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1. Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1427 (2004).
2. *Hotel Owner Tells Hispanic Workers to Change Names*, THE SEATTLE TIMES, Oct. 26, 2009, available at http://seattletimes.nwsource.com/html/business/technology/2010138781_apustroubleintaos.html [hereinafter “Hotel Owner Tells”]. Whitten maintained that, since the employees appeared “hostile” to the management style of the former Marine, Whitten thought that the employees might start talking about him in Spanish. *Id.* Fired hotel manager Kathy Archuleta said that she and her colleagues had tried to adjust to Whitten’s management style. *Id.*
3. Matthew van Buren, *Civil Rights Group Eyes Legal Options in Whitten Inn Fight; Owner Plans to Sell*, TAOS NEWS, Sept. 14, 2009, available at <http://www.taosnews.com/articles/2009/09/14/news/doc4aaa7d3d3a61d075317737.txt>.

Martin, and Marco was to become Mark.⁴ When several Latino employees refused to comply with these requirements, Whitten, who was White and did not speak Spanish, fired the employees.⁵ Not only did the employees suffer the financial consequences of this employer's action, but they also suffered the consequences of the erasure of their ethnicity.

This scenario from New Mexico is an example of how discrimination against employees, particularly lower-income employees, who speak Languages Other Than English (LOTEs) in the workplace is an ongoing phenomenon in the United States.⁶ Sometimes xenophobia is the cause of this discrimination,⁷ but often such discrimination takes aim at individuals whose cultures simply are not Anglo-Saxon-based.⁸ Although Spanish was spoken in what became the United States before English was,⁹ some English-speaking people fear the loss of control that they think will come when others speak Spanish.¹⁰ Regardless of where Spanish-speaking individuals were born or whether they are U.S. citizens, employers discursively construct such individuals "as 'foreign' or 'un-American.'" ¹¹ This rhetorical performance perpetuates the English/Non-English dualism, through which one pole, English, stands for "a value to be sought," and the other pole, Non-English, stands for "a negative to be avoided."¹² Given the sizeable growth within the national labor force of ethnic groups whose primary languages are not English,¹³ this type of discrimination, which furthers linguistic hierarchy,¹⁴ is unlikely to disappear soon.

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4. Matthew van Buren, *Whitten Inn Protest Draws Regional Support*, TAOS NEWS, Nov. 14, 2009, available at <http://www.taosnews.com/articles/2009/11/14/news/doc4aff208200883498160378.txt>.
 5. *Hotel Owner Tells*, *supra* note 2. One fired employee, Martín Gutierrez, informed Whitten that people in New Mexico had spoken Spanish before English, but Whitten told Gutierrez that Whitten did not care because the business belonged to him. *Id.*
 6. See Robyn S. Stoter, Note, *Discrimination & Deference: Making a Case for the EEOC's Expertise with English-Only Rules*, 53 VILL. L. REV. 595, 596–97 (2008).
 7. Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 850 (1995).
 8. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 278 (1992).
 9. Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 966 (1995).
 10. *Id.* at 965.
 11. Perea, *supra* note 8, at 278. Often, when a society defines language, the society simultaneously defines nationality. Chon A. Noriega, *Waas Sappening?: Narrative Structure and Iconography in Born in East L.A.*, in MEDIA/CULTURAL STUDIES 442 (Rhonda Hammer & Douglas Kellner eds., 2009) (citing DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? 6 (1990)).
 12. MARY FIELD BELENKY, LYNNE A. BOND, & JACQUELINE S. WEINSTOCK, A TRADITION THAT HAS NO NAME: NURTURING THE DEVELOPMENT OF PEOPLE, FAMILIES, AND COMMUNITIES 20 (1997) (considering dualism in the context of gender). These authors also refer to dualisms as *polarities*. *Id.*
 13. Mark Colón, Note, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL'Y REV. 227, 228 (2002).
 14. BELENKY, BOND, & WEINSTOCK, *supra* note 12, at 20 (discussing hierarchy in the context of gender).

As the example from New Mexico suggests, one way in which employers discriminate against employees who speak LOTES is based on the employees' use of LOTES. This Article uses the term *language discrimination* to refer to an employer's adverse treatment, including termination, of an employee who uses a non-privileged language at work. In the United States, non-privileged languages are generally LOTES, particularly LOTES from non-European countries. Restrictions on LOTES vary. In some cases, employers have policies that ban the use of LOTES in the workplace. In other cases, employers have policies that limit the use of LOTES, such as when employees may use LOTES to speak with non-English-speaking customers but not with anyone else.

Language is intimately linked to how people view one another and the world. Although linguists have put forward many competing definitions of the term *language*, the broad consensus is that language is a system of arbitrary relationships between symbols and meanings.¹⁵ Language usage is a complex human phenomenon that exploits the infinite (re)combination of sound segments to produce words and sentences.¹⁶ In sentences, words are arranged according to fixed rules.¹⁷ Basic categories of human identity, such as male and female, are present across languages, just as the past, negation, questions, and commands are.¹⁸ Any normal child, regardless of background, is capable of learning any language.¹⁹ As complex as they are, languages change though time.²⁰

This Article argues that, in the absence of a legitimate, non-discriminatory reason or a business necessity, Title VII of the 1964 Civil Rights Act can protect employees from language-based discrimination in the workplace.²¹ Language is a part of one's ethnicity, which refers to one's culture. Ethnicity, much as race already does, should receive protection under Title VII. Plaintiffs, however, have the burden of proof in litigation, and so a plaintiff who sues under a discrimination theory should have to make his or her case to the appropriate fact-finder.

Drawing upon the insights of critical theory, particularly to explore concepts like ethnicity and race in a dynamic way, the Article will develop this position in two major sections. Section II of the Article will look at the current state of the law and will consist of subsections on Title VII claims in general, language discrimination and national origin, and circuit approaches to language discrimination cases. Section III of the Ar-

15. VICTORIA FROMKIN & ROBERT RODMAN, AN INTRODUCTION TO LANGUAGE 25 (5th ed. 1993). The definition offered in this paragraph includes some of the major aspects of language but is not necessarily all-encompassing.

16. *Id.*

17. *Id.*

18. *Id.* at 26.

19. *Id.*

20. *Id.* at 25.

21. Although this Article focuses on Title VII claims, other federal claims, both statutory and constitutional, are possible in cases of language discrimination. For instance, in the case of a governmental employer that discriminates based on language, an employee could sue under the Free Speech Clause of the First Amendment. *See, e.g., Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006), *overruled in part by Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006).

ticle will address proposals for reforming the law and will include subsections on amendments to Title VII, responses to objections to the proposed amendments, disparate impact and disparate treatment analyses in the courts, and the linguistic situations of monolingual and bilingual speakers.

II. THE CURRENT STATE OF THE LAW

A. *Title VII Claims Generally*

Title VII of the 1964 Civil Rights Act prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”²² The statute applies to a variety of “persons,” including “one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.”²³ An employer is such a “person.” To fall under Title VII, an employer must be “engaged in an industry affecting commerce” and have at least fifteen employees “for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”²⁴ Federal protection against language-based discrimination by employers frequently, although not always, comes under the national origin category in Title VII.²⁵

In bringing a Title VII claim for discrimination, a plaintiff can sue under either a disparate treatment or disparate impact theory. Under a disparate treatment theory, the plaintiff must show that the employer intentionally discriminated against the employee.²⁶ Once the plaintiff has

22. 42 U.S.C. § 2000e-2(a) (2011). This Article makes no claim that Title VII has succeeded completely in eliminating the types of discrimination it sought to eliminate. Expressed legal principles and enacted practices are not always the same. Angela G. Ray & Cindy Koenig Richards, *Inventing Citizens, Imagining Gender Justice: The Suffrage Rhetoric of Virginia and Francis Minor*, 93 Q. J. SPEECH 375, 375 (2007).

23. 42 U.S.C. § 2000e(a).

24. *Id.* § 2000e(b). The federal government does not fall under the category “employer.” *Id.* Nonetheless, Title VII generally covers the federal government. *See id.* § 2000e-16(a).

25. Melissa Meitus, *English-Only Policies in the Workplace: Disparate Impact Compared to the EEOC Guidelines*, 84 DENV. U. L. REV. 901, 903 (2007).

In addition to federal law, state law can provide protection against discrimination based on language. *See, e.g.*, CAL. GOV'T CODE § 12951 (2010). This section of the California Government Code provides the following: “It is an unlawful employment practice for an employer . . . to adopt or enforce a policy that limits or prohibits the use of any language in any workplace . . .” *Id.* § 12951(a). Exceptions are permissible where the employer has a business necessity and “has notified its employees of the circumstances and the time when the language restriction is required to be observed and of the consequences for violating the language restriction.” *Id.* § 12951(a)(2). For a discussion of the California statute, see Karen L. Turner, Comment, *Chapter 295: Codification of California's Fair Employment and Housing Commission Regulations Governing Workplace Language Policies*, 33 McGEORGE L. REV. 433 (2002). For a similar statute in Illinois, see 775 ILL. COMP. STAT. 5/2-102(A-5) (2011), which deems imposing a restriction that has the effect of prohibiting a language from being spoken by an employee in communications unrelated to the employee's duties a civil rights violation.

26. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

put on evidence to suggest that the employer treated him or her differently based on membership in a protected class, the burden then shifts to the employer to proffer a legitimate, non-discriminatory rationale for the treatment.²⁷ After the employer meets that burden, the employee has to show that the employer's proffered reason is a pretext for discrimination.²⁸

Under a disparate impact theory, the plaintiff does not have to show discriminatory intent.²⁹ Rather, the plaintiff needs to show that the employer's policy discriminated against the plaintiff in his or her capacity as a member of a protected group.³⁰ After the plaintiff has shown the disproportionate impact, the defendant needs to show a business necessity for the rule.³¹ If the employer meets this burden, the plaintiff can prevail by showing that the employer could have used other non-discriminatory means to meet the business necessity.³²

Title VII claims based on language discrimination often, but not always, fall under a theory of disparate impact. Usually an employer's rule against using LOTE applies to everyone, so the rule is facially neutral.³³ Under these circumstances, the plaintiff would not have to show discriminatory intent.

B. *Language Discrimination and National Origin*

Title VII does not specifically prohibit discrimination based on language, but it does prohibit discrimination based on national origin.³⁴ Courts often use the national origin category of Title VII to address matters of language discrimination. Part of the problem with the state of the law on Title VII stems from confusion over the national origin terminology in the statute and how language discrimination relates to national origin.³⁵

Congress failed to put much effort into explaining its understanding of national origin.³⁶ Prior to appearing in the 1964 Civil Rights Act, the term *national origin* had appeared in executive and legislative rhetoric throughout much of the twentieth century.³⁷ For example, in the 1920s, favoring immigration from northern European countries, Congress had

27. *Id.*

28. *Id.* at 804.

29. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

30. *See id.*

31. *Id.* at 431. Previously, the defendant did not have the burden of proof in the second step of the framework. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659–60 (1989). However, in 1991 Congress changed the statute to give the employer the burden of proof at this stage. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k) (2011)).

32. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

33. Raechel L. Adams, Comment, *English-Only in the Workplace: A New Judicial Lens Will Provide More Comprehensive Title VII Protection*, 47 CATH. U. L. REV. 1327, 1339 (1998).

34. 42 U.S.C. § 2000e-2(a)(1).

35. Steven I. Locke, *Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment of Title VII*, 27 TEX. TECH L. REV. 33, 50 (1996).

36. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 817 (1994).

37. *Id.* at 810–17.

restricted immigration based on national origin.³⁸ The idea was that quotas would preserve the ethnic composition of the United States.³⁹ In the 1960s, when Congress debated the Civil Rights Act, only a handful of members of the House of Representatives and Senate went on the record addressing the term, and their few remarks indicated that national origin referred to one's place of birth or the places of birth of one's ancestors.⁴⁰ The U.S. Supreme Court has observed that the history of the term is "quite meager."⁴¹ In contrast, Congress spent much more time addressing race, particularly because of the extensive historical and continuing discrimination against Black Americans, most of whom were born in the United States.⁴²

In 1980, the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces civil rights laws, offered its own definition of the term *national origin discrimination*. According to the EEOC, the term includes, but is not limited to, "the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."⁴³ The EEOC observed that "[t]he primary language of an individual is often an essential national origin characteristic."⁴⁴ Limiting use of such a language "disadvantages an individual's employment opportunities on the basis of national origin [and] may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment."⁴⁵ While more detailed than the congressional definition, the EEOC definition, along with an accompanying explanation, lacks the force of law since the EEOC does not have substantive rulemaking authority.⁴⁶

38. Perea, *supra* note 9, at 982. See also Immigration Act of 1924, ch. 190, 43 Stat. 153, 155, 159.

39. Perea, *supra* note 9, at 982.

40. Perea, *supra* note 36, at 820–21.

41. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88–89 (1973).

42. Perea, *supra* note 36, at 817. Congress passed the 1964 Civil Rights Act before mass immigration from Latin America had developed. In the mid-1960s, Blacks outnumbered other minorities such as Latinos. James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J. L. REFORM 57, 102–03 (2004). Today, Latinos constitute the largest minority group in the United States. ROBERTO AVANT-MIER, *ROCK THE NATION: LATIN/O IDENTITIES AND THE LATIN ROCK DIASPORA* 1 (2010). The U.S. Census has recognized the increase in the size of the Latin community in the United States. Beginning in 1970, the Census included a category called *Hispanic*, and, as of 2000, the Census included the umbrella category *Latino*. *Id.* at 2.

On a related note, critics have observed that most of the discussions on race and the law have focused on African-Americans to the detriment of other minority groups. In more recent years, scholars from non-African-American minority positions have added to the discussion. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1265 (1993).

43. 29 C.F.R. § 1606.1 (2011).

44. *Id.* § 1606.7(a).

45. *Id.*

46. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976).

C. Circuit Approaches to Language Discrimination Cases

In light of the lack of U.S. Supreme Court precedent on language discrimination, the U.S. Courts of Appeals have had to develop their own approaches to language discrimination cases. The appellate courts often have followed a burden-shifting model that the Supreme Court set out in other Title VII cases, but this model has varied over the years.

In the early 1980s, the Fifth Circuit decided the first federal appellate case on language discrimination under Title VII.⁴⁷ Seeing the language of bilingual employees, unlike national origin, as mutable, the Fifth Circuit declined to view an English-only policy as an impetus for discrimination based on national origin.⁴⁸ The Fifth Circuit also briefly summarized business reasons for the treatment of an employee who had spoken Spanish at work.⁴⁹ The court did not follow an explicit burden-shifting analysis.⁵⁰

During the 1980s and 1990s, the Ninth Circuit took the lead in addressing language discrimination cases under Title VII,⁵¹ although the court twice changed its approach to analyzing these cases. Under the initial approach, which paralleled the model used in disparate treatment cases,⁵² the court adopted the perspective that the employee first should have to make a prima facie case for discrimination.⁵³ Then the employer

47. In *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), the court rejected a disparate impact claim. *Id.* at 270. Employer Gloor Lumber and Supply had fired Hector Garcia, who was Mexican-American and bilingual in English and Spanish, for several reasons, including using Spanish on the job in violation of an English-only rule. *Id.* at 266–67. Despite the English-only rule, Spanish was allowed when employees were communicating with Spanish-speaking customers and during breaks. *Id.* at 266. Non-English speakers who worked outside did not have to speak English. *Id.* The actions in question involved Mr. Garcia’s responding to another Mexican-American in Spanish, as well as his failing to keep his inventory current, replenish the stock on display, keep his area clean, and respond to various reprimands. *Id.* According to the trial court, Mr. Garcia previously had violated the English-only rule at every opportunity. *Id.* at 266–67.

Gloor Lumber offered several business reasons for the policy. They included the following: addressing English-speaking customers’ objections to employees’ communications in Spanish that the English-speaking customers could not understand, facilitating employees’ reading trade literature only available in English, improving employees’ English skills, and allowing non-Spanish-speaking supervisors to oversee subordinates’ work. *Id.* at 267.

48. *Id.* at 269–71.

49. *Id.* at 267.

50. Given its citation to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the court probably would have followed a burden-shifting analysis if the court had determined that a disparate impact claim was appropriate. *Garcia*, 618 F.2d at 270.

51. Meitus, *supra* note 25, at 902.

52. In *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987), the court upheld the trial court’s rejection of both disparate treatment and disparate impact claims. *Id.* at 1411–12. Employer and radio station KIIS had fired Valentine Jurado, who was Mexican-American and Native-American, as well as bilingual in English and Spanish, for continuing to speak Spanish on the air during the program he hosted. *Id.* at 1408. The employer previously had warned Jurado that, because a consultant had advised the radio station to move away from the Spanish-language format in an attempt to improve ratings, Jurado would need to stop using Spanish on the air. *Id.*

53. *Id.* at 1409. Although the court focused on a disparate treatment theory rather than on the usual disparate impact theory, the court briefly noted that, to make a prima facie case for a disparate impact claim, the plaintiff would need to show that an

would have to proffer a legitimate, nondiscriminatory reason for its employment decision.⁵⁴ Finally, the employee would need to show that the employer's proffered reason for the treatment was a pretext for discrimination.⁵⁵

Within one year, focusing on a disparate impact matter, the court took a noticeably different approach to language discrimination cases.⁵⁶ In looking to EEOC guidelines on the subject, the Ninth Circuit found that "English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized."⁵⁷ The EEOC had identified two types of English-only rules in the workplace: those that applied at all times and those that applied only at certain times.⁵⁸ The rules that applied at all times were "burdensome."⁵⁹ The rules that applied only at certain times were permissible only if the employer had a business necessity for the rules.⁶⁰ If an employer had a business necessity, the employer had to provide the employees with advance notice of the limitation on using LOTEs.⁶¹ Following the EEOC guidelines, the court put the real burden of proof on the employer. Provided that an employee could show that an employer had established an English-only rule, a minimal showing, the employer had to demonstrate that it had a business necessity for the rule, which is what the EEOC had proposed.⁶² The tran-

employment practice had a significant and adverse impact on the protected group. *Id.* at 1412. The employee would not need to show intent to discriminate. *Id.*

54. *Id.* at 1409.

55. *Id.*

56. In *Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989), the court, by accepting that a disparate impact argument had a likelihood of success on the merits, upheld the granting of a preliminary injunction against enforcement of an English-only rule. *Id.* at 1036. The Southeast Judicial District of the Los Angeles Municipal Court had developed a policy that forbade employees from speaking Spanish unless the employees were acting as translators. *Id.* Eventually, the rule did not apply during breaks and lunch. *Id.* Alva Gutierrez, who was Latina, bilingual, and a deputy court clerk, filed an EEOC charge and later a lawsuit. *Id.*

The employer offered a list of reasons for the policy. According to the employer, the rule was necessary to comport with California's being an English-speaking state, to avoid allowing the workplace to become a "Tower of Babel," to promote racial harmony, to allow English-speaking supervisors to understand subordinates who were communicating information to the public, and to adhere to the California Constitution's requirement that all state business be conducted in English. *Id.* at 1041-44.

57. *Id.* at 1040.

58. 29 C.F.R. § 1606.7(a)-(b) (2011).

59. *Id.* § 1606.7(a).

60. *Id.* § 1606.7(b).

61. *Id.* § 1606.7(c).

62. *Gutierrez*, 838 F.2d at 1039-40. *See also* 29 C.F.R. § 1606.7. The EEOC issued its guidelines shortly after the Fifth Circuit issued its decision in *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

sition to the new standard was not necessarily smooth,⁶³ and the U.S. Supreme Court vacated the Ninth Circuit's decision as moot.⁶⁴

Eventually, the Ninth Circuit settled on an approach to analyzing language discrimination cases that was very similar to the original approach that it had adopted.⁶⁵ The court, analyzing the case under a disparate impact theory, stated that the employee must make a prima facie case for discrimination that shows that "a specific, seemingly neutral practice or policy" had "a significantly adverse impact" on the employee, who is a member of a protected class.⁶⁶ If the employee can meet this burden, the employer has to show that the policy is related to the job and a business necessity.⁶⁷ The court did not specifically address the opportunity for a plaintiff to show that the employer could have used non-discriminatory means to meet the business necessity.⁶⁸ Once again, the transition between standards was not necessarily smooth.⁶⁹

63. In *Gutierrez*, when the court called upon the EEOC guidelines while also justifying its favorable citing of *Gloor* in *Jurado*, the court made factual distinctions between *Gutierrez* and *Jurado*. 838 F.2d at 1041. However, the *Gutierrez* court had a difficult time explaining how the plaintiff-deferential EEOC guidelines were consistent with the court in *Gloor*, which was hardly deferential to the plaintiff. Somehow the *Gutierrez* court felt it could, and had to, reconcile *Gloor*, the guidelines, and Ninth Circuit precedent. Despite differing facts, the court failed to justify the then-most-recent version of its fluctuating legal standard.

Given the weakness of the factual distinction as an adequate justification for the change in legal standard, the varying compositions of the panels that heard the two cases should receive consideration. In *Jurado*, Judges Warren J. Ferguson, Robert Boochever, and Charles Wiggins heard the case. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1408 (9th Cir. 1987). In *Gutierrez*, Judges James R. Browning, Thomas Tang, and Stephen Reinhardt heard the case. 838 F.2d at 1036.

Ironically, in *Jurado*, Judge Boochever agreed with the court's requirement that the plaintiff make a prima facie case. *Jurado*, 813 F.2d at 1409. Later, in *Garcia*, Boochever dissented when the court utilized the same requirement. *Garcia v. Spun Steak*, 998 F.2d 1480, 1490 (9th Cir. 1993).

64. *Gutierrez*, 838 F.2d 1031.

65. In *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993), the court reversed the trial court's grant of summary judgment based on a claim of disparate impact. After employer Spun Steak had received complaints that some bilingual workers were insulting and harassing other workers in a language that other workers could not understand, the company adopted an English-only rule to be in effect outside lunch and break time. *Id.* at 1483. Employees Garcia and Buitrago, Latinos who were bilingual in Spanish and English, allegedly had insulted two colleagues, one an African-American and the other a Chinese-American. *Id.* How strictly Spun Steak enforced the English-only rule was unclear, but, when Garcia and Buitrago continued to speak Spanish during working hours, the two men received warning letters from the company. *Id.* Eventually, Local 115 filed an EEOC complaint and later a lawsuit. *Id.* at 1483-84.

66. *Id.* at 1486.

67. *Id.*

68. The court did not find that the employees had made a prima facie case, so the court never addressed business necessity. *Id.* at 1490. Thus, the court did not have the opportunity to determine whether the employer could have used other non-discriminatory means to meet the business necessity.

69. One explanation for the change in standard for the analytical framework is that the U.S. Supreme Court had vacated the prior decision. The court in *Spun Steak* observed, "The case has no precedential authority, however, because it was vacated as

In the 2000s, the Tenth Circuit, less in a state of flux than the Ninth Circuit, decided a case⁷⁰ that, for a disparate impact theory, adopted the same analytical framework that the Ninth Circuit eventually had adopted.⁷¹ This approach included a *prima facie* case for discrimination and a defendant's response of business necessity. However, the Tenth Circuit, drawing upon EEOC guidelines, suggested that a jury could find that an English-only rule in the workplace was discriminatory and hostile.⁷² Under this approach, which followed the general burden-shifting approach for Title VII cases outlined above, but which gave a nod to the "body of experience and informed judgment" found within the EEOC guidelines,⁷³ the analysis could turn more easily to a consideration of a business necessity for the English-only policy. The court did not state "that the guideline is evidence admissible at trial or should be incorporated in a jury instruction."⁷⁴ Rather, the court cautiously indicated "only that a juror presented with the evidence presently on the record in this case would not be unreasonable in finding that a hostile work environment existed."⁷⁵ A hostile work environment claim, through which a plaintiff maintains that an atmosphere of discrimination at work was

moot by the Supreme Court. We are in no way bound by its reasoning." *Id.* at 1487 n.1.

Another explanation involves the varying compositions of the two panels that made the decisions. In *Gutierrez*, Judges James R. Browning, Thomas Tang, and Stephen Reinhardt heard the case. *Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*, 838 F.2d 1031, 1036 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989). In *Spun Steak*, Judges Robert Boochever, John T. Noonan, and Diarmuid F. O'Scannlain heard the case. 998 F.2d at 1482. Judge Boochever dissented in *Spun Steak*. *Id.* at 1490.

Ironically, in *Jurado*, Judge Boochever agreed with the court's requirement that the plaintiff make a *prima facie* case. Several years later, in *Spun Steak*, Boochever dissented when the court utilized the same requirement.

70. In *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006), the court reversed the trial court's decision to dismiss both disparate impact and disparate treatment claims. The City of Altus, Oklahoma, had adopted an English-only policy after receiving a complaint that, since some employees in the Street Department were speaking in Spanish, other employees were unable to understand messages over the City radio. *Id.* at 1298. The employees in question were Latino and fluently bilingual. *Id.* The policy did not apply during breaks and lunch, or with regard to brief communication with relatives. *Id.* at 1299–1300.

The City offered three main reasons for the English-only policy. Employees could not understand what was said over the radio, non-Spanish-speaking employees were uncomfortable when Spanish-speaking employees spoke Spanish in front of them, and use of a non-common language constituted a safety issue when heavy equipment was in use. *Id.* at 1300.

Additionally, several Latino employees stated they had been teased because of the English-only policy. *Id.* at 1301. The employees filed an EEOC complaint and later a lawsuit. *Id.* at 1301–02.

71. *Maldonado*, 433 F.3d at 1304.

72. *Id.* at 1305–06.

73. *Id.* at 1305.

74. *Id.* at 1306.

75. *Id.*

“sufficiently severe or pervasive,”⁷⁶ can be a type of disparate impact or disparate treatment claim.⁷⁷ For a theory of disparate treatment, the court noted that the plaintiff would have to show intent to discriminate, and the court could infer intent from conduct.⁷⁸

In another case shortly thereafter, the Tenth Circuit iterated its prior observation that an English-only rule can create a hostile work environment.⁷⁹ Nonetheless, the court said that, when an English-only policy is narrow, supported by an “undisputed business necessity,” and lacking discriminatory motive or effect, the policy can be legal.⁸⁰ One “undisputed business necessity” is “clear and precise communication” in the workplace.⁸¹

Although the decisions from the Fifth, Ninth, and Tenth Circuits constitute the leading federal appellate decisions in language discrimination cases to date, two other circuits have issued minor decisions in this area of the law. In the 1990s, the Eleventh Circuit and the Fourth Circuit issued, either without opinion or published opinion, decisions on language discrimination. Without opinion, the Eleventh Circuit upheld a lower court decision that said that an English-only rule enforced against bilingual employees was not discriminatory in violation of Title VII.⁸² In a brief unpublished opinion, the Fourth Circuit adopted the standard that, to make a *prima facie* case for discriminatory enforcement of employment

76. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–67 (1986) (considering sexual harassment and holding that a plaintiff can prevail under Title VII if the plaintiff proves that a hostile work environment existed).

77. L. Camille Hebert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 KAN. L. REV. 341, 351–63 (2005) (considering sexual harassment, which can be a type of hostile work environment). The general thinking is that hostile work environment cases are disparate treatment cases, but not all commentators agree that all hostile work environment cases have to be disparate treatment cases. Rather, some hostile work environment cases can be disparate impact cases. *Id.*

78. *Maldonado*, 433 F.3d at 1308.

79. In *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007), the court upheld the trial court’s granting of summary judgment on various discrimination claims. Several former employees of the Vail Clinic had sued their former employer for discrimination. Eva Escobedo, the one plaintiff who claimed that the employer had discriminated against her based on her use of a LOTE, was of Mexican descent and had worked as a housekeeper at the clinic. *Id.* at 1168. Escobedo, who had difficulty speaking English, had received an instruction to speak only English in the operating rooms. *Id.* However, the employer allowed Escobedo to speak Spanish during breaks and outside the operating room. *Id.* at 1169. The proffered business reason for the rule was to facilitate effective communication in the operating room, an environment in which most of the nurses with whom Escobedo worked did not speak English. *Id.* at 1171.

80. *Id.* at 1171–72.

81. *Id.* at 1171.

82. In *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir. 1993), the court affirmed the trial court’s decision that an English-only rule did not violate Title VII. *See also* *Gonzalez v. Salvation Army*, 1991 WL 11009376, at *3 (M.D. Fla. June 3, 1991) (unpublished district court opinion). The employer had received complaints from non-Spanish-speaking employees that Spanish-speaking employees were talking in Spanish about the employees who did not speak Spanish. *Id.* at *2. Also, a client had complained about a Spanish language conversation about condoms; Ivette Gonzalez, the plaintiff, had participated in that conversation. *Id.* Gonzalez spoke both English and Spanish. *Id.* at *1.

rules under Title VII, the employee would need to show membership in a protected class, comparable misconduct by the employee and members outside the protected class, and more severe enforcement of the rules against the member of the protected class.⁸³ Neither of these circuit courts addressed the EEOC guidelines. Given the lack of developed, published opinions from the Eleventh and Fourth Circuits, the discourse these circuits have produced on language discrimination is of limited utility in a policy discussion.

In general, then, the Ninth Circuit's current framework for analyzing language discrimination cases⁸⁴ has become the tentative standard in the absence of a specific case from the Supreme Court. Although the Tenth Circuit has recognized the merits of the EEOC guidelines, it declined to adopt the guidelines, and no other circuit to date consistently has adopted those guidelines.

III. PROPOSALS FOR IMPROVING THE LAW

A. *Amending Title VII to Address Language Discrimination More Completely*

Although the federal circuit courts have analyzed language discrimination cases under national origin, ethnicity is a necessary term for addressing many cases of language discrimination. Congress should amend Title VII to include ethnicity in the list of protected categories.⁸⁵ Ethnicity opens rhetorical space for arguments that language, which is a part of ethnicity, can receive protection.

One's national origin is where one was born.⁸⁶ A monolingual or bilingual speaker, such as a Latino,⁸⁷ who at least speaks a LOTE and may speak a LOTE as well as English, could have been born in the United States. Claiming that one suffered discrimination because he or she was born in the United States does not make sense since the business owner who discriminated also could have been born in the United States. Given the language that Congress provided in Title VII, national origin may have been a good possibility for use in some cases of language-based dis-

83. In *Long v. First Union Corp. of Va.*, 1996 U.S. App. LEXIS 12431, at *4–5 (4th Cir. May 29, 1996), the court upheld the trial court's decision of granting summary judgment on a disparate treatment claim. A bank branch manager had announced orally, and later re-announced in writing, an English-only rule because the manager felt that speaking Spanish in front of English-speakers was rude. *Id.* at *2–3. One of the plaintiffs, who was Latina, refused to sign the memorandum that announced the policy. *Id.* at *3. An EEOC complaint ensued, and the bank, with a new branch manager, rescinded the policy. *Id.* at *4 n.5. Nonetheless, a lawsuit ensued. *Id.*

84. *Garcia v. Spun Steak*, 998 F.2d 1480, 1486 (9th Cir. 1993).

85. The EEOC Employee Selection Guidelines already include reference to "ethnic group." See 29 C.F.R. § 1607.4(A) (2011).

86. Perea, *supra* note 36, at 832.

87. Various terms refer to individuals who are of Latin American descent. The term *Latino* is a pan-ethnic term. Susana Rinderle, Quiénes Son, Quiénes Somos: *A Critical Analysis of the Changing Names for People of Mexican Descent Across History*, 29 INT'L & INTERCULT'L COMM. ANN. 143, 156 (2006). In contrast to *Hispanic*, which emphasizes assimilation into mainstream U.S. culture, *Latino* emphasizes preservation of culture and addressing social injustice. *Id.* at 156.

crimination, but the term fails to address many other situations of language-based discrimination. The term is appropriate only when the employee was born in another country that does not have English as one of its major languages.

In cases of native-born employees, use of the national origin category under Title VII employs the ideograph <American> in a manner rhetorically harmful to individuals who speak LOTEs. An ideograph is an ordinary language term found in discourse and an abstraction that shows a collective commitment to a vague normative goal, justifies the use of power, excuses behavior otherwise generally not excused, and explains behavior such that a community will accept it.⁸⁸ Ideographs are generally culturally-specific and shed light on the ideology of a communicator.⁸⁹ Examples of ideographs include <confidentiality>, <national security>, <rule of law>, <freedom of speech>, <liberty>, <religion>, and <property>.⁹⁰ At different times and through different rhetorics, communicators might use such ideographs to justify keeping medical secrets, starting wars, maintaining oppressive laws, criticizing the government, allowing abortion, oppressing non-believing minorities, and perpetuating class inequalities.⁹¹

In this case, the ideograph <American> is employed narrowly to marginalize members of minority groups. The assumption is that those “who differ ethnically from unstated norms of [White] American identity” come from somewhere other than the United States.⁹² According to this viewpoint, Whites, who often speak only English, are from the United States, but non-Whites, who may use other languages, originate from elsewhere. Apparently, White individuals never came from other countries. The consequence is rhetorical marginalization of members of minority ethnic groups.⁹³

88. Michael Calvin McGee, *The “Ideograph”: A Link Between Rhetoric and Ideology*, 66 Q. J. SPEECH 1, 15 (1980). Communication scholars often use the characters “<” and “>” to identify the ideographs they are discussing.

Not all communication scholars accept that an ideograph has to be an ordinary language term. For instance, two scholars have argued that use of the image of the U.S. military personnel who raised the flag on the Pacific island of Iwo Jima near the end of World War II constitutes use of an ideograph. See Janis L. Edwards & Carol K. Winkler, *Representative Form and the Visual Ideograph: The Iwo Jima Image in Editorial Cartoons*, 83 Q. J. SPEECH 289 (1997).

89. McGee, *supra* note 88, at 15.

90. *Id.* at 12, 13, 16. For ideographic analyses, see, e.g., John Louis Lucaites & Celeste Michelle Condit, *Reconstructing <Equality>: Culturetypal and Counter-Cultural Rhetorics in the Martyred Black Vision*, 57 COMM. MONOGRAPHS 5 (1990); Dana L. Cloud, “To Veil the Threat of Terror”: *Afghan Women and the <Clash of Civilizations> in the Imagery of the U.S. War on Terrorism*, 90 Q. J. SPEECH 285 (2004); Bryan J. McCann, *Therapeutic and Material <Victim> hood: Ideology and the Struggle for Meaning in the Illinois Death Penalty Controversy*, 4 COMM. & CRIT./CULT. STUD. 382 (2007); and Sara Hayden, *Revitalizing the Debate between <Life> and <Choice>: The 2004 March for Women’s Lives*, 6 COMM. & CRIT./CULT. STUD. 111 (2009).

91. See authorities cited in immediately preceding footnote.

92. Perea, *supra* note 36, at 856.

93. *Id.* at 856–57 (discussing marginalization in general, although not in rhetorical terms).

Congress apparently deemed that national origin also includes the nations of birth of an individual's ancestors,⁹⁴ but this use of the term is illogical. Under such a definition, a plaintiff would need to claim that he suffered discrimination based on someone else's national origin rather than his or her own. The term *ancestry* is more logical for referring to one's descent or lineage, and such a term is broader than national origin since the former can refer to several ancestors and their respective national origins.⁹⁵

Although more sophisticated than the congressional definition, the part of the EEOC definition of national origin that goes beyond the congressional definition and accounts for discrimination based on "physical, cultural or linguistic characteristics of a national origin group"⁹⁶ is likewise unsatisfactory. In the case of an individual member of "a national origin group" who was born in the United States, the focus turns to the country or countries from which the individual's relatives came, and, in turn, to the individual's ancestry. Again, one would be bringing a claim on the characteristics of other individuals rather than one's own characteristics.

Given that, in different ways, national origin can be problematic for many Title VII cases, looking to other possible categories becomes necessary, and ethnicity becomes operative. The term *ethnicity*, from the Greek word *ethnos*, which means people or nation,⁹⁷ refers to one's socialization,⁹⁸ usually into a particular cultural group comprised of customs, foods, religious practices, celebrations, language, and national origin. Ethnicity involves self-identification, knowledge about the culture, feelings about being a part of that group, and a sense of the history of the group.⁹⁹ Other aspects of ethnicity include how people express themselves, think, move, solve problems, plan cities, establish economies, and form governments.¹⁰⁰ Examples of different ethnicities include Mexican American, Japanese American, Welsh American, Navajo, and Hopi ethnicities.¹⁰¹

As suggested, language "is one of the primary aspects of ethnicity."¹⁰² More specifically, language is "a symbol system that embodies essential

94. *Id.* at 832.

95. *Id.*

96. 29 C.F.R. § 1606.1 (2011).

97. Perea, *supra* note 8, at 277 (citing MILTON M. GORDON, *ASSIMILATION IN THE AMERICAN LIFE* 24 (1964)).

98. América Rodríguez, *Objectivity and Ethnicity in the Production of the Noticiero Univisión*, 13 *CRIT. STUD. MASS COMM.* 59, 61 (1996) (focusing on ethnicity of U.S. Latinos/as). Ethnicity is learned. See EDWARD T. HALL, *BEYOND CULTURE* 18–20 (1976) (explaining how White cultures often use time monochronically, or in a linear and scheduled way).

99. JUDITH N. MARTIN & THOMAS K. NAKAYAMA, *INTERCULTURAL COMMUNICATION IN CONTEXTS* 74 (1997).

100. HALL, *supra* note 98, at 16–17 (discussing how culture touches and alters life). As Hall suggests, ethnicity includes both ways of behaving and thinking. In that sense, religion is much like ethnicity, and Title VII provides for protection of both religious conduct as well as religious belief. 42 U.S.C. § 2000e(j) (2011).

101. MARTIN & NAKAYAMA, *supra* note 99, at 74.

102. Perea, *supra* note 8, at 277.

characteristics of [an] ethnic group,"¹⁰³ and language facilitates the understanding of social interactions,¹⁰⁴ especially in one's own cultural group. Also, language can define identities.¹⁰⁵ Language can be a tool for oppressing others and for resisting oppression.¹⁰⁶ Although humans are predisposed to learn languages,¹⁰⁷ the language one learns is a function of the culture in which one grows up. Currently, Title VII does not address ethnicity or language.

Since ethnicity, including language, is a concept closely related to race, an existing protected category under Title VII, some discussion of race will help to develop a more thorough understanding of ethnicity. Meanings of the term *race* have fluctuated over the years, and, despite the importance of the concept, courts rarely have defined race.¹⁰⁸ One reason for the lack of judicial definitions of race is that race is "a problematic category that confounds attempts to define it."¹⁰⁹ Race "is easily destabilized, and must be treated as a contested term, its meaning shifting with the rhetorical strategies summoned by the rhetor."¹¹⁰

Even though defining race has been difficult, race historically referred to one's biological makeup¹¹¹ and often was used to marginalize members of minority groups. Although identifying "distinctive human groups" based on "difference in physical appearance" goes back to the Bible and beyond,¹¹² the modern notion of race as a biological phenomenon devel-

103. Rodriguez, *supra* note 98, at 64. Language, through diction and accents, often gives clues to one's national origin. *Id.* at 65. For example, the type of Spanish that a Spanish-speaker uses can identify the speaker as being from Cuba or Puerto Rico.

Some Latino/a scholarship presents the notion that ethnicity and language are one in the same. One scholar has written, "Ethnic identity is twin skin to linguistic identity – I am my language." See GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MEZTIZA* 81 (2d ed. 1999).

104. MEREDITH E. ABARCA, *VOICES IN THE KITCHEN: VIEWS OF FOOD AND THE WORLD FROM WORKING-CLASS MEXICAN AND MEXICAN AMERICAN WOMEN* 68 (2006).

105. Margaret E. Montoya, *Law and Language(s): Image, Integration and Innovation*, 7 *LA RAZA* L.J. 147, 147 (1994).

106. Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 *VAND. L. REV.* 1691, 1708–09 (2007). Delgado notes that "the colonial subject who adopts the language of the conqueror 'has to convey in a language that is not one's own the spirit that is one's own. One has to convey the various shades and omissions of a certain thought movement that looks maltreated in an alien language.'" *Id.* at 1709 (presenting a conversation that quotes Raj Rao, *Language and Spirit*, in *THE POSTCOLONIAL STUDIES READER* 296 (Bill Ashcroft et al. eds., 1995)).

107. Donald G. Ellis, *Language and Communication*, 42 *COMM. EDUC.* 79, 80 (1993). Language in general has a biological, as well as a cultural, dimension to it. *Id.* at 79.

108. ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG, & FRANK H. WU, *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 5 (2001).

109. A. Cheree Carlson, "You Know It When You See It": *The Rhetorical Hierarchy of Race and Gender in Rhinelander v. Rhinelander*, 85 *Q. J. SPEECH* 111, 111 (1999) (evaluating the rhetorics related to a 1925 lawsuit in which a husband had accused his wife of defrauding him into believing she was entirely White).

110. *Id.* at 126.

111. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 2–6 (2000); YAMAMOTO ET AL., *supra* note 108, at 5–6.

112. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 61 (1994).

oped during the Enlightenment,¹¹³ and during the middle of the eighteenth century, European scientists began to devise a system of racial hierarchy that they used to create a “social pecking order[.]”¹¹⁴ In 1735, Carolus Linnaeus constructed what became “[t]he first authoritative racial division of humankind.”¹¹⁵ The categories of *Homo sapiens* that Linnaeus constructed were *Americanus*, *Europeus*, *Asiaticus*, and *Afer*.¹¹⁶ In 1787, Thomas Jefferson wrote of his suspicion that Blacks were “inferior to whites in the endowments of both body and mind.”¹¹⁷ By the middle of the nineteenth century in the United States, race was a function of cataloguing individuals’ physical features, including “crania, facial angles, and brain mass.”¹¹⁸ Scientists, purporting to be “value-free subject[s],”¹¹⁹ and hiding behind the “‘belief that science was an objective tool engaged in an ‘uninvolved’ diagnosis of empirical reality,’”¹²⁰ claimed that different biological features had links to people’s mental capacities.¹²¹ This creation of hierarchy supported the view that some minorities, such as Chinese immigrants to the United States, were so different from the majority group that the minorities should not assimilate with the majority.¹²² In the wake of the Civil War, this type of hierarchy led to “almost a century of legally sanctioned segregation and denial of the vote” for Black Americans.¹²³

By the early twentieth century, social scientists had theorized about race as a cultural construct.¹²⁴ Problems with a biological view of race centered around how many races existed and what the criteria for each race were.¹²⁵ More recent science, including that developed as part of the

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113. Judith E. Koons, *Making Peace with Difference: A Hermeneutic of Inclusive Conversation*, 12 *TEX. J. WOMEN & L.* 1, 26 (2002).
114. YAMAMOTO ET AL., *supra* note 108, at 6.
115. CORNEL WEST, *PROPHECY DELIVERANCE!: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY* 55–56 (1982).
116. STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 404 (1996). Linnaeus did not rank his categories of human beings in the racist order that many Europeans of the day favored; rather, he organized the categories by geography. *Id.* J. F. Blumenbach, a student of Linnaeus, later added “a ‘Malay variety’ for some Pacific peoples originally included in a broader Asian group.” *Id.* at 401–03. Although Blumenbach probably did not have a racist intent, with the advent of Blumenbach’s taxonomy, the ordering of categories of human beings changed from geographical ordering to hierarchical ordering, a development that has promoted racism ever since. *Id.* at 405–06. In commenting on this development, Gould asked, “[F]or what, short of railroads and nuclear bombs, had more practical impact, in this case almost entirely negative, upon our collective lives and nationalities[?]” *Id.* at 405.
117. YAMAMOTO ET AL., *supra* note 108, at 6.
118. Kirt H. Wilson, *The Contested Space of Prudence in the 1874–1875 Civil Rights Debate*, 84 *Q. J. SPEECH* 131, 143 (1998). For more on the study of heads and bodies, as used in the construction of racial hierarchy, see, e.g., GOULD, *supra* note 116, at 62–175.
119. WEST, *supra* note 115, at 53.
120. Wilson, *supra* note 118, at 143 (quoting JOHN S. HALLER, *OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859–1900* 140 (1995)).
121. YAMAMOTO ET AL., *supra* note 108, at 6.
122. *Id.*
123. OMI & WINANT, *supra* note 112, at 66.
124. YAMAMOTO ET AL., *supra* note 108, at 6–7.
125. *Id.* at 7.

Human Genome Project in the 1990s and early 2000s,¹²⁶ has supported the position that race does not exist in human genes.¹²⁷ Indeed, too few genes are involved in characteristics associated with race for there to be “distinct genetic signatures” for various racial groups.¹²⁸ Rather, characteristics associated with race are rather superficial.¹²⁹

Today, race often refers to “a complex of social and economic relationships.”¹³⁰ This approach to race accounts for “the specific relational and historical contexts in which racial categories arise, as well as the political and economic influences that shape racial meaning.”¹³¹ The process through which racial meanings develop is racial formation,¹³² and, although Whites often do not have to think about race, race applies to everyone.¹³³ Another way of describing race is race as performance, in which one acts out a role for a given set of circumstances.¹³⁴

In certain cases, race comes with privilege. For example, to protect their children, Whites do not have to educate their children “to be aware

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126. The Human Genome Project was a research effort, begun in 1990 and completed in 2003, that the U.S. Department of Energy and the National Institutes of Health coordinated. Among other goals, the Human Genome Project aimed to identify the 20,000 to 25,000 genes in human DNA. *About the Human Genome Project*, HUMAN GENOME PROJECT INFORMATION, http://www.ornl.gov/sci/techresources/Human_Genome/project/about.shtml (last visited May 11, 2011). The term *genome* refers to “all the DNA in an organism, including its genes.” *Id.*
127. Robyn Suriano, *Facing Who We Are: The Human Genome Reveals That Race Isn't In Our Genes*, ORLANDO SENTINEL, May 27, 2001, available at http://articles.orlandosentinel.com/2001-05-27/news/0105260032_1_race-human-genome-subspecies.
128. *Id.*
129. *Id.*
130. Carlson, *supra* note 109, at 111.
131. BELL, *supra* note 111, at 9.
132. See Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994).
133. The notion that only non-White individuals have racial identity is a function of whiteness. “[W]hiteness is a social construction which produces race privilege for white people by appearing racially ‘neutral,’ unlinked to racial politics, universal, and unmarked.” Aimee Carrillo Rowe & Sheen Malhotra, *(Un)hinging Whiteness*, 29 INTERNAT’L & INTERCULT’L COMM. ANN. 166, 170 (2006). See also Raka Shome, *Outing whiteness*, 17 CRIT. STUD. MEDIA COMM. 366, 366 (2000) (noting that whiteness leads to White privilege). In masquerading as anti-racist or colorblind, “whiteness moves with ease” from one rhetorical situation to another. Lisa A. Flores, *Dreama G. Moon, & Thomas K. Nakayama, Dynamic Rhetorics of Race: California’s Racial Privacy Initiative and the Shifting Grounds of Racial Politics*, 3 COMM. & CRIT./CULT. STUD. 181, 184 (2006). Whiteness aside, all individuals, including Whites, have some type of racial identity, and such identity becomes apparent when White individuals interact with non-Whites. See Thomas K. Nakayama & Robert L. Krizak, *Whiteness: A Strategic Rhetoric*, 81 Q. J. SPEECH 291, 299–300 (1995).
134. See, e.g., Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 112–13 (1998) (examining how individuals in the antebellum South used performance, including voting and sitting on juries, to establish their race as White and thus gain access to the social privileges society gave to Whites). See also Nadine Ehlers, *Hidden in Plain Sight: Defying Juridical Racialization in Rhinelander v. Rhinelander*, 1 COMM. & CRIT./CULT. STUD. 313 (2004) (considering the performance of race in a 1925 lawsuit in which a husband had accused his wife of carrying out a racial fraud by maintaining that she was entirely White).

of systemic racism.”¹³⁵ Also, Whites are not asked to speak for the members of their racial group.¹³⁶ One way of thinking of White privilege is that it is “an invisible package of unearned assets which [a White person] can count on cashing in each day, but about which [the White person] was ‘meant’ to remain oblivious.”¹³⁷ This privilege is much “like an invisible weightless knapsack of special provisions, assurance, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.”¹³⁸

While race can be “a contested term,”¹³⁹ the current Article, along with most of the scholarship in this area,¹⁴⁰ views race as a social construction.¹⁴¹ This understanding is consistent with a contemporary social scientific understanding of the concept. As noted above, the major problem with a biological understanding of race is the lack of consistent criteria to define specific races. Consequently, and in light of the history of racism in the United States and elsewhere, the Article sees race “as socially constituted, culturally mediated, and politically maintained.”¹⁴²

Although scholars disagree about how similar race and ethnicity are,¹⁴³ the two concepts intersect with each other to a degree.¹⁴⁴ Both ethnicity and race are social constructions of individuals within groups and are open to abuse through discrimination. One notable difference is that ethnicity has a material basis that is lacking in race. In other words, aspects of ethnicity like food and clothing exist independently of rhetoric. Another key difference is that awareness of race opens the door to discussion of racism more than awareness of ethnicity does.¹⁴⁵ Additionally, race usually addresses how groups in power exercise their power to marginalize outsiders. This Article adopts the position that, although race and ethnicity are not the same concept, they represent related, overlapping concepts and that a discussion of one usually benefits from a discussion of the other.

Based on the foregoing discussion, and to add doctrinal clarity that reflects more theoretical clarity, Congress should add the term *ethnicity* to

135. Stephanie M. Wildman with Adrienne D. Davis, *Making Systems of Privilege Visible*, in *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 18 (Stephanie M. Wildman ed., 1996).

136. *Id.*

137. *Id.* at 17 (quoting Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, *CREATION SPIRITUALITY*, Jan./Feb. 1992, at 33).

138. McIntosh, *supra* note 137, at 17–18.

139. Carlson, *supra* note 109, at 126.

140. See OMI & WINANT, *supra* note 112, at 65.

141. For more on the complexity and contested nature of race, see, e.g., Haney Lopez, *supra* note 132.

142. Koons, *supra* note 113, at 7 (also viewing gender and class in the same manner as race).

143. MARTIN & NAKAYAMA, *supra* note 99, at 75.

144. Roberto Avant-Mier & Marouf Hasian, *In Search of the Power of Whiteness: A Genealogical Exploration of Negotiated Racial Identities in America's Ethnic Past*, 50 *COMM. Q.* 391, 395 (2002) (exploring some of the various dimensions of racial and ethnic identities).

145. MARTIN & NAKAYAMA, *supra* note 99, at 75.

Title VII to address language discrimination claims.¹⁴⁶ As noted above, the term *race* is already included in the statute.¹⁴⁷ If Congress had been more expansive in its statutory rhetoric in 1964, Congress might have used more encompassing terminology at the time, but understandings of concepts like ethnicity and race have continued to develop in the years since 1964. Hence amendments are appropriate. Today the statute should contain at least all of the following terms: *national origin*, *ethnicity*, *race*, *color*, *religion*, and *sex*.¹⁴⁸ In this way, aggrieved parties can argue that one's language at the workplace, as a byproduct of one's ethnicity, should receive protection in specific cases.¹⁴⁹ Also, despite the focus in this Article away from the term *national origin*, the term should remain in the statute since some individuals may suffer discrimination based on their having been born outside of the United States and speaking LOTES in the United States.

Such protection would prevent some of the situations like the one at the Paragon Inn in Taos, New Mexico, in which the owner fired several employees for using Spanish at work.¹⁵⁰ In addition to providing workers, particularly lower-income workers, with greater protection against the financial consequences that come with being fired, this amendment to Title VII would provide such workers with protection against the erasure of their personhood. Since the victims of language discrimination generally lack social privilege and standing, they are especially vulnerable to abuse and in need of further legal protection.

While the current terminology of Title VII needs amendment, the federal appellate courts already have begun, if only tangentially, to consider ethnicity, sometimes in the same context as race, in analyzing cases of language-based discrimination under Title VII. For instance,¹⁵¹ the Fifth Circuit has spoken of "racial and ethnic oppression,"¹⁵² as well as language as a part of "ethnic identification."¹⁵³ The Ninth Circuit has discussed "particular ethnic, racial, or social groups,"¹⁵⁴ "a target ethnic audience,"¹⁵⁵ "ethnic identity,"¹⁵⁶ "racial or ethnic animus,"¹⁵⁷ "ethnic

146. Some prior scholarship has used the term *ethnic traits*. Perea, *supra* note 36, at 860–62.

147. 42 U.S.C. § 2000e-2(a)(1) (2011). Even though this Article conceptualizes race as a social construction, such a construction can cause, and has caused, harm. Accordingly, Title VII should continue to prohibit discrimination based on race. As long as racism exists, society should continue to discuss race. MARTIN & NAKAYAMA, *supra* note 99, at 75.

148. This list of terms does not preclude the addition of other terms that would provide suitable protection. Rather, the list is an attempt to develop the protections that Title VII offers. Another possibility would be *ancestry*. See Perea, *supra* note 36, at 832.

149. The next section of this Article considers some limitations on protection of language in the workplace.

150. See Introduction, *supra*.

151. The following examples do not constitute an exhaustive list of uses of the term *ethnicity* in these opinions. However, they do give an idea of how ethnicity appears in the various federal appellate opinions that have appeared since 1980.

152. *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980).

153. *Id.* at 267.

154. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410 (9th Cir. 1987).

155. *Id.*

tensions,"¹⁵⁸ and "ethnic groups."¹⁵⁹ The Tenth Circuit has spoken of "ethnic taunting,"¹⁶⁰ "ethnic pride or ethnic discrimination,"¹⁶¹ and "ethnic pride or opposition to discrimination."¹⁶² In one Tenth Circuit concurrence and dissent, Judge Semour used "ethnic pride,"¹⁶³ "ethnic identity and heritage,"¹⁶⁴ "ethnic heritage,"¹⁶⁵ "ethnic, racial or religious identity,"¹⁶⁶ "ethnic and linguistic diversity in the workplace,"¹⁶⁷ "ethnic identity,"¹⁶⁸ and "ethnic diversity."¹⁶⁹ Although some judicial rhetoric explicitly has tried to deny ethnicity-based protection,¹⁷⁰ ethnicity has appeared in judicial rhetoric on language discrimination. This type of ongoing rhetoric shows how, at least at an unconscious level, the judiciary has recognized that ethnicity is relevant to a discussion of language discrimination.¹⁷¹

B. Responses to Objections to the Proposals of This Article

Contrary to the proposal of this present Article, prior scholarship has questioned whether language, as a part of ethnicity, could receive any protection under Title VII at all.¹⁷² This scholarship argues that, in 1964, Congress was aiming to help Black Americans, who spoke English, and not individuals who spoke languages such as Spanish.¹⁷³ Also, the scholarship maintains that language, unlike Title VII categories in general, is mutable and that only immutable characteristics should justify Title VII protection.¹⁷⁴

These objections to potential protection for language rights under Title VII are notable but unpersuasive. First, the purpose of Congress in 1964 does not have to be the same purpose that Congress would have today because the social world has changed and become more complex over the years. The United States today is much more diverse than a world of

156. *Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*, 838 F.2d 1031, 1037 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

157. *Id.* at 1051 (quoting *Flores v. Pierce*, 617 F.2d 1386, 1391–92 (9th Cir. 1980) *cert. denied*, 449 U.S. 875 (1980)).

158. *Garcia v. Spun Steak*, 998 F.2d 1480, 1488 (9th Cir. 1993).

159. *Id.* at 1489.

160. *Maldonado v. City of Althus*, 433 F.3d 1294, 1301 (10th Cir. 2006).

161. *Id.* at 1312.

162. *Id.*

163. *Id.* at 1318, 1319, 1320, 1325, 1327 (Semour, J., concurring and dissenting).

164. *Id.* at 1319 (Semour, J., concurring and dissenting).

165. *Id.* at 1320 (Semour, J., concurring and dissenting).

166. *Id.* at 1321 (Semour, J., concurring and dissenting).

167. *Id.* at 1322 (Semour, J., concurring and dissenting).

168. *Id.* at 1319, 1321, 1327 (Semour, J., concurring and dissenting).

169. *Id.* at 1327 (Semour, J., concurring and dissenting).

170. *See, e.g., Garcia v. Spun Steak* 998 F.2d 1480, 1487 (9th Cir. 1993).

171. Whether the judges who wrote the opinions intended to open the door to consideration of ethnicity is another matter. The judges, not necessarily trained to have developed humanistic or social science understandings of ethnicity, may have been unaware of the implications of their rhetoric. Still, ethnicity crept into the rhetoric, and, since ethnicity can be a target for discrimination, the term was not out of place.

172. *See generally* Leonard, *supra* note 42.

173. *Id.* at 102–03.

174. *Id.* at 117.

White, Black, and other.¹⁷⁵ The country is made up of individuals from a wide variety of groups, as well as individuals who are bi-racial and multi-racial and consequently self-identify with two or more groups.¹⁷⁶ Continuing immigration adds to the need for a broader understanding of the population.¹⁷⁷ Congress simply can amend the statute to include ethnicity, which opens the door to arguments for protection of language. The rationale, as laid out above, is that ethnicity should receive protection under Title VII and that language is a part of ethnicity.

Second, while some of the categories that Title VII protects are immutable, not all areas are. Title VII protects against discrimination based on religion, but one's religious beliefs can change over time. For example, based on life experiences or reflection, one might become more or less religious, find or lose faith, or convert to another faith tradition. Additionally, since race is largely a social construction, as observed above, race becomes a mutable concept. Race can vary with rhetoric. Along the same lines, a member of one race, socially constructed as that race may be, can pass as a member of another race.¹⁷⁸ When passing, a passer performs a privileged identity¹⁷⁹ and destabilizes privilege based on race.¹⁸⁰ For in-

175. In 1964, the U.S. Census Bureau estimated that the U.S. population consisted of the following: 169,256,724 Whites; 20,671,914 Blacks; and 1,960,153 individuals of other races. At that time, the estimate for the entire population of the country was 191,888,791. See U.S. CENSUS BUREAU, POPULATION DIVISION, RESIDENT POPULATION PLUS ARMED FORCES OVERSEAS – ESTIMATES BY AGE, SEX, AND RACE: JULY 1, 1964 (Internet Release Oct. 1, 2004), available at www.census.gov/popest/archives/pre-1980/PE-11-1964.xls.

In 2009, the Census Bureau offered a more complex estimate of the population. The estimates were the following: 244,298,393 Whites; 39,641,060 Blacks; 3,151,284 American Indians and Alaskan Natives; 14,013,954 Asian-Americans; 578,353 Native Hawaiians and other Pacific Islanders; and 5,323,506 individuals of two or more races. The fact that the Census Bureau considered being Hispanic an ethnic, rather than a racial, characteristic complicated the figures; the data presented did not come with a definitional distinction between race and ethnicity. Nonetheless, the Census Bureau estimated that the population consisted of 48,419,324 Hispanics and 258,587,226 non-Hispanics. In 2009, the estimate for the entire population of the country was 307,006,550. See U.S. CENSUS BUREAU, POPULATION DIVISION, TABLE 3: ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2009 [hereinafter TABLE 3: ANNUAL ESTIMATES] (Internet Release June 2010), available at <http://www.census.gov/popest/national/asrh/NC-EST2009/NC-EST2009-03.xls>.

176. Unlike Census Bureau data from the 1960s, more recent Census Bureau data attempt to consider bi-racial and multi-racial individuals. See U.S. CENSUS BUREAU, POPULATION DIVISION, TABLE 3: ANNUAL ESTIMATES, *supra* note 175.

177. *Snapshot: America by the Numbers*, NAT'L PUB. RADIO (Oct. 18, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6289898> (noting that, between 2000 and 2005, immigration accounted for about 40% of the growth of the U.S. population).

178. Helene A. Shugart, *Performing Ambiguity: The Passing of Ellen DeGeneres*, 23 TEXT & PERFORMANCE Q. 30, 30 (2003). In the absence of legal protection for Blacks during the late 1800s and early 1900s, racial passing was an especially common performance. *Id.* Under such circumstances, "skin colour was not always an obvious indicator of race." *Id.* Although less common today, racial passing is still salient. *Id.* at 31.

179. Catherine R. Squires & Daniel C. Brouwer, *In/Discernable Bodies: The Politics of Passing in Dominant and Marginal Media*, 19 CRIT. STUD. MEDIA COMM. 283 (2002). Typi-

stance, a light-skinned Black person might pass as a White person.¹⁸¹ Although some risk is involved,¹⁸² passing can be a way of subverting “traditional notions of identity and belonging”¹⁸³ and supporting “discourses of dissent.”¹⁸⁴ Hence, Title VII protects mutable characteristics as well as immutable characteristics, and, if language were completely mutable, parties could argue that, through ethnicity, Title VII protection should extend to language.

Even if all categories under Title VII required immutability, which they do not, language is only quasi-mutable. One can learn a new language, but this is much more laborious as one becomes an adult.¹⁸⁵ Some individuals “are total failures at second language learning,”¹⁸⁶ and even educated individuals may never become fluent in their new languages. Few adults ever lose all distinguishing features of their native languages in their second languages; therefore, many advanced speakers remain identifiable as speakers of their first languages even when they speak English well, and, even if second-generation children learn English with native features through school, first-generation immigrants who speak LOTEs will likely never speak at a native level.¹⁸⁷ Influence from the native tongue may remain in the community, and dialectical features of the immigrants’ English mean that their English will be distinctive from other variants of the English language. When one’s children have learned English, another immigrant family that speaks no English will arrive and start the process again. At most times, someone will speak another language besides English and slowly be learning some English. Learning a new language, even partially, takes years. One does not learn even part of a new language as casually as one might adopt a new shade of hair color.

Given this analysis, aggrieved parties would be able to argue that language, as part of ethnicity, should receive protection under Title VII. Congressional intent from a distant world does not control congressional

cally, passing involves two other actors beside the passer. The in-group clairvoyant, another member of the marginalized group, can see through the pass, while the dupe, a member of the privileged group, cannot see through the pass. *Id.*

180. *Id.* at 287.

181. See generally Avant-Mier & Hasian, *supra* note 144 (analyzing three legal cases in which people challenged categorizations by passing).

182. Squires & Brouwer, *supra* note 179, at 287. Dominant social groups see passing as a transgression. *Id.* When a passer has been revealed, several possibilities, including scandal, interrogation, legal proceedings, violence, and murder, have resulted. *Id.*

183. Jeffrey A. Bennett, *Passing, Protesting, and the Arts of Resistance: Infiltrating the Ritual Space of Blood Donation*, 94 Q. J. SPEECH 23, 27 (2008).

184. *Id.* at 26.

185. FROMKIN & RODMAN, *supra* note 15, at 422. See also Leonard, *supra* note 42, at 119. Although a child acquires most of the grammar of a language before age five, a pre-pubescent child can learn a second language as well as the first language, regardless of the age at which the child learns the second language. FROMKIN & RODMAN, *supra* note 15, at 393-94, 422. Unlike children, adults tend to be more self-conscious about making errors in learning new languages. *Id.* at 423.

186. FROMKIN & RODMAN, *supra* note 15, at 422.

187. ALENE MOYER, AGE, ACCENT AND EXPERIENCE IN SECOND LANGUAGE ACQUISITION 1 (2004). Limits on the mutability of language apply mainly to the immigrant generation. Leonard, *supra* note 42, at 119-20.

intent in today's world. Moreover, immutability is not a categorical requirement for Title VII protection, and, even if immutability were required, language is at best quasi-mutable.

C. *Disparate Impact and Disparate Treatment Analyses in the Courts*

As argued above, Title VII needs amendment to add conceptual and doctrinal clarity, but the burden-shifting frameworks from *Griggs v. Duke Power Co.* and *McDonnell Douglas Corp. v. Green* remain the appropriate analytic frameworks for language discrimination cases. While language discrimination cases tend to involve disparate impact and thus would fall under *Griggs*,¹⁸⁸ some language discrimination cases involve disparate treatment and thus would fall under *McDonnell Douglas*. In resolving cases of language discrimination, courts should not defer to the EEOC guidelines.

The EEOC officially has expertise in the area of employment discrimination but does not have substantive rulemaking authority.¹⁸⁹ The EEOC guidelines are entitled to judicial consideration,¹⁹⁰ but courts can give less weight to the guidelines than to administrative regulations that Congress intended to have the force of law.¹⁹¹ Under the guidelines, the EEOC has opted to excuse plaintiffs from showing proof of discrimination,¹⁹² which is not the case in other Title VII cases such as those based on sex discrimination, and the EEOC has not explained how discrimination based on language is more harmful than discrimination based on something like sex. Plaintiffs usually bear the initial burden of proof in litigating their cases.¹⁹³ As such, the EEOC has not justified the judiciary's deference to the guidelines.

Even if the EEOC did have substantive rulemaking power, the courts should not follow what then would be administrative regulations. In general, when an agency has rulemaking power and the intent of the Congress is not clear, a court asks "whether an agency's answer is based on a permissible construction of the statute."¹⁹⁴ Regulations are not to be

188. Raechel L. Adams, *supra* note 33, at 1339.

189. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976). To resolve a filibuster over the 1964 Civil Rights Act, members of Congress agreed to reduce the enforcement power of the EEOC. Stoter, *supra* note 6, at 601 n.33.

190. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

191. *See Gen. Elec. Co.*, 429 U.S. at 141.

192. Meitus, *supra* note 25, at 913–14. In *Spun Steak*, the Ninth Circuit said, "[T]he Supreme Court has held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts to the employer. The EEOC Guideline at issue here contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof." *Garcia v. Spun Steak*, 998 F.2d 1480, 1490 (9th Cir. 1993).

193. LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 828 (2d ed. 1994). Here *burden of proof* refers to the burden of production of evidence, or the burden of going forward. In addition to the burden of production, the plaintiff usually has the burden of persuasion, or of ultimately making his or her case to the fact-finder, to which *burden of proof* also can refer. *Id.* at 828–29.

194. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). According to the Supreme Court, a court must reject administrative constructions contrary to a clear congressional intent. *Id.* at 843.

“arbitrary, capricious, or manifestly contrary to the statute” in question.¹⁹⁵ If the EEOC had substantive rulemaking power, the regulations, as noted above, would shift the burden of proof for one type of Title VII discrimination case, but not for others, allowing plaintiffs who sued under language discrimination, but not sex-based discrimination, to avoid having to make a *prima facie* case for discrimination. For unknown reasons, the plaintiff would be excused from making the *prima facie* case a plaintiff normally would have to make.¹⁹⁶ This type of regulation would be arbitrary and not warrant judicial acceptance.

Consequently, the courts should continue to require that plaintiffs make their cases for discrimination based on language. In a disparate treatment case, the employee would need to show that the employer intentionally discriminated against the employee. Then the employer would need to offer a legitimate, non-discriminatory rationale for the treatment. Finally, if the employer successfully offered a legitimate, non-discriminatory rationale, the employee would have to show that the employer’s proffered reason was just a pretext for discrimination. In the more common disparate impact case, the employee would need to show that the employer’s policy discriminated against the plaintiff in his or her capacity as a member of a protected group. After the plaintiff had shown the disproportionate impact, the defendant would need to show a business necessity for the rule. If the employer successfully met this burden, the plaintiff could win by showing that the employer could have used other non-discriminatory means to satisfy the business necessity.

A logical inquiry would be about the nature of legitimate, non-discriminatory reasons and business necessities. A legitimate, non-discriminatory reason would include an employee’s failure to comply with a specific format for packaging a product, such as packaging a radio program in English, rather than in English and Spanish, for an audience that has called for English.¹⁹⁷ Another example would be the lack of qualifications for doing a specific job. A business necessity significantly serves an employer’s valid purpose. Rather than relating to a general social goal, such a business necessity has to relate to performance on the job.¹⁹⁸ Business necessities come in a variety of forms. Some examples include, but are not limited to, communication with customers, coworkers, or supervisors who speak only English; communication that takes place in emergencies or other circumstances in which a common language is necessary to foster safety; communication for cooperative work assignments where English promotes efficiency; and communication that allows a supervisor who speaks only English to monitor the performance of an employee who is interacting with coworkers or customers.¹⁹⁹

195. *Id.* at 844.

196. TEPLY & WHITTEN, *supra* note 193, at 828.

197. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409–10 (9th Cir. 1987).

198. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

199. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL—SECTION 13: NATIONAL ORIGIN DISCRIMINATION § V(C) (2002), available at <http://www.eeoc.gov/policy/docs/national-origin.html#V>.

This proposal recognizes that language, as a part of one's ethnicity, can receive legal protection from discrimination and that employers have business interests, such as those noted above, to which they must attend. The proposal is a compromise between excusing a plaintiff from proving discriminatory action and allowing an employer to discriminate arbitrarily against an employee based on the employee's ethnicity, including a dimension of ethnicity such as language.

D. *The Linguistic Situations of Monolingual and Bilingual Speakers*

Because monolingual and bilingual speakers are not similarly situated, several points regarding the two types of speakers warrant discussion. A monolingual speaker would speak a LOTE, and bilingual speaker would speak English and a LOTE. A bilingual speaker might be fluent in two languages, or he or she might be fluent in a LOTE and have a degree of proficiency in English.

In general, monolingual speakers of LOTEs should not have a problem with valid English-only policies. Since an employer would have hired a monolingual speaker of a LOTE with knowledge of the employee's inability to speak English, the employer could not expect a monolingual individual to speak English on the job. Thus, firing an employee for his or her lack of English ability would not make sense.

On the other hand, bilinguals may face a slightly more complicated situation. Some bilinguals may not have a problem adapting to valid English-only rules. Such bilinguals simply would follow the rules, and no conflict would develop. However, several features of bilinguals' speech patterns could cause difficulties. Foremost is what linguists call *code-switching*, via which bilinguals move back and forth between their two languages while speaking with members of their primary cultural group.²⁰⁰ This phenomenon can take place within a sentence or between sentences.²⁰¹ Code-switching "is often inadvertent and unconscious,"²⁰² although that is not always the case.²⁰³ Bilinguals accustomed to speaking with other bilinguals who code-switch are not always able, in a given sentence, to speak one language or the other.²⁰⁴

An example of a code-switching situation is as follows. One bilingual Latina might be speaking with another bilingual Latina in a law office about case files. The first individual might say something like, "We really

200. *EEOC v. Premier Operator Serv.*, 113 F. Supp. 2d 1066, 1069-70 (N.D. Tex. 2000) (referencing the testimony of linguist Barbara Berk-Seligson). A concise explanation of code-switching is "language mixing." Roberto R. Heredia & Jeanette Altarriba, *Bilingual Language Mixing: Why Do Bilinguals Code-Switch?*, 10 CURRENT DIRECTIONS PSYCHOL. SCI. 164, 164 (2001).

201. *Id.* at 1070 (referencing the testimony of linguist Barbara Berk-Seligson).

202. *Id.* at 1074 (referencing the testimony of linguist Barbara Berk-Seligson).

203. Celso Alvarez-Cáccamo, *From "Switching Code" to "Code-Switching": Towards a Reconceptualisation of Communicative Codes*, in CODE-SWITCHING IN CONVERSATION: LANGUAGE, INTERACTION AND IDENTITY 29, 31 (Peter Auer ed., 1998); Colón, *supra* note 13, at 250.

204. Alfredo Mirande, "Now That I Speak English, No Me Dejan Hablar ['I'm Not Allowed to Speak']": *The Implications of Hernandez v. New York*, 18 CHICANO-LATINO L. REV. 115, 146 (1996).

need to get these new files organized. They should be *bien organizados ahora mismo* [well organized right now]." The second individual might respond, "*De acuerdo* [Agreed]. The files have to be labeled ASAP."

Although the phenomenon of code-switching presents a challenge for negotiating language use in the workplace, the challenge is surmountable. When a bilingual code-switches, she does not go on at length in a LOTE; she may only utter a few words or a sentence, as the above example illustrates. Since code-switching can be a conscious process, the employee may be able to catch herself and begin to speak English. If the code-switching is not a conscious process, a system of warnings eventually would allow the bilingual to condition herself to address the problem. In the absence of warnings, if an employer fired an employee for a few brief, harmless uses of a LOTE, and if the employee had no prior problems with her work record, the employee could argue that the employer used the policy as a pretext for discrimination.²⁰⁵

In short, if an English-only rule is valid – and that must be the case – employees should be able to comply substantially. Non-English speakers cannot be expected to work in positions that require them to speak English, so they would not be at risk. Some bilinguals naturally would be able to comply, and bilinguals who had a harder time complying initially, and only by a few words or several sentences, should be able to condition their behavior through a series of warnings so that the employees would minimize use of LOTEs.

IV. CONCLUSION

This Article has argued that, unless a legitimate, non-discriminatory reason or a business necessity exists, Title VII can offer employees protection from language-based discrimination in the workplace. Ethnicity, like other categories, should receive protection under Title VII, and aggrieved employees can argue that language is a dimension of one's ethnicity. Nonetheless, plaintiffs have the burden of proof in litigation of Title VII claims, and consequently a plaintiff who sues under a language discrimination theory should have to make his or her case to the trier of fact.

Rather than thinking narrowly of Title VII in terms of protecting only against fully-immutable qualities, the legal field would do well to think of Title VII more generally as offering protection for employees at risk for suffering unlawful discrimination. As religion would suggest, protection exclusively for immutable qualities was never the sole purpose of the statute in 1964. Immutability may be appropriate for some aspects of Title VII, but, as noted above, immutability does not address the underlying assumptions of Title VII fully. The underlying assumptions of the statute suggest that Title VII should protect vulnerable individuals in the workplace, such as the employees at the Paragon Inn in Taos, New Mexico,

205. In *Gloor*, the plaintiff was fired for an instance of using Spanish, but the record indicated that the employee already had several prior problems with his work performance. *Garcia v. Gloor*, 618 F.2d 264, 266–67 (5th Cir. 1980).

from unfair discrimination.²⁰⁶ Accordingly, in the absence of a business interest, ethnicity, as an umbrella for language, itself an easy target for discrimination, deserves protection.

206. Some scholars would suggest that the law should offer protection for one's identity, or who one is. See, e.g., Juan F. Perea, *Killing me Softly, with His Song: Anglocentrism and Celebrating Nouveaux Latinas/os*, 55 FLA. L. REV. 441, 449 (2003) (noting that "language is inextricably tied to one's sense of identity, as much for English speakers as for Spanish speakers"). Perea observes that workplace conflict over language is a struggle for identity. *Id.*

Other scholars have problematized the notion that an individual has one identity. See, e.g., IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 98-99 (1990). These postmodern scholars critique the notion of identity as focusing on substance at the expense of process or relation. *Id.* at 98. Such a focus on one's identity "denies or represses difference" and "eliminate[s] uncertainty and predictability." *Id.* at 98-99. To the contrary, the notion that one has several identities recognizes difference, or a "heterogeneity of sensuous particulars," within the individual. *Id.* at 99.

