University of Michigan Journal of Law Reform

Volume 23

1990

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ENGLISH-ONLY RULES AND THE RIGHT TO SPEAK ONE'S PRIMARY LANGUAGE IN THE WORKPLACE†

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> *They come from every country in Central and South America, the Caribbean and Spain. They differ in many ways. When they come to the United States, language is perhaps their only true bond.*[1]

On May 25, 1920, Robert Meyer, an instructor at the Zion Evangelical Lutheran Congregation's parochial school, taught the reading of biblical stories in the German language to a ten-year-old student at the school. Meyer was subsequently indicted and convicted of violating a Nebraska statute that prohibited the teaching of any language other than English to students who had not passed the eighth grade. Meyer's conviction was upheld by the Supreme Court of Nebraska.[2]

In *Meyer v. Nebraska*,[3] the United States Supreme Court reversed, finding that the statute interfered with the profession of modern language teachers, with the acquisition of knowledge by students, and with the prerogative of parents to control the education of their children.[4] The Court concluded that the statute violated the due process clause of the fourteenth amendment, noting that "the individual has certain fundamental rights which must be respected. The protection of the Constitution extends

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The author wishes to thank Professor Mark Brodin of Boston College Law School, Ms. Deborah Malamud, Esq., and Ms. Beth Tomasello, Esq., for their helpful and perceptive comments on earlier drafts of this Article. The views expressed in this Article are solely the personal views of the author, expressed in his private capacity, and do not reflect any view of the National Labor Relations Board or any other government agency.

1. Ribadeneira, *From Different Worlds, They Share a Label*, Boston Globe, June 5, 1988, at 40, col. 2.
2. Meyer v. State, 107 Neb. 657, 658-59, 187 N.W. 100, 101 (1922).
3. 262 U.S. 390 (1923).
4. *Id.* at 401.

to all, to those who speak other languages as well as to those born with English on the tongue."[5]

Despite the Court's recognition of a "fundamental right" to language, secured from governmental interference, an employee's right to speak his primary language in the workplace is not yet recognized under Title VII of the Civil Rights Act of 1964.[6] The law on the right to speak one's primary language[7] has developed in cases considering English-only rules, which require the use of English, at least at certain times, while an employee is on the employer's premises. Until very recently, the courts did not recognize the right of Hispanic employees to speak Spanish to each other while on the job.[8] In the leading case on this issue, *Garcia v. Gloor,*[9] the United States Court of Appeals for the Fifth Circuit decided that a rule restricting an employee's use of Spanish while on the job did not violate, or even implicate, Title VII. More recently, the United States Court of Appeals for the Ninth Circuit decided a very similar case, *Gutierrez v. Municipal Court,*[10] concluding that a similar rule did constitute national origin discrimination in violation of Title VII. The Supreme Court, however, vacated the *Gutierrez* decision as moot.[11]

Although the Supreme Court did not reach the merits in *Gutierrez* or consider the legality of English-only rules in the workplace under Title VII, eventually the Court will have to resolve this issue. It is certain to recur. The numbers alone guarantee it.

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5. *Id. Meyer* has continuing vitality in modern constitutional law. The case stands for the proposition that governmental invasions of personal identity and freedom are likely to be invalid when directed at members of discrete and insular minorities for whom the functioning of normal political processes have been curtailed. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1319-20 (2d ed. 1988). Language minorities are a discrete and insular minority. *See* S. REP. No. 295, 94th Cong., 1st Sess. 25-32 (1975), *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 774, 791-98 (discussing the history of discrimination against language minorities that has impeded their participation in the political process; this history of discrimination motivated the extension of the Voting Rights Act of 1965 to include language minorities). *See infra* notes 114-15, 122-26 and accompanying text.

6. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1982) (prohibiting employers from discriminating in employment relationships on the basis of race, color, religion, sex or national origin).

7. Primary language, as used in this Article, refers to a person's native language, usually the language spoken by one's parents in the home and one's first language.

8. Apparently all of the cases on this issue decided by the courts and the Equal Employment Opportunity Commission have involved restrictions upon Spanish-speaking employees. *See infra* notes 212, 215-17. Because of this situation and the large number of Hispanic persons in the United States, this Article will focus principally on the right of Hispanics to speak Spanish in the workplace. The principles stated here apply with equal force to restrictions upon the exercise of any primary language other than English.

9. 618 F.2d 264 (5th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981).

10. 838 F.2d 1031 (9th Cir. 1988), *vacated as moot,* 109 S. Ct. 1736 (1989).

11. Gutierrez v. Municipal Ct., 109 S. Ct. 1736 (1989).

The United States currently contains the fourth or fifth largest Spanish-speaking population in the world.[12] Estimates of the Hispanic population in the United States range between 18 million and 30 million.[13] By the year 2000, Hispanics will be the largest ethnic minority group in the country.[14] Moreover, this growth is reflected in the workplace. According to one recent study, between 1980 and 1987, the number of Hispanic workers rose dramatically, accounting for almost a fifth of employment growth in the United States.[15] This dramatic increase is expected to continue; projections indicate that, by the year 2000, ten percent of the nation's labor force will be Hispanic.[16]

Many Hispanics currently in the work force, as well as many of the new Hispanic entrants, speak Spanish as their primary language and English as a second language.[17] Generally, one can expect them to speak Spanish to their fellow employees who are Hispanic. Employers and supervisors, not understanding Spanish, may want to restrict its use in the workplace. The question of the legality of English-only rules, therefore, is very likely to recur until the Supreme Court decides the issue.

Employers use English-only rules to restrict the use of languages other than English in the workplace and during working hours. The United States Equal Employment Opportunity Commission (EEOC) recognizes two types of English-only rules: (1) a rule requiring employees to speak only English in the workplace at all times, and (2) a limited English-only rule, requiring that employees speak only in English at certain times.[18] This Article will focus on limited English-only rules, and particularly on those rules that seek to restrict private conversations between employees in languages other than English.[19]

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12. T. WEYR, HISPANIC U.S.A. 3 (1988).

13. *Id.* at 1.

14. Ribadeneira, *Boom Bypassing Mass. Hispanics*, Boston Globe, June 5, 1988, at 40, col. 4.

15. Cattan, *The Growing Presence of Hispanics in the U.S. Work Force*, MONTHLY LAB. REV., August 1988, at 9.

16. *Id.* at 10.

17. The estimated number of persons claiming Spanish as their mother tongue was 11,400,525 in 1979, an increase of 46% over the figure reported in 1970—7,823,583. *See* J. FISHMAN, THE RISE AND FALL OF THE ETHNIC REVIVAL: PERSPECTIVES ON LANGUAGE AND ETHNICITY 147 (Table 14). The number of persons speaking Spanish is likely to be higher today.

18. 29 C.F.R. § 1606.7(a),(b) (1989). The EEOC presumes that an English-only rule in effect at all times violates Title VII, while a limited English-only rule, properly promulgated, must be justified by business necessity. 29 C.F.R. § 1606.7(a)-(c) (1989).

19. The principal cases on English-only rules have involved rules seeking to restrict private conversations between employees. *See* Garcia v. Gloor, 618 F.2d 264, 266 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); Gutierrez v. Municipal Ct., 838 F.2d 1031,

This Article analyzes the issues raised by English-only rules and the decisions discussing these rules. Part I reviews the leading cases on English-only rules. The Article then explores several issues that must be considered in deciding any English-only rule case under Title VII. Part II addresses whether speaking one's primary language should constitute a protected right as an aspect of national origin under Title VII. This Article argues that primary language should be protected under Title VII for several reasons: the courts and the EEOC construe the term "national origin" broadly; primary language constitutes a fundamental aspect of ethnicity and national origin; and the difficulty of second-language acquisition renders primary language practically immutable for many persons whose primary language is not English. Part III argues that English-only rules have an exclusive adverse impact on language minority groups distinct from the nonexclusive effect of facially neutral rules typically considered under disparate impact cases. Part IV analyzes the current burden of proof standards for establishing discrimination under Title VII in light of *Wards Cove Packing Co. v. Atonio.*[20] This Part proposes that courts should hold employers to a stricter standard than the *Wards Cove* standard for proving business justification in recognition of the exclusive impact of English-only rules. Finally, Part V discusses the extent of the business justification that can properly justify an employer's use of a language restriction under the standard established in *Wards Cove.*

I. THE LEADING CASES ON ENGLISH-ONLY RULES

The leading cases on the legality of English-only rules are *Garcia v. Gloor*[21] and *Gutierrez v. Municipal Court.*[22] These

1036, *vacated as moot,* 109 S. Ct. 1736 (1989). More restrictive rules can be analyzed using disparate treatment theory, disparate impact theory and the business justification standard recently established in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125-26 (1989). *See infra* Parts III and IV.

20. 109 S. Ct. 2115 (1989).

21. 618 F.2d 264 (5th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981).

22. 838 F.2d 1031, *vacated as moot,* 109 S. Ct. 1736 (1989). In another case, Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919 (S.D. Tex. 1979), the court found that an employee's discharge for speaking Spanish violated Title VII. The case has little precedential value in this context, however, because the court did not analyze the prohibition on speaking Spanish, but instead focused on the unfair treatment of the plaintiff. *Id.* at 921-23. Unlike the rules in *Garcia* and *Gutierrez,* the employer's rule in *Saucedo* was informal. *Id.* at 921-22. Furthermore, the court did not state clearly whether the employer's conduct constituted national origin discrimination or race discrimination. Instead, the court found that Saucedo was discharged "because of racial animus." *Id.* at

cases disagree on whether an English-only rule constitutes national origin discrimination under Title VII.[23] *Garcia,* the only remaining precedent on the issue, establishes the legality of English-only rules. In *Garcia,* the Court of Appeals for the Fifth Circuit decided that an employee fired for speaking Spanish on the job had not stated a claim of national origin discrimination under Title VII.[24] The plaintiff, Hector Garcia, was a Mexican American working as a salesman for Gloor Lumber and Supply, Inc. Seven of the eight salesmen, and thirty-one of the thirty-nine persons employed by Gloor Lumber were Hispanic. The court observed that the high percentage of Hispanic salesmen may have been "a matter perhaps of business necessity, because 75% of the population in its business area is of Hispanic background and many of Gloor's customers wish to be waited on by a salesman who speaks Spanish."[25]

Gloor Lumber had an English-only rule prohibiting its salesmen, including Garcia, from speaking Spanish unless they were speaking with Spanish-speaking customers. Although they could speak as they wanted during breaks, the Hispanic salesmen could not speak to each other in Spanish while working in the store.[26]

On June 10, 1975, a fellow Mexican-American employee asked Garcia about an item requested by a customer. Garcia responded in Spanish that the item was not available. Alton Gloor, an officer of Gloor Lumber, heard Garcia speaking in Spanish and subsequently discharged him. Garcia sued, claiming that his discharge constituted national origin discrimination in violation of Title VII.[27]

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920. The court held that the employer had breached its "obligation to avoid treating its employees discriminatorily." *Id.* at 922. In dicta, however, the court stated that "a duly and officially promulgated . . . rule absolutely prohibiting the speaking of a foreign language during the drilling of a well or the reworking of a well, and providing for immediate discharge for violation of the rule, would be a reasonable rule for which a business necessity could be demonstrated." *Id.* at 921.

23. *Compare Garcia,* 618 F.2d at 266, 268 with *Gutierrez,* 838 F.2d at 1039-40 (disagreeing on application of Title VII to English-only rules).

24. *Garcia,* 618 F.2d at 270-71. For law review commentaries discussing *Garcia* see the following articles: Note, *Language Discrimination under Title VII: The Silent Right of National Origin Discrimination,* 15 J. MARSHALL L. REV. 667 (1982) (authored by John W. Aniol) (approving result in *Garcia*); Note, Garcia v. Gloor: *Mutable Characteristics Rationale Extended to National Origin Discrimination,* 32 MERCER L. REV. 1275 (1981) (authored by Dwight J. Davis) (also approving the result).

25. *Garcia,* 618 F.2d at 266-67.

26. *Id.* at 266.

27. *Id.*

Affirming the district court, the court of appeals held that there was no national origin discrimination.[28] The basis for the court's decision was its view that, for a bilingual person, the choice of which language to speak at a particular time is purely a matter of individual preference that has no compelling nexus to national origin.[29] The court wrote that "[n]either the statute nor common understanding equates national origin with the language that one chooses to speak."[30] Interpreting national origin as one's birthplace or the birthplace of one's ancestors, the court stated that Title VII "does not support an interpretation that equates the language an employee prefers to use with his national origin."[31]

The court also reasoned that a bilingual employee's desire to speak his native language is not an immutable characteristic like place of birth, race, or sex.[32] Rejecting the argument that Gloor Lumber's rule had a disparate impact on Hispanics, the court stated that "there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference."[33]

Finding no disparate impact and no violation of Title VII, the court declined to examine the employer's justifications for the English-only rule.[34] The court apparently accepted the district court's finding that Gloor's business reasons for the rule were valid.[35] Gloor Lumber offered several reasons for the rule: its English-speaking customers objected to conversations between employees in Spanish, conversations the customers could not understand; requiring bilingual employees to speak English at all times, other than when they served Hispanic customers, would improve their literacy and fluency in English; and the rule would enable Gloor Lumber's English-speaking supervisors to supervise Hispanic employees more effectively.[36]

While the *Garcia* court found no national origin discrimination and therefore no violation of Title VII, the *Gutierrez* court evaluated a similar rule, enacted under similar circumstances,

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28. *Id.*
29. *Id.* at 270.
30. *Id.* at 268 (footnote omitted).
31. *Id.* at 270.
32. *Id.* at 269.
33. *Id.* at 270.
34. *Id.* at 271.
35. *Id.* at 267.
36. *Id.*

and came to the opposite conclusion.[37] The plaintiff, Alva Gutierrez, worked as a deputy court clerk in the Southeast Judicial District of the Los Angeles Municipal Court. She, like a number of other deputy clerks, was Hispanic American and spoke both Spanish and English. In addition to their other responsibilities, these deputy clerks translated for non-English-speaking persons who used the court.[38]

In March 1984, the municipal court issued a rule prohibiting employees from speaking any language other than English except when they were translating for persons not fluent in English.[39] Later that year, the municipal court amended the rule to permit employees to speak in their preferred language during breaks and during lunch. During work time, however, unless they were translating, the Hispanic clerks were prohibited from speaking Spanish.[40]

The Court of Appeals for the Ninth Circuit affirmed the district court's grant of a preliminary injunction barring enforcement of the municipal court's rule.[41] The court based its analysis on the theory that the rule had a disparate impact on Hispanics.[42] Accordingly, the court first evaluated whether the rule had a disparate impact on Spanish-speaking employees and then whether the municipal court's rule was justified by business necessity.[43]

The *Gutierrez* court found that language is an important aspect of national origin.[44] The court wrote that "[t]he cultural identity of certain minority groups is tied to the use of their primary tongue."[45] Despite an individual's assimilation into American society, "his primary language remains an important link to his ethnic culture and identity."[46] Furthermore, according to the court, "[t]he mere fact that an employee is bilingual does not

37. Gutierrez v. Municipal Ct., 838 F.2d 1031, *vacated as moot*, 109 S. Ct. 1736 (1989).

38. *Gutierrez*, 838 F.2d at 1036.

39. Initially, the municipal court's rule prohibited more Spanish than the Gloor Lumber rule, which permitted employees to speak in the language they preferred during lunch and break times and outside the store. *Compare Gutierrez*, 838 F.2d at 1036 with *Garcia*, 618 F.2d at 266 (showing initial municipal court rule as more restrictive than Gloor Lumber's rule).

40. *Gutierrez*, 838 F.2d at 1036.

41. *Id.* at 1045-46 & n.20.

42. *Id.* at 1038-41.

43. *Id.* at 1038-44.

44. *Id.* at 1038-39.

45. *Id.* at 1039.

46. *Id.*

eliminate the relationship between his primary language and the culture that is derived from his national origin."[47]

Relying on regulations published by the EEOC, the court concluded that English-only rules have a disparate impact:

> We agree that English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized. We also agree that such rules can "create an atmosphere of inferiority, isolation, and intimidation." Finally, we agree that such rules can readily mask an intent to discriminate on the basis of national origin.[48]

Adopting the EEOC's approach to these rules,[49] as well as the traditional structure of disparate impact analysis, the court concluded that a limited English-only rule must be justified by a business necessity before it can be enforced.[50] The court concluded that none of the justifications offered by the appellants for their English-only rule met the business necessity standard.[51]

The *Gutierrez* decision, before it was vacated as moot by the Supreme Court, created a split in the circuits.[52] The court in *Garcia* found no link between a person's primary language and national origin, no disparate impact upon Hispanics, and, consequently, no violation of Title VII resulting from the enforcement of an English-only rule. While not acknowledging that it was doing so, the *Gutierrez* court differed on each of these issues. Under *Gutierrez,* a person's primary language is vitally linked to his national origin, an English-only rule has a disparate impact upon protected groups whose primary language is not English, and, under circumstances similar to those in *Garcia,* an English-

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47. *Id.*

48. *Id.* at 1040 (citation omitted).

49. The EEOC regulations provide that "[a]n employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity." 29 C.F.R. § 1606.7(b) (1989).

50. *Gutierrez,* 838 F.2d at 1040. *Gutierrez,* of course, was decided before Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), which significantly lightened the burden of justification faced by employers, who need not prove the business necessity for a challenged practice any longer. *See infra* Part IV.B.

51. *Gutierrez,* 838 F.2d at 1044-45. The municipal court offered several justifications for its rule: preventing the workplace from turning into a "Tower of Babel"; promoting racial harmony; and enhancing the effectiveness of supervision. Additionally, the court stressed that the United States and California are both English-speaking and that the rule was required by the California Constitution. *Id.* at 1042-43.

52. *See* Gutierrez v. Municipal Ct., 861 F.2d 1187 (9th Cir. 1988) (denying rehearing en banc) (Kozinski, J., dissenting) (pointing out the split among the circuits created by the *Gutierrez* decision).

only rule probably violates Title VII. In reaching its conclusions, the *Gutierrez* court examined the employer's justifications to determine whether a business justification existed for the rule.

Although no split exists among the circuits at the moment because the Supreme Court decided to vacate *Gutierrez*, the question of the enforceability of English-only rules is likely to recur.[53] The Supreme Court and the lower courts will need to decide three issues when hearing one of these cases. The first is whether the exercise of one's primary language should constitute a protected right as an aspect of national origin under Title VII. Second, the courts must consider whether English-only rules have a disparate impact upon protected language minority groups and, if so, the appropriate standard for justification of these rules. Third, the courts must consider the proper contours of the business justifications that will support the use of English-only rules in the workplace.[54] This Article will discuss each of these issues in turn.

II. THE TITLE VII ANALYSIS

Title VII prohibits discrimination based on national origin.[55] The statute makes no reference, however, to discrimination on the basis of language. The fundamental question, therefore, is whether a person's primary language warrants protection under Title VII as an aspect of national origin.

The Supreme Court has characterized the legislative history of the statutory phrase "national origin" as "quite meager."[56] The brief congressional debate on the term "national origin" suggests that the legislators contemplated persons who came from, or whose forefathers came from, a particular country.[57] There was

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53. *See supra* text accompanying notes 12-17.

54. The business justification issue will be analyzed using the framework and burdens of proof enunciated in the recently decided case of Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), which has changed significantly the employer's burden of justification. *See infra* notes 187-205 and accompanying text.

55. 42 U.S.C. § 2000e-2(a)(1) (1982) states that:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, sex, or *national origin;*

Id. (emphasis added).

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

57. During the debate on the amendment adding the phrase 'national origin' to the House bill, Representative Roosevelt explained that " 'national origin' means national. It

no commentary, however, on the meaning of national origin discrimination.[58]

Primary language should be protected as an aspect of "national origin" for several reasons. First, the courts and the EEOC have interpreted the phrase "national origin" broadly and have extended the protection of Title VII to bar discrimination against persons with characteristics closely correlated with national origin.[59] Second, the sociology of linguistics establishes the importance of primary language as a fundamental aspect of ethnicity and national origin.[60] Third, although primary language is not immutable in the same sense as protected characteristics like race or sex, primary language is what this writer will term "practically immutable," and thus entitled to statutory protection.[61]

A. Broad Construction of National Origin

The courts have construed "national origin" broadly to include characteristics that are correlated with national origin. Several courts, for example, have concluded that an employee's foreign accent, provided that it does not interfere with the employee's ability to perform his job duties, is not a legitimate justification for discrimination under Title VII.[62] Courts also have invalidated minimum height requirements that have discriminatory impact on Mexican Americans or Asian Americans and that

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means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2549 (1964), *reprinted in* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND IX OF CIVIL RIGHTS ACT OF 1964, at 3179-80 (1968). *See also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 305 (2d ed. 1983).

58. *See* Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1169 & n.25 (1985) (authored by Stephen M. Cutler).

59. *See infra* Part II.A.

60. *See infra* Part II.B.

61. *See infra* Part II.C.

62. *See, e.g.*, Carino v. Univ. of Oklahoma Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (holding that a foreign accent that does not interfere with a person's ability to perform job duties is not a legitimate justification under Title VII for an adverse employment action); Bell v. Home Life Ins. Co., 596 F. Supp. 1549, 1555 (M.D.N.C. 1984) (stating that discrimination because of foreign accent can constitute national origin discrimination); Berke v. Ohio Dep't of Pub. Welfare, 30 Fair Empl. Prac. Cas. (BNA) 387, 391-92, 394 (S.D. Ohio 1978), *aff'd per curiam*, 628 F.2d 980 (6th Cir. 1980); *see also* 29 C.F.R. § 1606.6(b)(1) (1989) (EEOC regulations stating that discrimination because of foreign accent may be national origin discrimination).

are not justified by business necessity.[63] The *Gutierrez* court treated primary language as a characteristic essentially linked with national origin[64] and entitled to protection under Title VII.[65]

The federal agency charged with enforcing Title VII, the EEOC, also construes national origin discrimination broadly to include discrimination because an individual has the physical, cultural, or linguistic characteristics of a national origin group.[66] In its Guidelines on National Origin Discrimination,[67] the EEOC wrote that "[t]he primary language of an individual is often an essential national origin characteristic."[68] Specifically, several EEOC decisions hold that rules prohibiting Hispanics from speaking Spanish on the job constitute a form of national origin discrimination.[69] The views of the administrative agency that enforces Title VII are entitled to special deference by the courts.[70]

Accordingly, under the broad construction of "national origin" applied by the courts, and under the explicit guidelines and decisions of the EEOC, primary language should be protected under Title VII.

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63. *See, e.g.*, Davis v. County of Los Angeles, 566 F.2d 1334, 1341-42 (9th Cir. 1977) (holding minimum height requirement for firemen had a disparate impact on Mexican Americans and was not proven to be job related); Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378, 380-81 (N.D. Cal. 1975) (holding minimum height restriction for police officers had a disparate impact on Hispanics, Asians, and women).

64. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1039, *vacated as moot*, 109 S. Ct. 1736 (1989); *accord* Olagues v. Russoniello, 797 F.2d 1511, 1520 (9th Cir. 1986) (en banc) ("[A]n individual's primary language skill generally flows from his or her national origin."), *vacated as moot*, 484 U.S. 806 (1987). *But see* Garcia v. Gloor, 618 F.2d 264, 268, 270-71 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

65. *Gutierrez*, 838 F.2d at 1038.

66. 29 C.F.R. § 1606.1 (1989).

67. 29 C.F.R. § 1606.1-.8 (1989).

68. 29 C.F.R. § 1606.7(a) (1989). The regulation also states that "[a] rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment." *Id.*

69. *See* EEOC Dec. No. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1823 (1981); EEOC Dec. No. 72-0281, EEOC Dec. (CCH) ¶ 6293 (1971); EEOC Dec. No. 71446, 2 Fair Empl. Prac. Cas. (BNA) 1127, 1128 (1970).

70. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

B. *Primary Language is a Fundamental Aspect of Ethnicity*

Primary language, like accent, is closely correlated and inextricably linked with national origin.[71] Prevailing social attitudes, however, deny any relationship between language and culture or ethnicity, leading to the belief that the restriction of language rights does not interfere with ethnic identity or cultural freedom.[72] The court in *Garcia* adopted this position, reasoning that "[n]either [Title VII] nor common understanding equates national origin with the language that one chooses to speak."[73]

Such attitudes are rejected by scholars of ethnicity and language. One leading scholar, Joshua Fishman, defines ethnicity as "both the sense and the expression of 'collective, intergenerational cultural continuity,' i.e. the sensing and expressing of links to 'one's own kind (one's own people),' " with whom one shares ancestral origins.[74] It is through the expression of ethnicity, one's cultural continuity and cultural traits, that "national origin" has perceptible meaning.[75] Primary language is recognized in sociology and sociolinguistics as a fundamental aspect of ethnicity.[76] Fishman has written that "language and ethnic

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71. *See* Gutierrez v. Municipal Ct., 838 F.2d 1031, *vacated as moot*, 109 S. Ct. 1736 (1989).

72. N. CONKLIN & M. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES (1983). Conklin and Lourie state:

> [P]revailing mainstream attitudes deny any relationship between language and culture, arguing that revocation of language rights in no way compromises the integrity of cultural freedoms upon which our nation was constituted. Paradoxically, while language is generally viewed as nothing but a means of communication, standard English is held up as the only appropriate embodiment of the national character.

Id. at 279.

73. Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980) (footnote omitted), *cert. denied*, 449 U.S. 1113 (1981).

74. J. FISHMAN, *supra* note 17, at 4.

75. *See* Note, *supra* note 58, at 1166-67 & nn.11, 13 (commenting on cultural traits related to national origin).

76. J. FISHMAN, *supra* note 17. Fishman explains:

> Ethnicity is . . . belonging or pertaining to a phenomenologically complete, separate, historically deep cultural collectivity, a collectivity polarized on perceived authenticity. This "belonging" is experienced and interpreted physically (biologically), behaviorally (culturally) and phenomenologically (intuitively). . . . [C]haracterized as it is on all three [of these dimensions] it is a very mystic, moving and powerful link with the past and an energizer with respect to the present and future. It is fraught with moral imperatives, with obligations to "one's own kind," and with wisdoms, rewards and proprieties that are both tangible and intangible. . . . As such, it is language-related to a very high and natural degree, both overtly (imbedded as it is in verbal culture and implying as it does structurally dependent intuitions) and covertly (the supreme symbol system [primary language] quintessentially symbolizes its users and distinguishes

authenticity may come to be viewed as highly interdependent."[77] Some scholars view Hispanic culture as imbedded in the language of Spanish speakers, in the sense that both their culture and their language are derived from the reality in which they live; in turn, the culture and the language create and shape that reality.[78] Language and culture together, therefore, form the basic orientation toward reality of any given person or social group.[79] Expert testimony in *Garcia* also stated that "the Spanish language is the most important aspect of ethnic identification for Mexican Americans."[80]

A number of legal commentators also recognize that language is inextricably linked to national origin.[81] One commentator

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between them and others). Indeed this is so to such a degree that language and ethnic authenticity may come to be viewed as highly interdependent.

Id. at 70-71; *see also* N. CONKLIN & M. LOURIE, *supra* note 72, at 279 ("[F]or many Americans, speech is an indicator of cultural identity, second in importance only to physical appearance. Further, accent, language choice, verbal style, choice of words, phrases, and gestures act as a primary vehicle for creative expression by individuals and by groups."); Fishman, *The Sociology of Language: An Interdisciplinary Social Science Approach to Language and Society*, in 1 ADVANCES IN THE SOCIOLOGY OF LANGUAGE 217 (J. Fishman ed. 1971)

> [Language] is not merely a *carrier* of content, whether latent, or manifest. Language itself *is* content, a referent for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.

Id. at 219.

77. J. FISHMAN, *supra* note 17, at 70.

78. Christian & Christian, *Spanish Language and Culture in the Southwest*, in LANGUAGE LOYALTY IN THE UNITED STATES 280, 300 (J. Fishman ed. 1966) [hereinafter LANGUAGE LOYALTY].

79. *Id.*

80. Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

81. *See, e.g.*, Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 351-57 (1986); McDougal, Lasswell & Chen, *Freedom from Discrimination in Choice of Language and International Human Rights*, 1 S. ILL. U.L.J. 151, 152 (1976) ("[L]anguage is commonly taken as a prime indicator of an individual's group identifications.") (footnote omitted); Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 898-901 (1986); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1355 (1987) ("As a separate basis for finding that language-based classifications implicate suspect criteria, courts might determine that such classifications in fact discriminate on the basis of national origin. Litigants have argued that no factor is more intimately tied to a person's ethnic or national identity than is language.") (footnote omitted) [hereinafter Note, *Official English*]; Note, *supra* note 58, at 1165 & n.5 (1985) ("Differences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself."); Comment, *Native-Born Acadians and the Equality Ideal*, 46 LA. L. REV. 1151, 1167 (1986) (authored by James Harvey Domengeaux) ("Language is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity.").

wrote that language is one of the key characteristics "that define social groups . . . . A distinctive language sets a cultural group off from others, with one consistent unhappy consequence throughout American history: discrimination against members of the cultural minority. Language differences provide both a way to rationalize subordination and a ready means for accomplishing it."[82]

The existence in the United States of a thriving ethnic mother-tongue press, non-English commercial broadcasting, and schools designed to preserve foreign languages, demonstrates that primary language is fundamental to ethnicity. The non-English press, particularly the Hispanic press, increased substantially in the United States between 1960 and 1980.[83] The number of Spanish-language publications grew from 49 to 165.[84] The ethnic mother-tongue press provides a vital forum for ethnic concerns and a vehicle for ethnic pride.[85] Non-English radio and television broadcasting also increased between 1960 and 1980, though not at the same rate as commercial broadcasting as a whole.[86] Mother-tongue schools also illustrate the connection between language and ethnicity. The roughly 6600 mother-tongue schools currently operating in the United States[87] are "unequivocally committed to the view that their particular language and ethnicity linkage is vital and, hopefully, eternal."[88]

None of the important sociological and psychological factors that make primary language an important, indeed crucial, aspect

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82. Karst, *supra* note 81, at 351-52 (footnotes omitted).

83. J. FISHMAN, *supra* note 17, at 344-45. This increase follows a substantial decrease in the non-English press from the 1930s, when ethnic mother-tongue publications reached a peak, to the 1960s. *See* Fishman, Hayden, and Warshauer, *The Non-English and the Ethnic Group Press*, in LANGUAGE LOYALTY, *supra* note 78, at 51-52.

84. J. FISHMAN, *supra* note 17, at 344-45.

85. *Id.* at 330. *See also* Glazer, *The Process and Problems of Language-Maintenance: An Integrative Review*, in A PLURALISTIC NATION: THE LANGUAGE ISSUE IN THE UNITED STATES 32 (1978). Glazer states:

> In America, the immigrant wants to preserve, as far as possible, his heritage from the old country. These (sic) are represented preeminently by his language and his religion. At the same time, he wants to participate in the common life and find a place in the American community. In these two motives, we have at once the problem of the foreign-language press and its solution.

Id. at 33. (quoting R. PARK, THE IMMIGRANT PRESS AND ITS CONTROL (1922)).

86. J. FISHMAN, *supra* note 17, at 224-26. In 1982, there were approximately 275 television stations broadcasting during at least a protion of the day in non-English languages. Approximately 60% of these stations broadcast in Spanish. *Id.*

87. *Id.* at 244 (Table 15), 364.

88. *Id.* at 365. The majority of ethnic mother-tongue schools teach in the languages of Hebrew, Yiddish, Spanish, Pennsylvania German, and Greek. *Id.* at 242.

of ethnicity are different in the case of a bilingual person.[89] Even for a bilingual, links to one's "own people" and ethnicity depend heavily on primary language. A study of Spanish-speaking bilinguals demonstrated that they associate Spanish with family and friendship and values of intimacy.[90] Accordingly, given all of these factors, the *Garcia* court erred in concluding that Gloor Lumber's English-only rule "did not forbid cultural expression to persons for whom compliance with it might impose hardship."[91]

C. *Primary Language is Practically Immutable*

Primary language, therefore, merits protection under Title VII as a fundamental aspect and a crucial expression of national origin and ethnicity. The exercise of a person's primary language also warrants protection under Title VII for another reason. One of the rationales for protecting a personal characteristic under Title VII is its immutability.[92] With the exceptions of religion and pregnancy, all of the characteristics protected under the statute—race, color, national origin, and sex—are immutable. The *Garcia* court viewed a bilingual's choice of language, however, as purely a matter of individual preference and not immutable.[93]

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89. In contrast, the *Garcia* court reasoned that, for a multilingual person, the matter of which language to speak at a particular time is purely a matter of individual choice and without invidious effects. Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

90. Greenfield, *Situational Measures of Normative Language Views in Relation to Person, Place and Topic Among Puerto Rican Bilinguals*, in 2 ADVANCES IN THE SOCIOLOGY OF LANGUAGE 17, 33 (J. Fishman ed. 1972) ("Use of Spanish was claimed primarily in the domain of family, secondarily for the domains of friendship and religion, and least of all in those of education and employment, while the reverse held true for English."). *See also* Fishman, *The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society*, in 1 ADVANCES IN THE SOCIOLOGY OF LANGUAGE 217, 251 (J. Fishman ed. 1971) (stating that among bilinguals, Spanish is primarily associated with family and friendship, which constitute the intimacy value cluster).

91. *Garcia*, 618 F.2d at 270.

92. *See id.* at 269; Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975).

93. *Garcia*, 618 F.2d at 269-70. Bilingualism can be considered as a spectrum of abilities in a second language, ranging from a minimal ability to communicate in the second language to equal facility in the second language. It is not necessarily the case, therefore, that someone able to speak enough English to meet the minimum requirements of a job is fully bilingual and able to express the full range of what needs to be conveyed to conduct personal relationships with co-workers. *See infra* notes 95-101 and accompanying text.

Although not immutable in the same sense as race or sex, primary language is, for many persons, practically immutable.[94] Even the *Garcia* court conceded that "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth."[95] Moreover, acquiring a new language is especially difficult for adults with limited economic resources.[96]

Studies of second-language acquisition demonstrate the difficulty of acquiring English as a second language. One study, conducted by Portes and Bach, examined the language acquisition of a group of recent Mexican and Cuban male immigrants to the United States.[97] Despite spending six years in the United States and despite instruction in English, over two-thirds (74.3%) of the men studied gained essentially no knowledge of English or only minimal English skills.[98] Another study focused on Hispanic-origin males and females, aged fourteen and over, who reported that Spanish was their mother tongue, the language spoken in their homes when they were children.[99] Of this sample, half of the studied group were still using Spanish as their primary language.[100] Other case studies show that, particularly for older adolescents and adults, acquisition of English is quite difficult; often the result is a bare, minimal level of competence in communication.[101] It is a well-established proposition in the psychology and sociology of language acquisition that the acqui-

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94. *See* Note, *Official English*, *supra* note 81, at 1354-55. *See also* W. LONGSTREET, ASPECTS OF ETHNICITY: UNDERSTANDING DIFFERENCES IN PLURALISTIC CLASSROOMS 19-20 (1978) ("Individuals will eventually attain some intellectual control over their ethnically learned behaviors, but that control is likely to remain incomplete. Much of what is learned ethnically is done at a very low level of awareness and in a way that seems to sidestep rationality."). The EEOC also recognizes that it is "common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language." 29 C.F.R. § 1606.7(c) (1989).

95. *Garcia*, 618 F.2d at 270.

96. Note, *Official English*, *supra* note 81, at 1354.

97. A. PORTES & R. BACH, LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES (1985).

98. *Id.* at 174, 180, 198.

99. Grenier, *Shifts to English as Usual Language by Americans of Spanish Mother Tongue*, in THE MEXICAN AMERICAN EXPERIENCE: AN INTERDISCIPLINARY ANTHOLOGY 346, 350 (1985).

100. *Id.* at 356. This study also found that Hispanics "are shifting to English at a relatively fast pace." *Id.*

101. *See* Schumann, *Second Language Acquisition: The Pidginization Hypothesis*, in SECOND LANGUAGE ACQUISITION: A BOOK OF READINGS 256-71 (E. Hatch ed. 1978); Shapira, *The Non-learning of English: Case Study of an Adult*, in SECOND LANGUAGE ACQUISITION: A BOOK OF READINGS 246-55 (E. Hatch ed. 1978). Both articles present case studies of Spanish-speaking adults encountering great difficulty in acquiring English.

sition and mastery of a new language is far more difficult for adults than for children.[102] Several theories attempt to explain this phenomenon. One theory postulates a "critical period" after which physiological changes in the brain make learning a second language much more difficult.[103] Another theory explains difficulties in second-language acquisition by adults as the result of the social and psychological distances between an individual member of a social group and members of another social group that speaks a different language.[104] Social distance, which creates a poor language learning situation, exists when an individual's group is either dominant or subordinate to the group speaking the desired language, when both groups desire preservation of their values and cultural pattern and resist intermingling, or when the two groups hold negative attitudes about each other, among other factors.[105] One can infer a large degree of social distance, and therefore poor language learning conditions, between many persons whose primary language is not English and the English-speaking majority culture based on differences

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102. *See* Seliger, *Implications of a Multiple Critical Periods Hypothesis for Second Language Learning*, in SECOND LANGUAGE ACQUISITION RESEARCH: ISSUES AND IMPLICATIONS 11 (W. Ritchie ed. 1978) ("[T]he biological fact of adulthood is enough to establish an insurmountable obstacle in most cases for *complete* language acquisition. The incompleteness of the adult learner's [second-language] system has a physiological basis and concomitant cognitive correlates."); Whitaker, *Bilingualism: A Neurolinguistics Perspective*, in SECOND LANGUAGE ACQUISITION RESEARCH: ISSUES AND IMPLICATIONS 21, 29-30 (W. Ritchie ed. 1978); Shapira, *supra* note 101, at 252-53. *See also* Schumann, *supra* note 101, at 259-67.

103. Professor Lenneberg first proposed this theory. He hypothesized that cerebral dominance, and lateralization of the language functions of the brain to the left hemisphere of the brain, was complete by puberty. *See* E. LENNEBERG, BIOLOGICAL FOUNDATIONS OF LANGUAGE (1967); *see also* S. KRASHEN, SECOND LANGUAGE ACQUISITION AND SECOND LANGUAGE LEARNING 72 (1981) (describing Lenneberg's theory); Seliger, *supra* note 102, at 11-12; Whitaker, *supra* note 102, at 29-30. This critical period appears to end at puberty. *See* Whitaker, *supra* note 102, at 29-30 ("Although there is evidence that under unusual circumstances language acquisition may occur after puberty . . ., possibly by the right hemisphere [of the brain], it is neither as rapid nor as successful as normal language acquisition.") (citations omitted); S. KRASHEN, *supra*, at 72-73 ("[T]here seems to be no question that puberty is an important turning point in language acquisition. . . .").

Several scholars question the critical period hypothesis. Krashen, while acknowledging that differences in second language acquisition potential do exist between children and adults, questions whether this difference is based on physiological or biological differences between children and adults. S. KRASHEN, *supra*, at 73, 81. *See also* Schumann, *supra* note 101, at 259; Shapira, *supra* note 101, at 252; Snow & Hoefnagel-Hohle, *The Critical Period for Language Acquisition: Evidence from Second Language Learning*, 49 CHILD DEV. 1114-28 (1978) (study failed to support the critical period hypothesis; fastest second-language acquisition occurred in subjects aged 12-15 years, while the slowest occurred in subjects aged 3-5 years).

104. Schumann, *supra* note 101, at 261-67.

105. *Id.* at 261-63.

in socioeconomic status and educational level,[106] as well as on the relative isolation of language minority persons in ethnic minority communities.[107]

Success in acquiring a second language can also depend on the psychological distance between the learner and the group speaking the second language.[108] Psychological distance develops as a language learner is haunted by doubts about his ability to express himself in a different language and when he finds that his problem-solving abilities do not work in a new culture with a different language.[109] An individual's motivation, dependent upon his attitude toward English-speakers and his willingness to adopt both linguistic and nonlinguistic aspects of their behavior, is another important factor in his acquisition of a second language.[110] Second-language acquisition, a complex and difficult task under ideal conditions, is more difficult for members of language minority groups, in part because of a long history of discrimination against members of language minorities.[111] Many

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106. *See infra* notes 114-15.

107. This isolation originates from a history of discrimination. *See infra* note 111.

108. Schumann, *supra* note 101, at 263-67.

109. *Id.*

110. R. GARDNER & W. LAMBERT, ATTITUDES AND MOTIVATION IN SECOND-LANGUAGE LEARNING (1972). Gardner and Lambert state:

> [E]thnocentric and prejudiced views held students back in various ways, where widely shared negative stereotypes of certain peoples appeared to make the work of a language teacher almost impossible, and where particular profiles of values and motives seemed to make the difference between success and failure at school work in general and language study in particular.

Id. at 144; *see also* Schumann, *supra* note 101, at 266-67. Schumann writes:

> [F]actors causing psychological distance . . . put the learner in a situation where he is largely cut off from [secondary] language input and/or does not attend to it when it is available. The language which is acquired under these conditions will be used simply for denotative referential communication in situations where contact with speakers of the [secondary] language is either absolutely necessary or unavoidable . . . [and] his use of the [secondary] language will be functionally restricted . . . .

Id.

Prejudice against the language of Hispanics is recognized as a cause of low esteem for the language. N. CONKLIN & M. LOURIE, *supra* note 72, at 193. "Spanish-influenced English is more often scorned than any other language variety in the Chicano verbal repertoire . . . . Neither Chicanos nor Anglos have much respect or affection for it." *Id.* at 192 (citation omitted). Attitudes such as these can only make the second language acquisition process more difficult and less successful.

111. There is a long history of discrimination against Mexican-Americans in employment. "[T]he pattern of employment of the Mexican American, dictated through the discrimination encountered, has been the major factor contributing to the isolation of the Mexican American from the majority population." Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662, 718 (1975) (footnote omitted). Mexican Americans have been paid lower starting wages than Anglos, have suffered from curtailed opportunities for promotion, and have

cases have recognized the systematic discrimination in public education against Hispanic[112] and Asian[113] children. For many

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been subject to discrimination from labor unions as well as employers. *Id.* at 719-20. "In nearly all of the broad occupational classifications . . . Mexicans held poorer jobs paying less money than did native American whites." J. MOORE, MEXICAN AMERICANS 61 (1st ed. 1970). Mexicans tend to hold the poorer and and lower paying jobs even within occupational categories. *Id.* at 62. Even if the representation of Mexican Americans and White Americans were equal in the broad occupational categories, Mexicans would still get lower pay than their Anglo counterparts doing similar work. *Id.* at 62.

In 1959, the median income of all Mexican Americans males in the Southwest United States was only 57% of the median earned by Anglo males in the same area. *Id.* at 60. As described by Professor Joan Moore:

> It is perfectly obvious from the most superficial examination of the data that in general Mexican Americans hold the less desirable jobs in the Southwest because of lack of education, lack of business capital, cultural dissimilarity to the majority, and their obvious role as a low-prestige group. Further, Mexicans are disproportionately forced to work in low-wage or marginal firms—in the less profitable, non-unionized fringes of the high-wage industries. Low job earnings are also associated with the concentration of Mexicans in certain low-wage geographical areas, the lower Rio Grande valley of Texas being an example. (Of course, such areas are "low-wage" partly *because* they are heavily Mexican.)

Id. at 63. A more recent study demonstrates that White Americans still fare better economically than Mexican Americans or Black Americans. Verdugo & Verdugo, *Earnings Differentials Between Mexican American, Black, and White Male Workers*, in THE MEXICAN AMERICAN EXPERIENCE: AN INTERDISCIPLINARY ANTHOLOGY 133 (1985).

> [W]hites fared better than either blacks or Mexican Americans socioeconomically. Whites earned more, had completed more years of schooling, and worked at far better jobs than either blacks or Mexican Americans. Whites also appeared to be more fully employed as they worked more hours than either blacks or Mexican Americans.

Id. at 136.

The under-representation of Hispanics in prestigious and highly paid jobs continues into the present. *See, e.g.*, Davila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403 (1987):

> Despite many advances, minority representation in the legal profession, as in most prestigious fields, is still not proportionate to the minority presence in the general population. But even within the legal world, corporate law firms have been slower than other professional groups in moving toward a more proportionate racial balance. . . . One survey reported that Hispanics represent less than 1 percent of the attorneys in the 151 biggest law firms in the United States.

Id. at 1404 (footnotes omitted). Hispanics in corporate law firms often experience a strong sense of isolation within the firms. *Id.* at 1415. "[T]his sense of isolation may be rooted in the fact that the Hispanic attorneys' backgrounds and value systems differ so radically from those of their white counterparts." *Id. Cf.* Olagues v. Russoniello, 797 F.2d 1511, 1521 (9th Cir. 1986), *vacated as moot*, 484 U.S. 806 (1987) ("[C]ourts have long recognized the history of discriminatory treatment inflicted on Chinese and Hispanic people.") (citations omitted). Many courts have observed such discrimination against Chinese and Hispanic people. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 479-82 (1954) (holding that persons of Mexican descent were discriminated against in jury selection); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (holding that Chinese persons were discriminated against by municipal ordinance regulating public laundries).

112. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 197-98 (1973); Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142, 144 (5th Cir. 1972) (en banc); United States v. Texas Educ. Agency, 467 F.2d 848, 853 (5th Cir. 1972) (en banc); Soria v. Oxnard School Dist., 328 F. Supp. 157 (C.D. Cal. 1971); *see generally*, Greenfield & Kates, *supra* note 111, at 711-15 (1975); Rangel & Alcalo, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 379 (1972).

years, state and local officials refused to offer equal educational opportunities to members of language minority groups.[114] According to the Senate Report accompanying the 1975 amendments to the Voting Rights Act of 1965, "[p]ersons of Spanish heritage are the group most severely affected by discriminatory practices, while the documentation of discriminatory practices concerning Asian Americans . . . was substantial."[115]

1215, 1215-16 (1971) (stating that a California statute authorized separate schools for children of Asian descent until its repeal in 1947).

114. *See* S. REP. No. 295, 94th Cong., 1st Sess. 2 (1975), *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 774, 794 [hereinafter SENATE REPORT].

The history of discrimination against members of language minority groups begins early: in the schools. It begins with the banning of languages other than English from the classroom. As one scholar has observed, "[i]n 1919 fifteen states decreed that English must be the sole language of instruction in all primary schools, public and private." J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 260 (2d ed. 1988). The Nebraska statute, which stated that "[n]o person . : . shall . . . teach any subject to any person in any language other than the English language," was applied to prohibit teaching in the German language. Meyer v. Nebraska, 262 U.S. 390, 397 (1923). In Louisiana, educators banned the use of French in the classroom. *See* Comment, *supra* note 81, at 1154-55. French-speaking students were severely punished when they spoke their primary language in school. *Id.* Spanish, too, was banned from the classroom. In Texas, as in other parts of the Southwestern United States, "Mexican-American children were prohibited from speaking their native language anywhere on school grounds. Those who violated the 'No Spanish' rule were severely punished." United States v. Texas, 506 F. Supp 405, 412 (E.D. Tex. 1981), *rev'd on other grounds*, 680 F.2d 356 (5th Cir. 1982); J. MOORE, *supra* note 111, at 84. The punishment included corporal punishment. *Id.* "[A]s late as the 1950s children who spoke Spanish in school were made to kneel on upturned bottle caps, forced to hold bricks in outstretched hands in the schoolyard, or told to put their nose in a chalk circle drawn on a blackboard. And this would happen in Texas towns that were 98 percent Spanish-speaking." T. WEYR, *supra* note 12, at 52.

The forcible suppression of other languages in schools was accompanied by the segregation of children from language minority groups in separate and unequal schools. *See* J. MOORE, *supra* note 111, at 81; *see, e.g.*, United States v. Texas, 506 F. Supp. at 411 ("[S]egregation of Mexican Americans is a historical fact in Texas public schools."); Keyes v. School Dist. No. 1, 413 U.S. at 197-98 (1973); Hernandez v. Texas, 347 U.S. at 479 (1954); Greenfield & Kates, *supra* note 111, at 714 & n.299 (1975); *see generally* Rangel & Alcalo, *supra* note 112.

During the enactment in 1975 of amendments to the Voting Rights Act, Congress found widespread discrimination against language minority citizens and recognized this as a denial of equal educational opportunity. *See* 42 U.S.C. § 1973b(f)(1) (1982); *cf.* Lau v. Nichols, 414 U.S. at 568 (1974) (holding that Chinese children taught in English-only classes were denied equal educational opportunity).

115. SENATE REPORT, *supra* note 114, at 797. The isolation of language minority students in segregated, inferior schools, and the suppression of their primary languages, has resulted in low educational attainment and a very high dropout rate for such students. These effects are well documented in the case of Mexican American and other Hispanic children. In 1960, the median number of years of education completed was 12.1 for Anglos, but only 7.1 for Spanish-surname students. J. MOORE, *supra* note 111, at 68 (Table 4-2). In 1970, the problem of low educational attainment was still severe. According to

The courts and the Congress have recognized and responded to the difficulties faced by persons of limited English-speaking ability. Indeed, one can imply the practical immutability of one's primary language from the numerous judicial and statutory accommodations to persons whose primary language is not English. For example, in *Lau v. Nichols*,[116] the Supreme Court interpreted Title VI of the Civil Rights Act of 1964[117] to require a school district to provide language assistance to overcome barriers faced by children whose primary language was Chinese and who spoke no English.[118] In other settings, the courts have held that non-English speakers are entitled to affirmative voting assistance,[119] to translators in criminal proceedings,[120] and to relief from a default judgment entered because the defendant, unable to speak or read English, failed to answer a complaint.[121]

Congress also enacted laws designed to accommodate persons whose primary language is not English. In perhaps the most important accommodation, Congress in 1975 extended the coverage of the Voting Rights Act of 1965[122] to include language minori-

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the 1970 Census, only 5.5% of the general population over 25 had failed to complete five years of school, compared with more than 18.9% of Hispanic citizens over 25. SENATE REPORT, *supra* note 114, at 794. In Texas, over 33% of Mexican American citizens had failed to complete the fifth grade. *Id.* Over half of the Mexican American children in Texas who enter the first grade never finish high school. *Id.* "In 1981, 30 percent of the Hispanic 18 and 19-year-olds were not high school graduates, a significantly higher dropout rate than [for] white or black students." H. R. REP. No. 748, 98th Cong., 2d Sess. 4 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4036, 4040 (legislative history of the Education Amendments of 1984, including the Bilingual Education Act). Lest one consider this a problem wholly of the past, the very high dropout rate for Hispanic youngsters, currently measured at 50 percent in the Boston schools, for example, remains a serious source of concern and a major problem in 1988. *See* Ribadeneira, *Hispanics Demand a Better Effort by City Schools: Parents Blame High Dropout Rate on Indifference*, Boston Globe, Nov. 21, 1988, at 15, col. 1; Ribadeneira, *Boom Bypassing Mass. Hispanics*, Boston Globe, June 5, 1988, at 41, col. 1 (Massachusetts state dropout rate for Hispanics about 56%; in Boston, about 51%).

To the extent that English is learned in the schools, these high dropout rates support the argument that, for those students whose primary language is not English, primary language is practically immutable.

116. 414 U.S. 563 (1974).

117. 42 U.S.C. § 2000d (1982) (prohibiting discrimination based on national origin in programs receiving federal financial assistance).

118. *See also* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1154 (10th Cir. 1974).

119. Puerto Rican Org. for Political Action v. Kusper, 350 F. Supp. 606, 611-12 (N.D. Ill. 1972), *aff'd*, 490 F.2d 575 (7th Cir. 1973). *See* Note, *Official English*, *supra* note 81, at 1349 & n.31.

120. United States *ex. rel.* Negron v. New York, 434 F.2d 386, 390-91 (2d Cir. 1970). *See* Note, *Official English*, *supra* note 81, at 1350 & n.33.

121. Cota v. Southern Arizona Bank & Trust Co., 17 Ariz. App. 326, 497 P.2d 833 (1972).

122. 42 U.S.C. §§ 1971-74 (1982).

ties.[123] Congress found that "voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English."[124] Congress concluded that "where state and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process."[125] To remedy this exclusion, Congress required state and political subdivisions to provide voting materials, instructions, and ballots "in the language of the applicable language minority group as well as in the English language."[126] Congress recognized, therefore, the substantial barriers blocking effective participation in the electoral process for persons whose primary language differs from English.

Congress has taken other affirmative steps to assist language minorities. In the Bilingual Education Act,[127] Congress provided financial assistance for local bilingual projects designed to assist children and adults whose primary language is not English and whose abilities in English are limited. As part of the Bilingual Education Act, Congress recognized "that there are large and growing numbers of children of limited English proficiency . . . many of [whom] . . . have a cultural heritage which differs from that of English proficient persons."[128] Congress also was aware that "because of limited English proficiency, many adults are not able to participate fully in national life, and that limited English proficient parents are often not able to participate effectively in their children's education."[129]

In its regulations implementing the Bilingual Education Act, the Department of Education recognizes explicitly the difficulties faced by individuals whose primary language is different from English. The department defined "limited English proficiency" individuals as including those "not born in the United States or whose native language is other than English" or who come "from a home in which a language other than English is used most for communication . . . ."[130] When such a person

123. Voting Rights Act Extension of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).
124. 42 U.S.C. § 1973b(f)(1) (1982).
125. *Id.*
126. 42 U.S.C. § 1973b(f)(4) (1982).
127. 20 U.S.C. §§ 3281-3341 (1988).
128. *Id.* § 3282(a)(1)-(2) (1988).
129. *Id.* § 3282(a)(19) (1988); *see also* H. REP. No. 748, 98th Cong., 2d Sess. 7 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4036, 4042.
130. 34 C.F.R. § 500.4(b)(1)(i)-(ii) (1988). In 1989, the department formally adopted the definitions in the Bilingual Education Act. 34 C.F.R. § 500.4(b) (1989). These definitions contain the same language. *See* 20 U.S.C. § 3283(a) (1988).

"has sufficient difficulty in speaking, reading, writing or understanding the English language" [that they cannot] [p]articipate fully in our society," the person has "limited English proficiency."[131]

A number of other federal statutes require the use of different languages in a variety of contexts, covering situations such as the use of interpreters in the courtroom,[132] the use of foreign languages at federally funded migrant and community health centers,[133] and in federal alcohol abuse and treatment programs.[134]

Judges and lawmakers recognize, therefore, that full participation in important aspects of American life is difficult for persons with a different primary language. Access to voting, education, and simple justice is limited severely for many Americans unless these rights and services are provided in languages understood by them. These many accommodations to persons of different primary language imply that a different primary language, if not completely immutable, is at least practically immutable for many Americans to a degree that inhibits full functioning in society. The practically immutable nature of a primary language is the unstated premise of many of these laws, for if one's primary language could be so easily changed—if English could be so easily acquired—then there would be little need for national laws guaranteeing that basic rights will be communicated in different languages and so made available to many Americans.

D. Garcia v. Gloor—*The Wrong Path*

The *Garcia* court's conclusion that Title VII does not support an interpretation that equates an employee's primary language with his national origin[135] is therefore misguided for several reasons. The courts and the EEOC have extended the protection of Title VII to bar discrimination against persons who have characteristics that are closely correlated with national origin.[136] Pri-

131. 34 C.F.R. § 500.4(b)(2) (1988).

132. 28 U.S.C. § 1827(d) (1982); *see* Note, *Official English, supra* note 81, at 1350 & n.37.

133. 42 U.S.C. §§ 254b(f)(3)(J), 254c(e)(3)(J) (1982); *see* Note, *Official English, supra* note 81, at 1350 & n.37.

134. 42 U.S.C. § 4577(b)(3)(1982); *see* Note, *Official English, supra* note 81, at 1350 & n.37.

135. *Garcia v. Gloor* 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981).

136. *See supra* notes 62-69 and accompanying text.

mary language or mother tongue—English for most Americans, and Spanish, German, Italian, French, Polish, Yiddish and other languages for many Americans[137]—is one of the most important aspects of ethnic identity and national origin.[138] As such, it is properly protected under Title VII as a characteristic closely correlated and inextricably related to national origin.[139] In particular, the courts and the EEOC already protect linguistic characteristics such as foreign accent under the statute.[140] It is difficult to discern a reason for protecting one's foreign accent under the statute while denying protection to one's primary language, the fundamental ethnic trait that gave rise to the accent.

The *Garcia* court also reasoned that a bilingual employee's desire to speak his primary language is not an immutable characteristic like place of birth, race or sex.[141] The foregoing analysis demonstrates, however, that for many persons primary language is practically immutable. Indeed, even the *Garcia* court recognized that language might be immutable for persons who speak only one language or who have difficulty with languages other than their mother tongue.[142]

The established difficulty of second-language acquisition for language minorities in this country and the recognition by the courts and Congress of the need to accommodate persons whose primary language is not English provide compelling evidence that primary language is practically immutable. The practical immutability of primary language justifies its protection under Title VII.

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137. These are the six languages other than English most frequently claimed as mother tongues in the United States as reported in 1970 and 1979 Bureau of the Census data. J. FISHMAN, *supra* note 17, at 111, 145-48.

138. *See supra* notes 74-80 and accompanying text.

139. *See* Note, *supra* note 58, at 1166 ("Courts should therefore employ a definition of national origin discrimination which includes the concept of discrimination on the basis of national origin-linked (i.e., cultural) traits.") (footnote omitted).

140. *See supra* notes 62 and 69 and accompanying text.

141. Garcia v. Gloor, 618 F.2d 264, 269-70 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

142. *Id.* The plaintiff in *Garcia*, Hector Garcia, testified during the trial that he had difficulty following Gloor Lumber's rule because Spanish was his primary language. Because of his primary language, Garcia tended to speak Spanish inadvertently and had to think carefully before speaking English because he might give the wrong impression at times and could not always express himself fluently. Brief for the EEOC at 3-4, Garcia v. Gloor, 625 F.2d 1016 (5th Cir. 1980) (No. 77-2358) (petition for rehearing). Despite Garcia's difficulty in expressing himself in English, the *Garcia* court did not find that his primary language was immutable. Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

III. THE "EXCLUSIVE ADVERSE IMPACT" OF ENGLISH-ONLY RULES

Having established that one's primary language closely correlates with national origin and that its use is entitled to protection under Title VII, we must then determine the proper analysis to apply to restrictions imposed upon the exercise of one's primary language. Although few courts have addressed the legality of English-only rules, the EEOC has advocated[143] the use of the disparate impact theory developed in *Griggs v. Duke Power Co.*[144] The *Gutierrez* court, adopting the EEOC's analysis, analyzed the municipal court's English-only rule under a disparate impact theory.[145]

The disparate impact theory applies when a plaintiff demonstrates that a specific, facially neutral employment policy has a discriminatory impact on protected groups.[146] An English-only rule is a specific and identifiable employment practice, as required by *Wards Cove Packing Co. v. Atonio.*[147] Application of the disparate impact theory to the analysis of English-only rules also rests on the assumption that an English-only rule is a facially neutral employment policy. This assumption, not questioned by the litigants or the courts in *Garcia* and *Gutierrez,* or by the EEOC, has superficial appeal. It can be argued that an English-only rule applies equally to all employees in that every employee must speak English.

An English-only rule, however, differs in kind from the facially neutral rules usually analyzed under the disparate impact model. Facially neutral rules are facially neutral because they operate to disqualify members of both the majority class and the protected minority class. Thus, in *Griggs,* the neutral selection devices of a high school diploma or general intelligence tests would disqualify at least some Whites as well as Blacks.[148]

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143. *See, e.g.,* EEOC Dec. No. 81-25, 27 Fair. Empl. Prac. Cas. (BNA) 1820 (1981); EEOC Dec. No. 72-0281, EEOC Dec. (CCH) ¶ 6293 (1971).

144. 401 U.S. 424 (1971). The application of the disparate impact theory, particularly the allocation of burdens of proof under the theory, has been changed significantly by the recent decision in *Wards Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989). *See infra* notes 182-95 and accompanying text.

145. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1040, *vacated as moot,* 109 S. Ct. 1736 (1989).

146. *Wards Cove,* 109 S. Ct. at 2119, 2124; *Griggs,* 401 U.S. at 431 (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

147. 109 S. Ct. 2115, 2124 (1989).

148. *Griggs,* 401 U.S. at 427-28.

In *Dothard v. Rawlinson*,[149] the facially neutral statutory height and weight requirements would disqualify at least some men as well as women.[150] Accordingly, such facially neutral devices show fairness in form, if not in results. Only when the neutral rule disqualifies a disproportionate number of members of a protected class does a disparate impact exist.

Now consider the impact of an English-only rule. No member of the majority class will ever be disqualified because of the operation of the rule. An English-only rule will never have any adverse impact on persons whose primary language is English.[151] The only persons disqualified are members of protected groups whose primary language is not English.[152] The rule's full impact falls exclusively upon members of protected groups. Accordingly, English-only rules have no claim to the fairness in form of other rules analyzed under disparate impact theory.[153] Rather than characterizing them inaccurately as "facially neutral," English-only rules should be described as having an exclusive adverse impact that constitutes the "functional equivalent" of national origin discrimination.[154]

Outside the Title VII context, courts already recognize such an adverse impact upon citizens whose primary language is not English. In *Yu Cong Eng v. Trinidad*,[155] decided in 1926, the Supreme Court declared unconstitutional a Philippine law prohibiting Chinese merchants from keeping their business account books in Chinese, the only language the merchants knew. Finding that the enforcement of the law's criminal penalties against the Chinese merchants "would seriously embarrass all of them and would drive out of business a great number,"[156] the

149. 433 U.S. 321 (1977).

150. *See id.* at 329-30.

151. Although it is possible to conceive of a few situations in which persons whose primary language is English could be affected by an English-only rule, for example, if someone studying Spanish wanted to practice Spanish with Spanish-speaking co-workers in the workplace, such situations seem few and trivial. Furthermore, in such a situation there would probably be no correlation between Spanish and such a person's national origin, so there would be no national origin discrimination implicated in limiting such a student's use of Spanish in the workplace.

152. *See* Note, *Official English*, *supra* note 81, at 1353.

153. *See* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION LAW § 73.41 (1987) ("As to English language tests, when the issue is one of national origin discrimination they probably are not entitled to be called neutral at all.").

154. *See* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 298-99 (1971); Comment, *The Business Necessity Defense to Disparate Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911, 923 (1979) (authored by Marcus B. Chandler) (citing "functional equivalence" theory of Professor Owen Fiss).

155. 271 U.S. 500 (1926).

156. *Id.* at 514-15.

Court held that the law denied to Chinese persons due process and equal protection of the laws.[157] More recently, in *Serna v. Portales Municipal Schools,*[158] the court recognized the negative effect of language and cultural restrictions on school children, heeding expert testimony[159] that "a child who goes to a school where he finds no evidence of his language and culture and ethnic group represented becomes withdrawn and nonparticipating."[160] There is little reason to assume that these negative effects are much different when English-only rules are imposed upon adults whose primary language is not English.[161] One court has recognized recently that the chilling effect upon the Spanish-language speech of Hispanics caused by a state Official-English law is a constitutionally redressable injury, violating the first amendment of the U.S. Constitution.[162]

The United States Senate, in its report on the extension of the Voting Rights Act to include language minority citizens, reviewed the adverse effects of English-only elections upon language minority groups.[163] While the issues involved in English-only elections may be somewhat different from those involved in considering an English-only rule in the workplace,[164] the resulting discouragement, frustration and inhibition of people subject to the rule are the same. Recognizing these adverse effects upon adults, the EEOC published regulations describing the effect of English-only rules:

> Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.[165]

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157. *Id.* at 524-25.

158. 351 F. Supp. 1279 (D.N.M. 1972), *aff'd,* 499 F.2d 1147 (10th Cir. 1974).

159. *Serna,* 351 F. Supp. at 1282.

160. *Serna,* 499 F.2d at 1150 (summarizing district court expert testimony).

161. *See infra* note 165 and accompanying text.

162. *See* Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990) (invalidating Arizona's English-only law as violating the first amendment of the U.S. Constitution).

163. SENATE REPORT, *supra* note 114, at 790-97.

164. *Cf. id.* at 792, 796. In *Gutierrez,* the court noted that the English-only rule greatly disturbed Hispanic employees. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1036, *vacated as moot,* 109 S. Ct. 1736 (1989).

165. 29 C.F.R. § 1606.7(a) (1989) (footnote omitted).

Although a limited English-only rule is less burdensome than a complete prohibition on the use of one's primary language, the negative effects of a more limited rule will differ only in degree, not in kind, from those of a complete prohibition.

One should not assume that these effects are different for bilingual persons. Primary language can be a crucial aspect of the ethnicity of a bilingual person.[166] The term "bilingualism" is defined as the ability "to speak two languages with nearly equal facility."[167] Because of the practical immutability of primary language, and the factors contributing to practical immutability,[168] many persons whose primary language is not English are not bilingual, although they may be thought to be so if they have any ability to communicate in English. It is more realistic to consider bilingualism as a spectrum of abilities in a second language ranging from minimal ability to communicate in a second language to equal facility in two languages. For persons with limited English proficiency, who are "bilingual" only to a limited extent, a restriction on their ability to speak their primary languages may be a serious handicap tantamount to the effect of a restriction forcing a right-handed person to write left-handed.

Those who are more fully bilingual still suffer the adverse effects of a restriction on their ability to speak their primary languages. The sociological and psychological factors that make primary language a crucial aspect of ethnicity[169] are also relevant for more fully bilingual persons. Their links to their "own people," their sense of ethnic identity, and their ability to enjoy a full range of verbal expression in relationships with bilingual coworkers depend heavily on their ability to use their primary language. For bilinguals, then, as well as for those who speak only their mother tongue, the exclusive adverse impact of English-only rules warrants a high burden on employers to justify their discriminatory rules.

IV. THE BURDEN OF PROOF FOR EXCLUSIVE ADVERSE IMPACT UNDER TITLE VII

In light of the exclusive impact of English-only rules upon protected groups, the business justification standard recently an-

166. *See supra* notes 74-80 & 89-90 and accompanying text.
167. RANDOM HOUSE COLLEGE DICTIONARY 133 (1972).
168. *See supra* notes 92-101 and accompanying text.
169. *See supra* notes 74-80 and accompanying text.

nounced in *Wards Cove Packing Co. v. Atonio*[170] is inappropriate. Under *Wards Cove*, employers only have the burden of producing evidence of a business justification that significantly serves some legitimate employment goal.[171] The exclusive adverse impact of English-only rules upon language minorities raises the issue of whether the traditional disparate impact theory, as modified by *Wards Cove Packing Co.*, is the most appropriate model for analyzing such rules.

A. English-Only Rules As Disparate Treatment on the Basis of National Origin

A restriction on the use of one's primary language such as an English-only rule should be analyzed as disparate treatment on the basis of national origin. Discrimination on the basis of primary language is equivalent to discrimination on the basis of national origin, both because of the very close correlation between primary language and national origin and the exclusive adverse impact of restrictions upon the use of primary languages other than English. The intent necessary to show disparate treatment can be inferred from the existence of such exclusive adverse effects.[172]

The statutory treatment under Title VII of pregnancy, a characteristic exclusively associated with women, supports the view that restrictions on the use of primary languages other than En-

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170. 109 S. Ct. 2115 (1989).

171. *Id.* at 2125-26.

172. *Cf.* Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (" 'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. *Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.*") (emphasis added); Washington v. Davis, 426 U.S. 229 (1976) Regarding a constitutional attack on equal protection grounds against a test used to select police recruits, the Court wrote

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. . . .

Id. at 242. Justice Stevens's concurrence is also supportive. *Id.* at 253 ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."). For further discussion of disparate treatment see M. ZIMMER, C. SULLIVAN, & R. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 86-94 (2d ed. 1988).

glish should be treated the same as discrimination because of national origin. In 1978, Congress amended Title VII by adding section 701(k), which provides, in part, that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical condition; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes."[173]

Congress enacted this amendment to overrule *General Electric Co. v. Gilbert*,[174] in which the Supreme Court concluded that a benefit plan that discriminated on the basis of pregnancy did not discriminate because of sex in violation of Title VII. The amendment adopted the views of the dissenting Justices, who recognized the exclusive adverse effect of discrimination because of pregnancy upon women and who found that such discrimination violated Title VII.[175] The House Report accompanying the amendment concluded that "the dissenting Justices correctly interpreted the Act."[176]

Accordingly, a correct interpretation of Title VII requires treating characteristics that are closely correlated with a protected characteristic the same as the explicitly protected characteristic when such characteristics are used as the basis for discrimination that results in an exclusive adverse effect upon a protected group. Just as the dissenting Justices in *Gilbert* and members of Congress recognized that discrimination because of pregnancy is the same as discrimination because of sex, so should the courts recognize that discrimination because of primary language is the same as discrimination because of national origin. A proper interpretation of Title VII requires that restrictions on the exercise of primary languages other than English be analyzed as disparate treatment because of national origin.

If restrictions upon primary languages other than English are analyzed as discrimination because of national origin, then em-

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173. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (currently codified at 42 U.S.C. § 2000e(k) (1982)).

174. 429 U.S. 125 (1976).

175. *Id.* at 147 (Brennan, J., dissenting) (adopting the EEOC's view that the plan violates Title VII "because the omission of pregnancy from the program has the intent and effect of providing that 'only women [are subjected] to a substantial risk of total loss of income because of temporary medical disability' ") (quoting Brief for EEOC at 12); *id.* at 161 (Stevens, J., dissenting) ("[T]he rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.") (footnote omitted).

176. H. REP. No. 948, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750.

ployers can only justify such restrictions under the bona fide occupational qualification (BFOQ) defense.[177] The Supreme Court has described the BFOQ defense as "an extremely narrow exception to the general prohibition of discrimination."[178] It is the employer's burden to establish the BFOQ defense by a preponderance of the evidence, proving the "reasonable necessity" of policies that discriminate on the basis of national origin.[179] Furthermore, the discrimination must be reasonably necessary to the essence of the employer's business.[180]

The courts should require employers utilizing English-only rules to prove that their rules are necessary under the strict standards of the BFOQ defense, rather than under the permissive standard of *Wards Cove*. The functional equivalence of primary language and national origin warrants imposing upon employers the burden of proving that restrictions on languages meet the standards of the BFOQ defense. English-only rules merit close examination from courts because of the ease with which employers can use such rules as a pretext to keep Hispanics, and other language minority groups, out of the work force.[181]

B. Disparate Impact Theory and Exclusive Adverse Impact

Under the disparate impact theory, as interpreted most recently in *Wards Cove*, the plaintiff bears the initial burden of demonstrating the adverse effect of a particular rule or employ-

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177. Section 703(c) of Title VII describes the defense, stating that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . national origin in those certain instances where . . . national origin is a *bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise*." 42 U.S.C. § 2000e-2(e) (1982) (emphasis added).

178. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

179. Western Air Lines v. Criswell, 472 U.S. 400, 422 (1985).

180. *Id.* at 419; Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) ("[D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.").

181. The discharge of Hector Garcia from Gloor Lumber illustrates how enforcement of such rules can keep members of language minorities out of the work force. *See* Garcia v. Gloor, 618 F.2d 264, 266 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). *See also* Fragante v. City of Honolulu, 888 F.2d 591 (9th Cir. 1989). The *Fragante* court stated:

> Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communication skills demanded by the job. We encourage a very searching look by the district courts at such a claim.

Id. at 596 (footnote omitted).

ment practice on a protected group.[182] The plaintiff must identify a specific employment practice or rule that results in a disparate impact.[183] If the plaintiff successfully demonstrates the adverse impact of a specific employment practice, then the inquiry shifts to a consideration of the business justification offered by the employer for its practice.[184] The inquiry consists of a reasoned review of the employer's asserted justification.[185] The challenged practice must serve, in a significant way, the legitimate employment goals of the employer.[186] The employer carries only the burden of producing evidence of a business justification for his employment practice.[187] The plaintiff bears the burden of persuading the court that the employer's proffered justification is invalid.[188] If the trier of fact concludes that the employer's business justification is valid, then the plaintiff may still prevail if he can demonstrate the availability of alternative employment practices that would accomplish the employer's goals with less adverse impact.[189] If the plaintiff can show that such alternatives exist, or that the employer's asserted business justification is a pretext, then the plaintiff prevails.[190]

The Court in *Wards Cove* thus revised the burden imposed upon an employer seeking to establish a business justification. Under the old standard the employer bore the burden of proving

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182. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124-25 (1989); Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, 2784 (1988); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). *See also* B. SCHLEI & P. GROSSMAN, *supra* note 57, at 1287, 1324-25.

183. *Wards Cove*, 109 S. Ct. at 2124.

184. *Id.* at 2125.

185. *Id.* at 2126.

186. *Id.* at 2125-26.

187. *Id.* at 2126. The recent decision in *Wards Cove* represents a radical departure from the previously settled distribution of burdens of proof in a disparate impact case. Prior to *Wards Cove* if a plaintiff successfully proved the disparate impact of an employer's practice, then the burden of proof shifted to the defendant to prove that its practice was justified by business necessity. *See, e.g.*, Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, 2791-97 (1988) (Blackmun, J., concurring) (stating that burden of proof passes to defendant to establish that employment practice is a business necessity); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (holding employer required to "prov[e] that the challenged requirements are job related"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (same); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (stating that Congress placed on the employer the burden of showing that the challenged requirement bears a "manifest relationship to the employment in question").

188. *Wards Cove*, 109 S. Ct. at 2126.

189. *Id.* at 2126-27; *Dothard*, 433 U.S. at 329; *Albemarle Paper*, 422 U.S. at 425. *See also* B. SCHLEI & P. GROSSMAN, *supra* note 57, at 1287.

190. *Wards Cove*, 109 S. Ct. at 2126-27; *Dothard*, 433 U.S. at 332; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 368 (4th Cir. 1980) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)); Robinson v. Lorillard Corp., 444 F.2d 791, 798-800 (4th Cir. 1971), *cert. dismissed sub nom.* Tobacco Workers Int'l Union v. Robinson, 404 U.S. 1007 (1972).

the job-relatedness of an employment practice.[191] This so-called "business necessity" standard received criticism for being varied and inconsistent.[192] The new standard created in *Wards Cove* imposes only a burden of production on the employer to present some evidence of business justification. This is apparently the slightest burden ever imposed upon employers under the disparate impact theory.[193] Although evidence of an insubstantial business justification is not sufficient to meet the employer's burden,[194] an employer no longer needs to prove that a challenged rule or practice is essential to good job performance.[195] Now it is up to the employee to disprove the alleged business justification.

The Supreme Court, in developing its standards in disparate impact cases, has evaluated standardized employment tests and criteria[196] and subjective employment criteria,[197] all of which can

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191. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see also* B. SCHLEI & P. GROSSMAN, *supra* note 57, at 1328-29.

192. Commentators and courts have remarked on the varied and inconsistent standards applied to employers attempting to establish a business necessity defense. *See* Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1312 (1987) ("[D]isarray . . . has resulted in the federal courts from uncertainty over what the defense requires the defendant to prove."); Comment, *supra* note 154, at 912 ("[L]ower courts have been afforded a considerable degree of freedom in shaping the contours of the defense."); B. SCHLEI & P. GROSSMAN, *supra* note 57, at 1328-29 & n.139; *see also* Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-76 (9th Cir. 1981) ("[C]ourts differ on just what an employer must prove to discharge its burden."). There is little reason to assume that the application of the new business justification standards established by *Wards Cove*, will be any more uniform than the application of the old business necessity standard.

193. *Wards Cove* creates essentially the same burden of proof for an employer under a disparate impact case that exists for a disparate treatment case. Under the *McDonnell Douglas Corp. v. Green* disparate treatment model, the employer must only "articulate some legitimate, nondiscriminatory reason for the employee's rejection," and the burden then shifts to the plaintiff, who must then demonstrate that the articulated reason is a pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). The burden of production imposed upon employers by *Wards Cove*, and the "reasoned review" of the employer's asserted justification, is only slightly more onerous a burden than the mere articulation of a legitimate reason for a business practice.

194. *Wards Cove*, 109 S. Ct. at 2126.

195. This is another example of how *Wards Cove* has lessened significantly the burden of proof on employers. Prior to the decision, employers were required to prove that a challenged practice or rule was essential to good job performance. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (holding that discriminatory tests must be proven to be " 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job' ") (quoting 29 C.F.R. § 1607.4(c) (1974)); Craig v. County of Los Angeles, 626 F.2d 659, 662 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

196. *See* Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2785 (1988) ("[E]ach of our subsequent decisions, however, like *Griggs* itself, involved standardized employment tests or criteria."); *see, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (policy against employing persons using narcotic drugs, including methadone); Dothard v. Rawlinson, 433 U. S. 321 (1977) (height and weight requirements); Washington v. Davis, 426 U.S. 229 (1976) (written test of verbal skills); Albemarle Paper Co. v. Moody, 422 U.S.

be characterized as facially neutral in the sense described earlier.[198] The disparate impact theory, however, should not apply to English-only rules because such rules are not facially neutral and because they have an exclusive adverse impact.[199] The courts, nevertheless, will probably continue to apply this familiar theory to such rules. Even under the disparate impact theory, though, courts should recognize the exclusive impact and hold employers to a higher standard of business necessity.[200] Rules that are not facially neutral warrant a different analysis under the disparate impact theory, with a correspondingly higher burden of justification required from employers seeking to use them. The exclusive adverse impact of English-only rules on language minority groups justifies at least a return to the former burdens of proof under the business necessity defense, which required an employer to prove the business necessity for a challenged practice.[201] This exclusive adverse impact also justifies a more substantial burden upon employers, such as requiring employers using English-only rules to prove that such rules are the least discriminatory alternative that will accomplish their legitimate goals.[202]

English-only rules warrant very close examination by the courts because of the ease with which employers can discriminate against language minority groups through the use of such rules.[203] Such a close examination is appropriate especially in light of past discrimination against language minorities.[204] Employers also can use these rules to subject such groups to discipline and consequently reduced job opportunities. Furthermore,

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198. *See supra* notes 146-50 and accompanying text.

199. *See supra* notes 151-54 and accompanying text.

200. In contrast to a practice with an exclusive impact, the disparate impact theory that originated in *Griggs* was meant to analyze employer practices that were "fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

201. *Wards Cove*, 109 S. Ct. at 2130 (Stevens, J., dissenting).

202. *See* Rutherglen, *supra* note 192, at 1326 (employment practices with larger adverse impact should be harder to justify than practices with little impact). *See also* Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed sub nom.* Tobacco Workers Int'l Union v. Robinson, 404 U.S. 1007 (1972) ("[T]here must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.") (footnote omitted).

203. *See supra* note 181 and accompanying text.

204. *See supra* note 111 and accompanying text.

such rules may discourage otherwise qualified applicants from applying for positions with employers utilizing such rules. The danger of applying a permissive standard of review, such as that articulated in *Wards Cove,* to English-only rules is that "such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices."[205]

V. ENGLISH-ONLY RULES UNDER THE DISPARATE IMPACT THEORY: THE CURRENT STANDARD APPLIED

Courts may continue to analyze English-only rules under the disparate impact theory, as modified by *Wards Cove.* Even under the current disparate impact theory, however, analysis of justifications offered by employers for English-only rules demonstrates that the rules often will not pass muster. The following section analyzes common justifications offered by employers for English-only rules.

Even if primary language is recognized as a characteristic of national origin protected under Title VII, the right to speak one's primary language is not absolute. Rather, it is a right bounded by the actual requirements of the job and the business at issue. In certain situations, it is clearly inappropriate for someone to speak a language other than English in the workplace.[206] If a bilingual, Spanish-speaking salesperson insisted on speaking in Spanish to a prospective customer who spoke only English, leading to a lost transaction, the employer could properly discipline this salesperson for failing to do his job. Similarly, a bilingual stage actor cast in the role of Hamlet would not have a right to deliver the soliloquy in Spanish, unless the production called for such a delivery. The actor's and the salesman's use of primary language would constitute poor performance, and the employer could properly discipline or discharge a poorly performing employee. In such a situation, it is not the language that needs regulation, but rather the job performance.[207]

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205. *Wards Cove,* 109 S. Ct. at 2126. It is ironic that these words were written by the Court in *Wards Cove,* which has made it easier for employers to justify seemingly neutral employment practices.

206. *See, e.g.,* Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411-12 (9th Cir. 1987) (finding no violation of Title VII in the discharge of a bilingual radio announcer who refused to comply with the station program director's instructions to broadcast only in English).

207. Accordingly, if one Hispanic, bilingual salesperson insisted on speaking Spanish to English-speaking customers, the appropriate regulation would be exactly the same

Business justification, however, means more than mere business convenience or preference.[208] The challenged practice must serve "in a significant way" the legitimate employment goals of the employer.[209] Accordingly, the challenged practice or rule must carry out the business purpose asserted by the employer effectively and objectively.[210] If a plaintiff can show that less discriminatory alternatives exist that would accomplish the employer's purpose equally well or more effectively with less adverse impact, this proof undermines the justification for the employer's practice.[211] These principles limit, therefore, the potentially acceptable purposes for which employers can enact English-only rules as well as the scope of these rules.

The cases decided by the courts and the EEOC reveal a variety of justifications offered by employers to defend their use of English-only rules. Employers have claimed that such rules reduce the racial tension and fear experienced by customers or fellow employees who do not understand conversations in languages other than English.[212] One employer argued that these

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kind of discipline that would be meted out to any other employee who performed poorly in a similar manner, say by ignoring customer requests or by being rude. Such poor performance by a bilingual employee would not be grounds for an English-only rule, prohibiting conversations between employees who would understand each other, but would be grounds for whatever discipline is ordinarily imposed for poor performance.

208. *See, e.g., Wards Cove*, 109 S. Ct. at 2126 (stating that a "mere insubstantial justification . . . will not suffice"); Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979) ("Administrative convenience is not a sufficient justification for the employer's practices."); United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971) (stating that "management convenience and business necessity are not synonomous"); *see also* B. SCHLEI & P. GROSSMAN, *supra* note 57, at 359.

209. *Wards Cove*, 109 S. Ct. at 2125-26.

210. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed sub nom.* Tobacco Workers Int'l Union v. Robinson, 404 U.S. 1007 (1972); Rutherglen, *supra* note 192, at 1321 (defense of business justification deals with objective reasons for an employment practice); *cf.* Comment, *supra* note 154, at 934 ("[S]tandard of job-relatedness is an objective one. . . . [O]nly if the practice *in fact* serves business purposes can it be deemed 'necessary.' ").

211. *Wards Cove*, 109 S. Ct. at 2126-27. *See* Rutherglen, *supra* note 192, at 1327-28 ("[I]f the defendant has not considered an alternative . . . procedure with obviously greater validity, then it has undermined the procedure that it did choose."); *cf.* Williams v. Colorado Springs, Colo., School Dist. #11, 641 F.2d 835, 841 (10th Cir. 1981); EEOC Dec. No. 71-1418, 3 Fair Empl. Prac. Cas. (BNA) 580, 582 (1971).

212. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1042-43, *vacated as moot*, 109 S. Ct. 1736 (1989); Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); Hernandez v. Erlenbusch, 368 F. Supp. 752, 754 (D. Or. 1973) (language restriction in tavern allegedly necessary to stem fear on the part of White clientele that Chicanos were talking about Whites); EEOC Dec. No. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1821 (1981) (fellow workers and customers annoyed at Spanish conversations between co-workers); EEOC Dec. No. 72-0281, EEOC Dec. (CCH) ¶ 6293 (1971) (Anglo barbers irritated at Spanish conversations of Hispanic barber).

rules reduce disruptions in the workplace.[213] Employers also have claimed that the rules support the use of English in this predominantly English-speaking society.[214] The argument that English-only rules facilitate supervision by those who do not understand languages other than English has been raised as well.[215] Finally, in one reported case, an employer justified such a rule as necessary for safety and efficiency in potentially dangerous areas of the employer's premises and during emergencies.[216] Each of these asserted justifications will be analyzed under the business justification standard to determine whether it can support an English-only rule in the workplace.

For this analysis, a distinction should be made between jobs in which a different language is required and jobs in which there is no such requirement.[217] It will be more difficult for an employer to advance a cogent business justification for a language restriction in a job that requires the use of a different language than in a job with no such requirement. When speaking Spanish is a requirement of the job, such as the sales position in *Garcia* or the municipal court clerk job in *Gutierrez,* the Spanish language is already an established part of the work environment. If fluency in Spanish is required in a job, this must be in order to provide a required or desired service in Spanish. A rational employer, by hiring someone to perform part or all of his job in a different language, has acted to reduce disruptions and confusion and to maximize efficiency. At Gloor Lumber, for example, the employer hired bilingual sales clerks to enhance its appeal to Hispanic customers and maximize revenues.[218] In the municipal

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213. *Gutierrez,* 838 F.2d at 1042 (stating that the employer contended "the rule [was] necessary to prevent the workplace from turning into a 'Tower of Babel' ").

214. *Id.* at 1042; *Garcia,* 618 F.2d at 267.

215. *Gutierrez,* 838 F.2d at 1043; *Garcia,* 618 F.2d at 267; EEOC Dec. No. 71-446, 2 Fair Empl. Prac. Cas. (BNA) 1127, 1128 (1970) (employer apparently attempted to justify rule based on inability of supervisors to understand Spanish).

216. EEOC Dec. No. 83-7, 2 Empl. Prac. Guide (CCH) ¶ 6836 (1983) (the employer claimed that the English-only rule was necessary to assure effective communication among its employees during emergencies, and that the rule helped to prevent or control fires, explosions and other casualties in a refinery while employees were working with potentially dangerous equipment and materials); *see also* Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919, 921 (S.D. Tex. 1979) (employer sought to justify English-only rule during drilling of an oil well).

217. Under appropriate circumstances, it can be lawful to require bilingual ability. *See* Smith v. Dist. of Columbia, 29 Fair Empl. Prac. Cas. (BNA) 1129, 1133 (D.D.C. 1982) (upholding the employer's requirement of bilingual ability in Spanish and English in an action brought under the fifth amendment, Title VII and 42 U.S.C. § 1983).

218. Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981). The court wrote: "Of the eight salesmen employed by Gloor in 1975, seven were Hispanic, a matter perhaps of business necessity, because 75% of the population in its busi-

court, the situation must have been far more chaotic when clerks who did not speak Spanish attempted to conduct court business with persons who did not speak English. In cases such as these, business necessity requires the use of different languages in the workplace. Accordingly, it is illogical for these employers to argue that there is also a business justification for restricting the use of the different language.[219]

For jobs in which a different language is required, some of the potential justifications for a language restriction are illogical and could not, therefore, constitute a business justification. Because a different language is already an established part of the workplace, a language restriction probably cannot effectively reduce disruptions in the workplace. In such a case, whatever additional Spanish or other language results from conversations between employees is unlikely to be significantly more disruptive than the standard work environment.[220] Furthermore, the asserted justification of "supporting the use of English" makes no sense in a job that requires a different language for its proper performance.[221] Nor can supervision of job performance partially or wholly conducted in a different language be enhanced by requiring personal conversations between employees to be in English.[222] Although the requirement of a different language in a job may undermine certain asserted business justifications, the question of the validity of language restrictions in other jobs, and for other reasons, remains.[223]

A. Reducing Racial Tension and Fear

Employers claim that English-only rules promote racial harmony and reduce racial tension and fear.[224] In *Garcia,* for example, the employer stated that customers who understood no

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ness area is of Hispanic background and many of Gloor's customers wish to be waited on by a salesman who speaks Spanish." *Id.* at 267.

219. *See Gutierrez,* 838 F.2d at 1043. This analysis only works, of course, where the language necessary for the job is the same as the restricted language.

220. *Id.* at 1042.

221. *Id.*

222. *Id.* at 1043.

223. Interestingly, the two principal cases discussing the legality of English-only rules involved jobs in which the ability to speak Spanish was a requirement of the job.

224. *See supra* note 212 and cases cited therein. Although the *Gutierrez* court described it as racial tension and fear, the tension and fear resulting from the use of a language other than English is more properly described as cultural, linguistic, or ethnic tension.

Spanish became irritated when employees spoke Spanish to each other.[225] In *Gutierrez*, the municipal court asserted that its rule reduced racial tension and fear among employees.[226] The municipal court listed a number of very common fears in attempting to justify its rule. The employer was concerned that Spanish might be used to make discriminatory, insubordinate, or belittling comments about fellow employees.[227] The employer also was concerned that Spanish could be used to conceal the substance of conversations.[228] A restriction on the ability of Spanish speakers to speak their primary language was necessary, therefore, to assuage these fears of employees who spoke no Spanish.[229]

Such fears, however, are exactly the kind of stereotyped judgments that Title VII was designed to eliminate from the workplace,[230] and are no different from the many racial or sexual stereotypes that cannot be used as the basis for discriminatory treatment of members of a protected group under Title VII. It is well-established law under Title VII that customer preference does not provide the business justification that will support a discriminatory rule.[231] If customer preference provides no justification, then neither do the discriminatory preferences of fellow employees. As the Supreme Court stated, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[232] Accordingly, the reduction of employees' or customers' racial tensions and fears cannot justify an English-only rule under the business justification standard.[233]

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225. Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

226. *Gutierrez*, 838 F.2d at 1042-43.

227. *Id.* at 1042.

228. *Id.*

229. *Id.*

230. *See infra* note 243 and accompanying text. Courts recognize the problem of lingering stereotypes. *See, e.g.*, Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, 2786, (1988) (O'Connor, J.) (plurality opinion) (mentioning "the problem of subconscious stereotypes"); Guardians Ass'n of New York City Police Dept., Inc. v. Civil Serv. Comm'n of New York, 431 F. Supp. 526, 551 (S.D.N.Y. 1977) ("As has been seen in the areas of race and sex discrimination, long-accepted stereotypes too often help perpetuate discriminatory practices even though they have no basis in fact.").

231. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); *see also* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (holding stereotyped customer preferences did not justify sexually discriminatory conduct); Witt v. Secretary of Labor, 397 F. Supp. 673, 678 (D. Me. 1975) (holding customer preference for a male hairdresser was not a bona fide occupational qualification).

232. Palmore v. Sidoti, 466 U.S. 429, 433 (1984); *see also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985).

233. Indeed, this must be the right result because, otherwise, the "reduction of racial tension" rationale could be used to justify egregious racial or sexual discrimination. There are still many places in the United States where racial or sexual tension would be

Moreover, someone who does not understand Spanish has little basis for reaching negative judgments about the content of conversations in Spanish. The employer, fellow employees, or customers who speak no Spanish simply assume, in the absence of understanding, that Spanish-language conversations are ill-intentioned, discriminatory, insubordinate, belittling, or secretive.

There was little or no evidence in the *Gutierrez* case to prove that these fears and concerns were justified.[234] Indeed, the evidence in the case showed that racial tension increased as a result of the English-only rule.[235] The EEOC itself has reached this conclusion. In its regulations discussing national origin discrimination, the EEOC states that restrictions on languages other than English may increase racial tension.[236] Evidence of such racial tension would greatly assist plaintiffs who, under *Wards Cove,* must now disprove an employer's assertion that English-only rules decrease racial tension.[237] Plaintiffs may even be able to prove that racial tension increases as the result of English-only rules. Such racial tension, induced by restricting the ability to speak one's primary language, is apparent in several of the cases that have discussed the issue.[238] If a plaintiff can prove that an English-only rule increases racial tension, it will obviously be difficult for an employer to claim that the reduction of racial tension justifies the rule.[239]

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reduced for White persons or for males if Blacks, Hispanics or women were denied employment opportunities or the ability to use public accomodations. Yet the fact that such tension may exist cannot provide a justification for discrimination against these protected groups without violating Title VII. *See* Hernandez v. Erlenbusch, 368 F. Supp. 752, 755 (D. Or. 1973) ("Catering to prejudice out of fear of provoking greater prejudice only perpetuates racism.").

234. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1042-43, *vacated as moot,* 109 S. Ct. 1736 (1989).

235. *Id.* at 1042.

236. 29 C.F.R. § 1606.7(a) (1989) (prohibiting employees from speaking their primary language at all times may create an "atmosphere of inferiority, isolation and intimidation based on national origin").

237. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989). *See supra* notes 186-88 and accompanying text.

238. *See Gutierrez,* 838 F.2d at 1042; Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919, 921-22 (S.D. Tex. 1979) (racial tension and fight resulting from employer's discharge of employee for speaking Spanish on the job); Hernandez v. Erlenbusch, 368 F. Supp. 752, 754 (D. Or. 1973) (rule prohibiting foreign languages in a tavern led to racial tension and assault upon Hispanic customers by regular customers of the tavern).

239. The net effect of such an English-only rule, rather than to reduce racial or cultural tension, may be merely to transfer such tension from persons objecting to different language conversations to those persons engaging in such conversations.

B. Reducing Disruptions in the Workplace

Employers claim that a limited English-only rule reduces disruptions in the workplace and prevents the workplace from becoming a "Tower of Babel."[240] Suppose that an employer finds that conversations in languages other than English are "disruptive," and seeks to eliminate such conversations with a limited English-only rule. This employer permits employees to enjoy private conversations in English in the workplace and seeks to limit only conversations in Spanish. There is no permissible reason why two employees' private conversation in Spanish would be any more disruptive than the same conversation would be in English. If the employer or fellow employees feel annoyed or threatened by conversations in a different language, or if they feel suspicious about what is being said, these feelings are probably based on negative feelings about persons speaking in languages other than English or on negative assumptions about the content of such conversations. As discussed above, such private fears or biases cannot constitute the business justification for a rule that discriminates against a protected group.[241] An employer who allows private conversations between employees in English should have great difficulty justifying a rule attempting to restrict the same conversations in Spanish to minimize disruptions. The only way to minimize such disruptions, consistent with Title VII, entails prohibiting all private conversations between employees, whether in Spanish, English, or any other language.[242] Although somewhat draconian, at least such a solution is even-handed, creating no greater burden on the protected class than on the majority class. Even-handed treatment is, of course, the very goal of Title VII.[243]

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240. *Gutierrez*, 838 F.2d at 1042.

241. *See supra* notes 231-33 and accompanying text.

242. Such a prohibition, applied to persons whose primary language is English, is only slightly more burdensome than an English-only rule is for someone with very limited abilities in English.

243. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 26 (1963), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND IX OF CIVIL RIGHTS ACT OF 1964 at 2001, 2026, 2150.

C. *Supporting the Use of English in the Nation*

Employers seek to justify English-only rules on the basis that these rules support the use of English in the nation.[244] The argument may take several forms. An employer, like the municipal court in *Gutierrez,* may argue that an English-only rule is required by state statutes making English the "official" language of a state.[245] A related justification, offered by the employer in *Garcia,* is that an English-only rule improves the English fluency of persons whose primary language is not English.[246]

One can wonder whether an employer's voluntary desire to support perceived national or state policies can constitute a business justification at all, as such a desire may have nothing to do with an employer's business.[247] The fact that a state constitutional provision or statute makes English the "official" language of the state does not automatically provide a business justification for an employer's English-only rule; any such statute, in order to be a valid justification for an employer's English-only rule, must itself be supported by a business justification.[248]

An employer's desire to improve the English fluency of employees by restricting the use of languages other than English may provide a more relevant employer purpose. The Supreme Court, however, has rejected this justification when offered for an English literacy requirement as a qualification for the right to vote.[249] This should make the justification less plausible in the workplace. Furthermore, an English-only rule enacted for this purpose probably cannot survive examination under the business justification standard for at least two reasons. First, a plaintiff can demonstrate that there are less discriminatory alternatives that would more effectively improve an employee's fluency

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244. *See supra* note 214 and accompanying text. Such English-only statutes may themselves be unconstitutional. *See* Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990) (invalidating Arizona's English-only provision as violating the first amendment of the U.S. Constitution).

245. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1042, 1043-44, *vacated as moot,* 109 S. Ct. 1736 (1989).

246. Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981).

247. *Cf.* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371 (4th Cir. 1980) (plurality opinion), *cert. denied,* 450 U.S. 965 (1981) ("If this personal compassion [for pregnant stewardesses] can be attributed to corporate policy it is commendable, but in the area of civil rights, personal . . . decisions not affecting business operations are best left to individuals who are the targets of discrimination.").

248. *Cf.* Dothard v. Rawlinson, 433 U.S. 321, 331-32 & n.14 (1977) (holding that statute itself did not establish a business justification in a sexual discrimination context).

249. Katzenbach v. Morgan, 384 U.S. 641, 654 (1966).

in English. An employer could offer English classes to employees, or offer to reimburse employees for courses they take to improve their English. Both of these alternatives would more effectively accomplish the employer's stated purpose with less adverse impact.[250] Second, a restriction on languages other than English does little to improve an employee's abilities in English. It forces employees to rely exclusively on their English, such as it is, but, absent some instruction or assistance, does little to improve that English. It is questionable, therefore, whether an English-only rule facilitates fluency in English.

D. More Effective Supervision

Another justification offered for English-only rules is that they enable more effective supervision. Like the business justification itself, effective supervision is more important in the essential aspects of a job than in the tangential aspects. In order for more effective supervision to constitute a business justification, the English-only rule must enhance significantly a supervisor's ability to monitor the performance of a job.[251]

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250. Under *Wards Cove*, the cost of such alternatives to the employer would be relevant in determining whether they are as effective as the challenged rule or practice, but additional cost to the employer would not necessarily defeat them as viable, less-discriminatory alternatives. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2127 (1989). Courts will have to determine what costs for less discriminatory alternatives can be imposed upon employers under the business justification standard. Under the former business necessity defense, cost considerations gained greater judicial acceptance as a legitimate defense to liability under the disparate impact theory, posing a danger to the effectiveness of Title VII and the accomplishment of its goals. *See* Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 344-58 (1987):

> The allowance of such cost justification in fair employment law is ill-advised. If Title VII is to operate effectively in the American workplace to extend opportunities to groups traditionally excluded, justification for discriminatory practices must be narrowly confined to situations where job performance, productivity, or the very financial existence of the enterprise is at stake.

Id. at 358 (footnote omitted). The explicit mention in *Wards Cove* of cost considerations as relevant in evaluating the "equal effectiveness" of less discriminatory alternatives offered by plaintiffs sanctions and furthers the cost defense to liability under the disparate impact theory. *See Wards Cove*, 109 S. Ct. at 2127; Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, 2790 (1988) (O'Connor, J.) (plurality opinion) ("Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.").

251. *Wards Cove*, 109 S. Ct. at 2125-26 (stating that a challenged practice must serve significantly and substantially the legitimate employment goals of the employer)l; *see also* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) ("[T]he challenged practice must effectively carry out the business purpose it is alleged to serve.") (footnote omitted); *cf.* United States v. Bethlehem Steel Co., 446 F.2d 652, 662 (2d Cir. 1971)

An English-only rule can enhance supervision in only one way: it allows supervisors without skill in a different language to know the content of employees' conversations. Access to the content of such conversations alone, however, cannot constitute a business justification without a showing that supervision is significantly enhanced by such access. The employer must also show that access to the content of such conversations is somehow job-related. Accordingly, if an English-only rule limits the use of other languages at certain times or in certain areas of the workplace, a business justification exists only if access to the content of conversations at those times and in those areas relates to the job and significantly enhances supervision.

The extent to which knowledge of conversations relates to the job varies depending on the type of job. For example, in a production job such as manufacturing widgets, the essential part of the job is producing widgets. The important ingredients of job performance will be the quantity and quality of widgets produced, efficiency and safety in producing them, reliability, diligence, and other typical factors. Assume that this widget manufacturer institutes a rule prohibiting conversations between employees in languages other than English while they work. The employer asserts that the rule enhances the supervision of employees. This justification should fail because there is no business reason for a supervisor to have access to the content of employee conversations that do not relate to important tasks of the job.[252] As long as job performance is good, measured by the quantity, quality, efficiency, and safety of widget production, the content of employee conversations should make little or no difference to the employer.

If employee conversations interfere with job performance, the interference results from the fact that such conversations occur, not from the fact that they occur in a language other than English. Accordingly, if the employer permits conversations between employees in English, then he can assert no business jus-

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(stating that to constitute a business necessity, the criteria needs to be "an irresistible demand" of the job); B. SCHLEI & P. GROSSMAN, *supra* note 57, at 359 (noting that criteria must be reasonably necessary for job performance).

252. *Wards Cove*, 109 S. Ct. at 2125-26. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) ("If an employment practice [that has a disparate impact] cannot be shown to be related to job performance, the practice is prohibited. . . .[A]ny given requirement must have a manifest relationship to the employment in question."). The requirement that an employment practice with disparate impact must be job related still appears to be part of the disparate impact standard. *Wards Cove*, 109 S. Ct. at 2126 (holding evidence of an insubstantial business justification will not be sufficient to meet an employer's burden).

tification based on more effective supervision for restricting similar conversations in languages other than English.

The same outcome holds true in sales jobs. The salesperson sells merchandise and provides good service to customers. The content of an employee's conversations with fellow employees is typically not an important part of the job. If an employee's conversations with his fellow employees interfere with service to customers and job performance, it is because such conversations occur, not because of the language in which they occur or their content. Accordingly, if an employer allows employee conversations in English, more effective supervision will often not furnish a business justification for an English-only rule. If customers are annoyed at conversations in languages other than English, that annoyance is based on private biases and furnishes no justification for an English-only rule.[253]

A recently decided case in the Ninth Circuit, *Jurado v. Eleven-Fifty Corp.*,[254] illustrates how these principles might apply to a job in which the content of the non-English speech is at the core of a job. The plaintiff, Valentine Jurado, was a bilingual disc jockey. For several years he had conducted his radio show in English. Attempting to increase the radio station's Hispanic audience, the program director asked Jurado to use some Spanish words and phrases during his broadcasts. Jurado complied, but his use of Spanish did not increase his Hispanic audience. A consultant hired by the station concluded that the bilingual broadcasts actually hurt the station's ratings by confusing listeners about the station's programming. Accordingly, the program director told Jurado to stop using Spanish during his show. Jurado refused and was fired.[255]

Both the district court[256] and the court of appeals[257] found that Jurado's discharge did not violate Title VII. Although both courts relied on the rationale of *Garcia v. Gloor*,[258] the *Gutierrez* decision discusses *Jurado* and offers a rationale more consistent with the business justification standard.[259] As the *Gutierrez*

253. *See supra* notes at 231-33 and accompanying text.

254. 630 F. Supp. 569 (C.D. Cal. 1985), *aff'd*, 813 F.2d 1406 (9th Cir. 1987).

255. *Jurado*, 630 F. Supp. at 570-71.

256. *Id.* at 578-80.

257. Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411-12 (9th Cir. 1987).

258. *Jurado*, 630 F. Supp. at 580; 813 F.2d at 1411-12 (citing Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). Both courts reasoned that because Jurado was bilingual, he could readily comply with the employer's English-only rules and therefore there was no disparate impact and no violation of Title VII.

259. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1041, *vacated as moot*, 109 S. Ct. 1736 (1989).

court recognized, the content of radio broadcasts is the product produced by a radio station.[260] Because Jurado's use of Spanish had negative effects, the station's business - its ability to broadcast as it chose and to sustain the audience for its broadcasts - was undermined by Jurado's refusal to comply with the program director's instructions.[261]

Although the employer in *Jurado* did not attempt to justify the language restriction as necessary for more effective supervision, the case illustrates how a language restriction may be permissible. Where content is at the core of the job, an employer may be able to sustain the business justification for restrictions on the use of languages other than English.[262]

Courts must evaluate the job-relatedness of language restrictions based on the need for more effective supervision. When evaluating the "more effective supervision" business justification, it may be useful for a court to consider a spectrum ranging from jobs in which the content of employee conversations has no job relation, such as widget production, to jobs in which the content of conversations is at the core of the job and highly job-related, like the disc jockey in *Jurado*. In the former kind of job, it will be difficult for an employer to show the business justification for an English-only rule based on more effective supervision. In the latter kind of job, where content is at the core, an employer may be able to justify a language restriction.

Even when an employer can offer evidence of a business justification based on the need for more effective supervision, a plaintiff may be able to prove the existence of a more effective and less discriminatory alternative. "[T]he best way to ensure that supervisors are apprised of how well . . . bilingual employees are performing . . . their assigned tasks would be to employ Spanish-speaking supervisors."[263] A plaintiff able to offer such proof still may be able to establish that an English-only rule violates Title VII.[264]

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260. *Id.*

261. *Id.*

262. *See* Fragante v. City of Honolulu, 49 Fair Empl. Prac. Cas. (BNA) 437, 439 (9th Cir. 1989) ("Employers may lawfully base an employment decision upon an individual's accent when—but only when—it interferes materially with job performance. There is nothing improper about an employer making such an honest assessment of a candidate for a job when oral communication skills" are necessary) (citations omitted) (text omitted from amended decision reported at 888 F.2d 591). *See also infra* note 276 and accompanying text.

263. *Gutierrez*, 838 F.2d at 1041.

264. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126-27 (1989).

E. Safety and Efficiency

Although no courts have decided the issue, an employer in a proceeding before the EEOC used safety and efficiency as the basis for justifying a limited English-only rule.[265] Safety and efficiency are well-recognized grounds for establishing a business justification under Title VII,[266] and employers are likely to assert them in support of English-only rules in the future. The requirements of the "safety and efficiency" justification arose in cases prior to *Wards Cove* in the context of the business necessity defense, which required employers to prove the business necessity for a challenged practice. Plaintiffs, now carrying the burden of persuasion on the business justification for an employer's challenged practice, will have to disprove the validity of the employer's offered justification.[267]

The safety and efficiency justification was asserted to support mandatory leave and minimum height requirements in the airline industry,[268] and to justify minimum height or strength requirements for police officers.[269] The analysis in such cases is particularly useful because it illustrates the kind of evidence required by courts analyzing the safety and efficiency justification when a job's duties include managing emergencies. By analogy, the same kind of evidence will be required from plaintiffs seek-

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265. EEOC Dec. No. 83-7, 2 Empl. Prac. Guide (CCH) ¶ 6836 (1983). The employer claimed that effective communication among its employees was necessary during emergencies and while employees were working with potentially dangerous equipment and materials in order to prevent or control fires, explosions and other casualties; the employer alleged that its English-only rule was narrowly drawn to fit these circumstances. *Id.* The EEOC, however, apparently accepted the employer's claimed necessity for the rule with no showing of proof of the justification for the rule. *Id.*

266. Dothard v. Rawlinson, 433 U. S. 321, 331-32 & n.14 (1977); *see also* Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 108 (1974).

267. *Wards Cove*, 109 S. Ct. at 2126-27.

268. *See, e.g.*, Levin v. Delta Air Lines, Inc., 730 F.2d 994, 997 (5th Cir. 1984); Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 676-77 (9th Cir. 1980); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 365, 371 (4th Cir. 1980) (plurality opinion), *cert. denied*, 450 U.S. 965 (1981); Boyd v. Ozark Airlines, Inc., 419 F. Supp. 1061, 1062 (E.D. Mo. 1976).

269. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977); Craig v. County of Los Angeles, 626 F.2d 659, 666-68 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); Blake v. City of Los Angeles, 595 F.2d 1367, 1374, 1379-81 (9th Cir. 1979); Davis v. County of Los Angeles, 566 F.2d 1334, 1341-42 (9th Cir. 1977); United States v. New York, 21 Fair Empl. Prac. Cas. (BNA) 1286, 1293, 1296 (N.D.N.Y. 1979) (findings of fact not included in decision as reported at 475 F. Supp. 1103); League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873, 882 (C.D. Cal. 1976); Officers for Justice v. Civil Serv. Comm'n of San Francisco, 395 F. Supp. 378, 380 (N.D. Cal. 1975).

ing to disprove the justification for an English-only rule involving hazards or emergencies.

As with the other supposed justifications, the employer carries the burden of production.[270] Merely asserting the rationale should not suffice. As one court stated, "the incantation of a safety rationale is not an abracadabra to which [a] [c]ourt must defer judgment."[271] An employer's subjective belief that a practice is necessary, without any supporting evidence, is insufficient to justify a discriminatory practice.[272]

Assuming an employer can meet its burden, the plaintiff will have to prove that conversations in a primary language different from English do not interfere with the specific job-related tasks he must perform routinely in particularly hazardous areas of the workplace and during emergencies.[273] Courts may also require expert testimony establishing that the use of different languages does not interfere with safety or efficiency.[274]

In evaluating the effectiveness of an English-only rule, the court should consider the purpose of the rule and what the rule actually accomplishes. In a job involving hazards or possible emergencies, the purpose of a limited English-only rule must be to improve communication between employees and to reduce confusion. The English-only rule ensures that all communications will be in English, thus improving the ability of those whose primary language is English to understand all conversations between employees when the rule is in force. By improving communication, so the argument goes, the rule increases safety on the job and improves the employees' ability to respond to an emergency.

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270. *Wards Cove*, 109 S. Ct. at 2125-26.

271. Maclennan v. American Airlines, Inc., 440 F. Supp. 466, 472 (E.D. Va. 1977).

272. *See* Craig v. County of Los Angeles, 626 F.2d 659, 667 n.8 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 941-43 (10th Cir. 1979).

273. In cases challenging mandatory leave requirements for pregnant flight attendants, courts, applying the business necessity standard, have required employers to provide proof of the specific duties of flight attendants, both normally and during emergencies, and of the specific experiences of pregnant attendants in their jobs. *See* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 365-66 (4th Cir. 1980) (plurality opinion). Employers also have been required, under the former standard of business necessity, to present considerable expert testimony on the effect of pregnancy on job performance. *Id. See also* Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 675 (4th Cir. 1980); Levin v. Delta Air Lines, Inc., 730 F.2d 994, 997 (5th Cir. 1984). Now that the burden of proof on the employer's justification has been shifted to plaintiffs under *Wards Cove*, 109 S. Ct. at 2125-26, plaintiffs presumably will have to offer similar kinds of proof of the invalidity of an employer's asserted justification.

274. *Cf. supra* note 273 and cases cited therein (noting that expert testimony was required in cases based on sexual discrimination).

Upon careful analysis, however, one can question whether an English-only rule effectively carries out its purpose. Although an English-only rule clearly would improve the ability of persons whose primary language is English to understand all conversations in the workplace, such a rule may decrease the effectiveness of communications, and therefore interfere with safety and efficiency for persons whose primary language is Spanish or some other language. The reviewing court, therefore, should consider the composition of an employer's work force to determine whether English-only communication enhances or interferes with safety and efficiency. Furthermore, an English-only rule based on safety and efficiency often may be unnecessary. A rational employer hires and retains employees who are capable of understanding the safety requirements of a job and of performing their jobs satisfactorily. Where ability to speak and understand English is necessary, an employer may properly require such an ability as a prerequisite for employment.[275] In a potentially hazardous job in which lives and equipment may be at risk, it would make no sense for an employer to place his trust in an employee who could not perform the job. Even if his primary language is not English, an employee working in such a job must have been found by the employer to both understand and communicate well enough in English to meet the requirements of the job in the first place. Additionally, a rational employer will train his employees, probably in English, to handle situations that could arise on the job. In a crisis situation, it would be completely irrational for a trained and capable Spanish-speaking employee to defy his experience, training, and common sense by attempting to communicate in Spanish to people who will not

275. *See e.g.*, Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 660 F.2d 1217, 1222 (7th Cir. 1981) (holding that ability to speak and read some English is a requirement for virtually every job in a highly sophisticated hospital); Duong Nhat Tran v. City of Houston, 35 Fair Empl. Prac. Cas. (BNA) 471, 472 (S.D. Tex. 1983) (holding that mastery of English could be required in job involving explanation of requirements of city law to building owners); Mejia v. New York Sheraton Hotel, 459 F. Supp. 375, 377-78 (S.D.N.Y. 1978), *modified*, 476 F. Supp. 1068 (S.D.N.Y. 1979) (holding that adequate mastery of English could be required for hotel front office position, which involved contact with guests); Chung v. Morehouse College, 11 Fair Empl. Prac. Cas. (BNA) 1084, 1088-89 (N.D. Ga. 1975) (holding that mastery of English could be required for college faculty position); *cf.* Vasquez v. McAllen Bay & Supply Co., 660 F.2d 686, 688 (5th Cir. 1981) (finding no violation of 42 U.S.C. § 1981 in employer's requirement that truck drivers speak English because the employer lacked discriminatory intent); Frontera v. Sindell, 522 F.2d 1215, 1220 (6th Cir. 1975) (holding that requirement of successful performance on English-language civil service exam for a carpenter position is not a violation of 42 U.S.C. §§ 1981, 1983, 1985 or fourteenth amendment).

understand him.[276] Rationality, therefore, and the need to perform a job or to handle a crisis, may accomplish the same objectives as a limited English-only rule.

To the extent that an English-only rule in a dangerous employment situation is based on an employer's fear that an irrational response to a crisis by a bilingual person will increase the risk of catastrophe, it appears that, under *Wards Cove,* a plaintiff would have to prove that such a fear is unjustified. This could be very difficult.[277] Once an employer has a bilingual work force, the risk that bilingual employees might speak their primary language is always there. The inquiry, therefore, should be whether routine observance of an English-only rule diminishes that risk.

A plaintiff, however, can probably show the existence of less discriminatory measures that accomplish the employer's safety and efficiency purposes. In a hazardous business, an employer concerned about possible confusion due to language differences among his employees should post emergency instructions and offer training in the languages best understood by his employees. Such measures are both less restrictive and probably more effective than an English-only rule for persons whose primary language is not English.[278]

Like the existence of less discriminatory alternatives, the presence of counterexamples provides persuasive evidence of pretext or lack of job relation. A counterexample is a case in which an employer, without any decrease in safety or efficiency, fails to adhere to an allegedly necessary discriminatory practice.[279] In one case an employer attempted to justify a minimum height

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276. Persons successfully holding jobs requiring ability in English are likely to be at the more fully bilingual end of the bilingual spectrum. *See supra* notes 93-94. Such persons, who are more fully able to express themselves in a second language, are probably less apt to slip inadvertently into speaking their primary languages than persons whose limited abilities in English place them at the less bilingual end of the spectrum.

277. Formerly, under the business necessity standard, employers were required to prove that such fears were justified. For example, employers were required to prove that pregnant flight attendants and short police officers could not perform their jobs safely, which employers were, at least in some cases, unable to do. For cases challenging pregnancy rules for flight attendants, see *supra* note 268. For cases challenging minimum height requirements for police officers, see *supra* note 269.

278. *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 655 (1966) (stating that ability to read or understand Spanish-language newspapers, radio, and television is as effective a means of obtaining political information as ability to read English).

279. *Cf.* Levin v. Delta Air Lines, Inc., 730 F.2d 994, 998 (5th Cir. 1984) ("If it is established that an employer takes a lax approach to safety in comparable matters, the employer may be hard-pressed to convince the court that it deems the contribution to safety effected by the challenged policy to be necessary . . . .") (footnote omitted).

requirement of 5'7" for a truck driver position.[280] Indiscreetly, the employer had hired many nonminority drivers unable to meet the minimum height requirement; one of these drivers, a 5' 4 ½" white man, had performed years of accident-free driving and had received safe driving awards.[281] The court concluded that "if Anglos less than 5' 7" tall could perform safely and efficiently . . ., there is no reason to suppose that Spanish surnamed Americans could not do likewise."[282] Accordingly, in addition to considering the existence of less discriminatory and equally effective alternatives, plaintiffs' lawyers challenging English-only rules should consider the consistency with which the employers have applied their rules.

In some circumstances, employers may be able to justify English-only rules that are not unduly discriminatory, based on safety and efficiency. An English-only rule, however, must actually and significantly contribute to greater safety or efficiency.[283] The employer's mere assumptions or beliefs, like the beliefs that pregnant flight attendants or short police officers cannot do their jobs, are not sufficient to support a discriminatory English-only rule.[284] The presence of more than one language in the workplace does not necessarily make a dangerous workplace less safe. One can be as safe and efficient in Spanish, or any other language, as in English.[285]

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280. United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 941-42 (10th Cir. 1979).

281. *Id.* at 941.

282. *Id.* at 942.

283. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125-26 (1989).

284. *Id.* at 2126 (holding that an employer bears the burden of producing evidence of a business justification; a "mere insubstantial justification [offered by an employer] will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices"). Accordingly, although it remains to be seen how the courts will apply the new standard established in *Wards Cove*, mere assumptions about or beliefs in the validity of a challenged practice do not appear to be sufficient to pass muster. *See, e.g.*, Craig v. County of Los Angeles, 626 F.2d 659, 667 n.8 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981) ("Mere opinion testimony by sheriff's department personnel that height is effective in control functions is inadequate to establish the significant correlation that is required under Title VII."); United States v. Virginia, 454 F. Supp. 1077, 1088 (E.D. Va. 1978) (stating that opinions of five members of state police that "height and weight are useful in police work" fail to establish job relatedness, but establish only "a good faith belief of job relatedness").

285. *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 655 (1966) (stating that in exercising the right to vote "an ability to read or understand Spanish is as effective as ability to read English").

F. Summary of Analysis of English-Only Rules Under the Business Justification Standard

This Part of the Article has examined the various justifications offered by employers in support of English-only rules: reducing racial tension and fear; reducing disruptions; supporting the English language and improving employees' English skills; enhancing the effectiveness of supervision; and enhancing safety and efficiency in the workplace. Applying the business justification standard, it appears that three of the potential justifications—reducing racial tension and fear,[286] reducing disruptions,[287] and improving employees' English skills[288]—probably cannot pass muster under the standard. English-only rules simply are not effective for such purposes. English-only rules increase, rather than reduce, racial tensions and fears. Different-language conversations are no more disruptive than conversations in English, except for legally impermissible reasons. And English-only rules do little to improve the English of persons whose primary language is not English.

Some of the other asserted justifications do not fare much better under the business justification standard. It is questionable whether supporting the use of English in this country is a business purpose at all. A desire to enhance the effectiveness of supervision cannot constitute a business justification unless a supervisor's access to the content of different-language conversations relates to the job and enhances supervision. Furthermore, a plaintiff often will be able to show a less discriminatory, and more effective, alternative to an English-only rule: an employer needs only to hire a supervisor conversant in the different language to achieve more effective supervision.[289]

Under appropriate circumstances, an employer may be able to justify an English-only rule on the grounds of safety and efficiency. The new business justification standard requires the plaintiff to disprove the employer's asserted justification. This standard will be as difficult for plaintiffs to meet with regard to the safety and efficiency justification as it was for employers to meet under the business necessity standard. Plaintiffs, however,

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286. *See supra* Part V.A.

287. *See supra* Part V.B.

288. *See supra* Part V.C.

289. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1043, *vacated as moot*, 109 S. Ct. 1736 (1989).

may be able to prevail by demonstrating less restrictive and more effective alternatives.

VI. CONCLUSION

The long history of discrimination against members of language minority groups in the United States suggests that they, like persons whose race or religion differs from those of the majority, warrant protection under Title VII.[290] The strong link between the primary language, ethnicity, and national origin of persons whose primary language is different from English justifies protection for such persons under Title VII. This link between primary language and national origin exists regardless of bilingualism.[291] Furthermore, the difficulty of second-language acquisition makes primary language practically immutable, another basis for protection under the statute. For these reasons, discrimination against persons whose primary language is different from English is a form of national origin discrimination.

English-only rules have a disparate impact on persons whose primary language is not English. Indeed, the impact of these rules is beyond "disparate." The rules result in an exclusive adverse impact because English-only rules can disqualify or affect only members of protected national origin groups. English-only rules, therefore, cannot be facially neutral in the same sense as other neutral rules analyzed under the disparate impact theory. The demographics of the United States indicate that, by the year 2000, Hispanics will be the largest ethnic minority group in the United States.[292] The primary language of many of these persons will be Spanish. They will bear the impact of English-only rules in the workplace along with other persons whose primary language is different from English.

The issues posed in *Garcia* and *Gutierrez,* consequently, are very likely to return to the courts. Courts should recognize the link between primary language, ethnicity, and national origin. Courts also should recognize that English-only rules have an exclusive adverse impact upon protected language minority groups.

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290. *Cf.* Olagues v. Russoniello, 797 F.2d 1511, 1521 (9th Cir. 1986), *vacated as moot,* 484 U.S. 806 (1987) ("[C]ourts have long recognized the history or discriminatory treatment inflicted on Chinese and Hispanic people.") (citations omitted). *See* SENATE REPORT, *supra* note 114, at 791-97. *See supra* notes 111-15 and accompanying text.

291. *Gutierrez,* 838 F.2d at 1039. *See* Karst, *supra* note 81, at 351-57; J. FISHMAN, *supra* note 17, at 70.

292. *See supra* note 14 and accompanying text.

Accordingly, courts should evaluate such rules as disparate treatment because of national origin and require employers to establish a bona fide occupational qualification defense for such rules. In the alternative, if a court adheres to the disparate impact theory for analyzing English-only rules, employers should be required to meet a strict standard of business necessity. Even if a court adheres to the permissive standards of *Wards Cove* in analyzing an English-only rule, such a rule should be upheld only when the rule relates to the job and effectuates its asserted purpose, when the rule is not a pretext for discrimination, and when a plaintiff fails to demonstrate the availability of less discriminatory, but equally effective, alternatives.

Conversations in one language need not be more disruptive, nor less safe, than conversations in another language.