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**POLICY, POLITICS & PRAXIS: ARTICLE:** How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy

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**BIO:**

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**SUMMARY:** ... Title VII of the Civil Rights Act of 1964 outlaws discrimination in employment based on, among other things, national origin. The adoption by employers of policies requiring employees to speak only English in the workplace would appear to constitute national origin discrimination against bilingual Latinos, whose Spanish-speaking ability is central to their identity. ... Decisions approving English-only rules in the workplace are based largely on judges' limited understandings of the forms that national origin discrimination can take: after all, for a bilingual employee, isn't Spanish-speaking ability a mutable characteristic, changeable without causing serious inconvenience? ... Below, I identify two common errors, traceable to the United States' tendency toward racial dualism, found in reported decisions involving English-only rules: (A) the belief that a "mere inconvenience" occasioned by a classification based on national origin, such as requiring a bilingual Latino to speak English only, does not constitute discrimination; and (B) the understanding that the only legitimate index of a protected class is some "immutable" characteristic, such as race. ... Even the Supreme Court, which generally has offered a cold shoulder to the argument that language discrimination equals national origin discrimination, has occasionally acknowledged "Spanish-speaking" persons as a "minority group" in need of special protection. ...

[\*1347]

Title VII of the Civil Rights Act of 1964 outlaws discrimination in employment based on, among other things, national origin. The adoption by employers of policies requiring employees to speak only English in the workplace would appear to constitute national origin discrimination against bilingual Latinos, whose Spanish-speaking ability is central to their identity. Yet it is settled in the federal courts that implementing "English-only" rules does not even state a prima facie case of discrimination. In this Essay, the author seeks to understand why judges hold national origin challenges based on language discrimination in such low

esteem. He argues that three themes drawn from the growing literature of LatCrit theory help explain these results: racial dualism, the tendency of courts to view civil rights discourse in terms of Blacks and Whites to the exclusion of Browns and other people of color; Latino [\*1348] invisibility, the tendency of legal institutions to make Hispanic litigants and their injuries disappear; and legal indeterminacy, the tendency of the jurisprudential tools of legal reasoning to be ambiguous and manipulable. The author concludes that understanding judges' use of language - phraseology, choice of metaphor, and silence - offers insights into the values and prejudices that have assigned Latinos and other minorities to second-class legal status. By confronting these values and prejudices, courts and combatants may begin to change them and accord victims of national origin discrimination the respect they deserve.

#### Introduction

"What happened, Yo?" her mother asked the hand she was patting a little later. "We thought you and John were so happy."

"We just didn't speak the same language," Yo said, simplifying.

- Yolanda Garcia de la Torre n1

This is the story of how the federal law of equal opportunity failed to protect three bilingual, distant cousins, each of whom bears the family name Garcia, when they spoke Spanish in the workplace.

The first cousin is Hector Garcia, "a native-born American of Mexican descent." n2 He worked as a salesman for Gloor Lumber & Supply Inc. at its retail store in Brownsville, Texas. Mr. Garcia was among the seven of eight Gloor salesmen who were "Hispanic" n3 - a business decision perhaps influenced by the fact that three-quarters of the company's customer base is also Latino "and many of Gloor's customers wish to be waited on by a salesman who speaks Spanish." n4

Mr. Garcia, who speaks English perfectly well but prefers Spanish, because that is the language spoken en casa, was hired by Gloor "precisely because he was bilingual." n5 Eventually, he was fired for the same reason. This happened after Gloor adopted a work rule [\*1349] forbidding any on-duty employee from speaking a language other than English unless the employee was waiting on a non-English-speaking customer. Soon thereafter, Mr. Garcia was asked a question by another Mexican-American employee about an item sought by a customer. Mr. Garcia replied "in Spanish that the article was not available." n6 Alton Gloor, a company officer and stockholder, overheard the conversation; Mr. Garcia was promptly discharged for breaking the rule. n7

The second cousin is Priscilla Garcia, "a fully bilingual" employee of the Spun Steak Company of South San Francisco, California. n8 Of Spun Steak's thirty-three employees, Ms. Garcia is among the twenty-four who speak Spanish, "virtually all of whom are 'Hispanic'." n9 As a production line worker, she stands in front of a conveyor belt and places poultry and other meats into packages for resale. The company's production line workers do not appear to have contact with the general public, and "Spun Steak has never required job applicants to speak or to understand English as a condition of employment." n10

Ms. Garcia's production line compa<tild n>era, Maricela Buitrago, is also "fully bilingual," but the two prefer communicating with one another in Spanish. n11 Two co-workers, one African-American and the other Chinese-American, who apparently did not understand Spanish, nevertheless complained that Garcia

and Buitrago had made "derogatory, racist comments in Spanish." n12 The company's president, Kenneth Bertelsen, formulated a new workplace rule mandating that employees only communicate in English "in connection with work." n13 The rule permits conversation in languages other than English when speaking in situations outside of the work context, such as at lunch and on breaks. n14 After catching Ms. Garcia and Ms. Buitrago speaking in Spanish while working, the company issued warning letters and prohibited the pair from working next to each other for two months. The workers' union [\*1350] unsuccessfully filed suit, charging that Spun Steak's English-only policy violates Title VII of the Civil Rights Act of 1964. n15

The third cousin is Yolanda Garcia de la Torre, a fictional American poet, who as a young girl emigrated from the Dominican Republic to New York with her parents and sisters Carla, Sandra, and Sofia. The lifelong adventures of the Misses Garcia de la Torre are brought to life by novelist and literature professor Julia Alvarez in her novel, *How the Garcia Girls Lost Their Accents*. n16 Although Professor Alvarez weaves the Garcia family tapestry in all its intricate and variegated splendor, the singular thread in the life of each girl - and especially the poet Yolanda, or "Yo" - is her transformation from a comfortable Spanish-speaking immigrant child into an unsure bilingual American adult, who in struggling with her dual identity cannot help but keep one foot firmly planted in the Old World and the other in the New. n17

Soon after their move to the United States, several incidents with a neighbor introduce the Misses Garcia to the United States' resistance toward biculturalism - and by extension, bilingualism. La Bruja, the old woman "with a helmet of beauty parlor blue hair" who lives in the apartment below them, n18 has been complaining that, among other things, the Garcias bother her by speaking loudly and in Spanish. One day La Bruja stops Mrs. Garcia and the four girls in the lobby. "Spics!" she says, "Go back to where you came from!" n19

The stories of the three cousins Garcia are unremarkable merely because they are, or could be, true. Even in what we sometimes suppose to be these enlightened times, tales of overt discrimination against U.S. citizens and legal residents who look, speak, or act in a manner that the Anglo cultural majority considers "foreign" could be told by all too many folks, whether native-born or immigrant, professional or [\*1351] campesino, Latino or non-Latino. Rather, the Garcias' stories are remarkable because, according to the leading federal appellate decisions, none of them states a claim for illegal national origin discrimination.

In the real life cases of Hector n20 and Priscilla, n21 the United States Court of Appeals for the Fifth and Ninth Circuits, respectively, each held that a private employer's English-only rule could not be considered discriminatory. n22 The Garcias, these courts reasoned, are bilingual, and therefore, can "easily comply" with the directive. n23 Under the law, neither Garcia has the right to speak Spanish while on duty - to supervisors, co-workers, or even customers - unless communicating with somebody else who speaks Spanish only. So Mr. Garcia must stay fired, and Ms. Garcia shall remain segregated from her Spanish-speaking compa<tild n>era for as long as her boss sees fit.

Even in the fictional case of Yolanda Garcia, were the super to placate La Bruja by putting the Garcia family out on the street, there is reason to doubt whether a legal challenge could be successful. In the eyes of the law, the family's ancestry, and especially its bilingualism, is more of a liability than an asset. Nearly twenty-five years ago, the United States Supreme Court held that Title VII's ban on "national origin" discrimination does not mean what it appears to say, and, in fact, permits an employer to deny a job to a lawful resident alien from Mexico based solely upon her alienage. n24 Unfortunately for the Garcia family, Title VIII of the Civil Rights Act of 1968, n25 which purports to outlaw "national origin" discrimination in public housing, contains language similar to that found in Title VII and is practically indistinguishable. n26

United States society's serious misunderstandings about bilingual speakers have even invaded courtroom proceedings. Just six years ago, the Supreme Court decided that a prosecutor's use of peremptory challenges to exclude bilingual Latinos from jury service does not violate [\*1352] the Equal Protection Clause. n27 The prosecutor had struck two jurors because he was afraid they would listen to and use the

direct testimony of Spanish-speaking witnesses, rather than the official English translation. n28 "It is a harsh paradox," wrote Justice Kennedy for the Court, "that one may become proficient enough in English to participate in trial...only to encounter disqualification because he knows a second language as well." n29

It is precisely this "harsh paradox" that merits a searching inquiry. In our times, U.S. citizens seem obsessed with passing laws that, far from preserving bilingualism, direct everyone to speak English only. n30 Although a First-Amendment challenge to such a rule for state government employees was recently before the United States Supreme Court, n31 the case did little to resolve either U.S. feelings about bilingualism in general or the validity of such rules for private sector employees in particular. This is unfortunate, because English-only rules constitute precisely the type of national origin discrimination that violates Title VII. Title VII is supposed to secure equal opportunity with respect to the terms, conditions, and privileges of employment of all workers, regardless of "race, color, religion, sex, or national origin." n32 [\*1353]

Under Title VII, a work rule whose adverse effects fall exclusively upon the most widely accepted class of protected workers - African-American men n33 - ordinarily would raise a prima facie violation of the statute. n34 In most of our courts, an attempt to defend such a rule by claiming it could easily be complied with would be rejected, if not mocked, as the equivalent of telling an African-American that she may lawfully be "required to sit at the back of a bus" because she could easily do so. n35 How, then, can a work rule which effectively requires a bilingual employee "to sit at the back of the bus" escape the grasp of the employment discrimination laws?

That English-only rules have a discriminatory impact on bilingual Latinos ought to be beyond rational debate. n36 As I summarize below, the [\*1354] Spanish language is central to Latino identity. People whose primary language is Spanish constitute a cognizable group - a "discrete and insular minority" - who historically have been, and continue to be, subject to discrimination. Therefore, English-only policies that appear to be neutral workplace regulations are actually language discrimination against bilingual employees, including Spanish-speakers. This is illegal national origin discrimination, as so many commentators have persuasively argued. n37

The question, then, is not whether English-only rules are national origin discrimination, but why courts have consistently refused to find them so. I believe the explanation lies partly in the tendency of judges toward "racial dualism" - the tendency to view civil rights discourse in terms of Blacks and Whites only. Racial dualism is a world view that infects judicial decision making, as reflected in the reported opinions of cases dealing with challenges to English-only rules brought under Title VII. This view embraces, among other things, reliance on false dichotomies, such as the traditional jurisprudential distinction between "mutable" and "immutable" personal characteristics. Decisions approving English-only rules in the workplace are based largely on judges' limited understandings of the forms that national origin discrimination can take: after all, for a bilingual employee, isn't Spanish-speaking ability a mutable characteristic, changeable without causing serious inconvenience?

Racial dualism is problematic not only because it limits judges' understanding of national origin claims, but also because it makes Latinos and their problems in the workplace invisible. If racial dualism were a coin, then its "flip" side would be blank. When there are only two ways of seeing things - Black or White - other colors, such as Brown, are bound to remain hidden from view.

Finally, racial dualism and invisibility are often submerged, and thereby left unexamined, in the texts of judicial decisions. This happens because the jurisprudential tools of legal reasoning are constructed so as to conform to pre-existing world views. That is, legal rules, and nowhere more so than in the realm of national origin discrimination, are indeterminate, making it not only possible but also easy to reach results [\*1355] that make English-only policies seem benign to the decision-makers who consider them.

By their use of language - phraseology, choice of metaphor, or silence - parties and judges offer insights into why the bilingual population receives a second-class (if any) form of protected status. These insights yield a rich harvest of information about their, and our, belief systems concerning the treatment of minority cultures in the workplace. By confronting these values and prejudices, combatants and courts alike may begin to change their belief systems and accord victims of national origin discrimination the respect they truly deserve.

In this Essay, I will examine the manner in which litigants and judges discuss English-only rules. I will do so by referring to what I believe to be three interrelated, yet distinct, themes that are emerging in the recent literature of Latino Critical Legal Theory. n38 Part I explores the limits of racial dualism, the traditional characterization of race relations along a binary Black/White paradigm, n39 in addressing the study of oppression of Latinos. Too often the corpus of civil rights literature is seen as the product of a clash between "two races," one Black and one White. n40 Although the racial dualism analyzed by this literature is [\*1356] undeniably important to our study of equal opportunity law, it does not translate well when applied to Latinos, whose oppression is not limited to odious classifications based upon skin color or race but also includes language capability, religious tradition, immigration status, and other markers of non-Anglo "otherness." Part I offers examples of how employers argue, and how judges report and analyze, national origin claims in terms of a Black/White paradigm, and thereby oversimplify and diminish Latinos' claims.

Focusing on a closely related theme, Part II argues that the law so ignores the plight of Latinos in the United States that we are virtually "invisible." n41 In many ways, the oppression resulting from a policy of conscious discrimination against a recognized people is less intractable than the oppression resulting from denying that such a people exists at all. At least in the former case, there can be improvement once the key task - persuading the majority culture to recognize that the victimized "other" faces a problem - is undertaken. But in the latter case, there can be no progress unless and until the majority culture recognizes there is a victim. Part II offers examples of how parties and decision makers, both in their language and failure to use language, make Latinos invisible by ignoring how English-only rules create victims.

Part III argues that the indeterminacy of modern legal materials - here, cases and statutes - leaves open to discretion a large and important field of decisions, in all areas of the law, that can be manipulated to justify multiple outcomes to lawsuits. n42 Legal indeterminacy is particularly apparent in the various courts' interpretations of Title VII. Although Title VII prohibits national origin discrimination, the subject merited hardly a paragraph in the statute's legislative history, and the task of defining the term fell largely to the Equal Employment Opportunity Commission ("EEOC"). Part III offers examples of how employers and courts have taken full advantage of this indeterminacy in litigation [\*1357] over the validity of English-only rules and the EEOC's interpretation of Title VII as applied to them, sometimes in ways that subvert the purpose of the statute.

Finally, this Essay concludes with the hope that, by understanding how we speak of Latinos, litigants and judges will better appreciate the seriousness of national origin discrimination and treat meritorious claims challenging English-only rules with the respect they deserve.

Throughout this Essay, I shall return not only to the stories of the three cousins Garcia, but also to those of other Latino litigants in the decisions interpreting Title VII.

#### I The Limits of Racial Dualism in National Origin Claims

"Sky," she tried. Then, the saying of it made it right: "I want to be the sky."

"That's not allowed....Your own rules: you've got to rhyme with your own name."

"I" - she pointed to herself - "rhymes with the sky"!

"But not with [Yo]!" John wagged his finger at her. His eyes softened with desire. He placed his mouth over her mouth and ohed her lips open.

"Yo rhymes with cielo in Spanish." Yo's words fell into the dark, mute cavern of John's mouth. Cielo, cielo, the word echoed. And Yo was running, like the mad, into the safety of her first tongue, where the proudly monolingual John could not catch her, even if he tried.

- Yolanda Garcia de la Torre n43

As Rachel Moran has reminded us, U.S. history is associated with at least two models purporting to account for how the Anglo cultural majority has traditionally welcomed "other" peoples to this country. These may be referred to as the "civil rights" n44 model and the "immigration" n45 model.

In the civil rights model, the world consists of Black people, who historically have been denied their basic human rights, and White [\*1358] people, who by law, force, or both have been responsible for it. In more recent times, our society has attempted to reform the law and how it is enforced in order to liberate Blacks and their descendants from their oppression by Whites and their forebears. Because the overclass is composed of Whites and the underclass is composed of Blacks, the civil rights model is binary in nature; civil rights are understood as having been denied, and therefore as now in need of redress, on the basis of Whiteness or Blackness. Thus, the study of U.S. race relations has traditionally been the study of what Angel Oquendo calls "racial dualism": n46 the inquiry into the brutal enslavement and tentative emancipation of Blacks by Whites to the exclusion of the study of oppressive conditions suffered by other minorities, especially Latinos. "The U.S. racial imagination," says Oquendo,

posits a bifurcated universe, in which the black-white divide overwhelms all other differences. This conception of race is not surprising in light of the prominence in U.S. history of the oppression of people of African ancestry by individuals of European extraction. The institutions of enslavement and discrimination have created and reinforced the perception that the opposition between these two groups is essential and universal. Racial dualism is but the other side of dualist racism. n47

The trouble with this "bifurcated universe" is that Latinos have neither a place in it nor a need for access to the machinery of civil rights law. If "racial dualism is but the other side of dualist racism," then racism is only a problem for Blacks and Whites and nobody else.

In the immigration model, the superior people are still White, but now what makes them superior is a type of nativism characterized by their Anglo, English-speaking, monolingual background. The superior people,

with the Statue of Liberty as their emblem, welcome by invitation non-Anglo, non-English-speaking inferiors, especially those from continental Europe, but only so long as they promise to assimilate - that is, try to become more like Anglo English-speakers and less like the folks they used to be.

Neither model accurately depicts our actual traditions, much less the story of Latino Americans in the United States. The civil rights model fails to account for the Latino experience in at least two respects. First, in the White-and-Black world, only skin color matters; the other meaningful differences that may distinguish a people - such as [\*1359] language, culture, religion, and the like - are ignored. In reality, Latinos have diverse racial and ethnic origins and are attuned to questions of class and wealth, not merely race or ethnicity. n48 Yet as many Latinos of my acquaintance and in my family have told their stories, to so many Whites, all minorities are "niggers." n49

Second, the key institution whose effects the civil rights model is designed to address - chattel slavery - was not extensively used by Anglos to subjugate Latinos in what became the territorial United States. Whereas African Americans trace their roots in the United States to 1619, when the first slaves arrived at Jamestown, Virginia, Latino Americans often trace their roots to 1519, when a century earlier, Cortes, in leading the Conquest, initiated the uniquely Latino tradition of mestizaje, or the mixing of European and Indian blood by miscegenation, thus creating a race of people who never existed before. Indeed, many if not most Latino Americans trace their ancestry back much further than the Spanish Conquest. Latino identity is based upon not only mestizaje, but also pre-Columbian roots in the Americas, indigenous roots among Indian peoples who called the land home well before 1519. To be sure, Latinos faced oppression by Spanish and Anglo-American conquerors, but it was an oppression accomplished by means other than slavery. n50 And whereas the Civil War was fought and our Constitution amended in hopes of resolving the proper status of former slaves, an endless web of legal entanglements, unresolved to the present day, has been spun to determine the "proper" status of Latinos as minorities here. n51 [\*1360]

Similarly, the immigration model fails to account for the Latino condition in at least two respects. First, as Rachel Moran has pointed out, it is based on the supposed historical experience of immigrants from Europe, who are believed to have come "by invitation only" to the United States, where they received a "warm reception" for accepting the challenges of assimilation. n52 But many present-day Latinos are not the descendants of immigrants, at least as we commonly use the term; rather, they are the children of ancestors who had settled the New World centuries before Anglos first arrived in the Southwest. Whereas the ancestors of most European Americans voluntarily came to the United States, the ancestors of Latino Americans in the old California, New Mexico, and Texas territories involuntarily had the United States come to them through the forced annexation of their homelands. n53 Even Latinos whose ancestors immigrated here after the Texas Rebellion of 1836 or the Treaty of Guadalupe Hidalgo of 1848, which ended the Mexican-American War by transferring one-half of all Mexican homelands to the U.S., came not from Europe but from the Caribbean, Central America, Mexico, or South America.

Second, the "immigration" model ignores the rich non-Anglo, multilingual heritage our country has enjoyed since its inception. As Juan Perea n54 and Bill Piatt n55 have documented, the United States is not now and has never been an exclusively Anglo, English-speaking, monolingual nation. The Dutch, French, German, and Spanish languages were each spoken contemporaneously with English. Indeed, Spanish was the first European language spoken in the New World, including North America. By the late sixteenth century, the conquistadores had expanded New Spain to present-day New Mexico and begun a centuries-long tradition in which Spanish remained the principal language, even after that territory had become annexed to the U.S. n56

Unfortunately, lessons about the limits of racial dualism as applied to bilingual Latinos have been largely lost on the courts hearing Title VII cases. Below, I identify two common errors, traceable to the United [\*1361] States' tendency toward racial dualism, found in reported decisions involving English-only rules: (A) the belief that a "mere inconvenience" occasioned by a classification based on national origin, such as

requir-ing a bilingual Latino to speak English only, does not constitute discrimination; and (B) the understanding that the only legitimate index of a protected class is some "immutable" characteristic, such as race.

#### A. English-Only Rules and the Veil Of "Inconvenience"

In *Garcia v. Spun Steak Co.*, the Ninth Circuit, with little fanfare, raised what turned out to be an insurmountable barrier for Priscilla Garcia: it insisted that, in order to establish a prima facie case of disparate impact, she prove that Spun Steak's speak-English-only rule have a "significantly adverse impact" on the protected class of bilingual Spanish-speaking workers. n57 This construction of Title VII opened the door to a discussion of how the rule was "merely [an] inconvenience" and could not "significantly" affect people like Ms. Garcia.

Judge O'scannlain addressed the plaintiff's claims as arising from the fact "that fully bilingual employees are hampered in the enjoyment of the privilege [of conversing] because for them switching from one language to another is not fully volitional." n58 He rejected this argument as irrelevant, even assuming it could be proven. n59 According to Judge O'scannlain:

Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls squarely on a protected class. Rather, Title VII protects against only those policies that have a significant impact. The fact that an employee may have to catch himself or herself from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity....The fact that a bilingual employee may, on occasion, unconsciously substitute a Spanish word in the place of an English one does not override our conclusion that the bilingual employee can easily comply with the rule. n60

[\*1362] There are three remarkable things about this reasoning. First, Judge O'scannlain cited no persuasive authority for the proposition that adverse impact analysis is limited only to "significant" adverse impacts. Indeed, for the most part, he cited no authority at all. n61 Yet the language of Title VII does not single out "significant" as opposed to "insignificant" discrimination. n62 The fair - and literal - reading of the statute is that limiting, segregating, or classifying an employee "in any way" which would even "tend" to deprive her of employment opportunities, or to "adversely affect" her employment status, is "unlawful." n63 Thus, under a traditional plain-meaning approach to statutory interpretation, the reasoning of *Garcia v. Spun Steak Co.* failed.

Second, Judge O'scannlain never sought to explain from whose perspective the measure of "insignificance" should be taken. That of the plaintiff? The employer? A reasonable bilingual person? Absent any explanation, we have little choice but to assume he meant his own perspective, or more generally, that of the three judges on this panel of the Ninth Circuit - which, so far as we can tell, is the Anglo monolingualist's perspective. Thus, it is not surprising that a rule restricting a bilingual person's language usage to English can be dismissed as a mere inconvenience.

Third, Judge O'scannlain posits an internal contradiction. In one breath, he says that Spun Steak's English-only rule does not discriminate, because Ms. Garcia and other bilingual workers "can easily comply" with it. In the next breath, however, he concedes that "slipping into Spanish" can be "involuntary." This begs the question: if the speaker cannot avoid "slipping into Spanish," how can she "easily comply" with such a rule? Curiously, Judge O'scannlain demurred [\*1363] from addressing the issue altogether. n64 "Whether a bilingual speaker can control which language is used in a given circumstance," he said, "is a factual issue that cannot be resolved at the summary judgment stage." n65

What does the tortuous reasoning of *Garcia v. Spun Steak Co.* have to do with the limits of racial dualism? It is simply this: the Anglo majority culture has been taught to understand, and is willing to sanction, only the least subtle types of offenses against minorities in the workplace. Accordingly, a case that clearly offends our modern civil rights tradition, such as assigning a college-educated, minority applicant to the hotel's laundry room rather than its accounting department, n66 will draw the opprobrium of Anglo judges. But something less familiar, such as a workplace rule banning a minority from speaking a language other than English, will not.

Most Anglo judges are monolingual or speak non-English languages as second languages. Thus, they have little experience with, much less sympathy for, poor treatment based on language capability. So insisting that somebody who has the ability to speak English now be required to do so does not seem nearly so serious to them as situations in which employees are terminated because of the color of their skin. n67

Other courts upholding English-only rules against bilingual employees have made the same mistake the Ninth Circuit did in *Garcia v. Spun Steak Co.*. For example, Hector Garcia could be fired because he "could readily comply with the speak-English-only rule; as to him nonobservance was a matter of choice." n68 A Mexican-American disc jockey could be fired for uttering some words of "street Spanish" on the air, because he "had the ability to conform to the English-only order, but chose not to do so." n69 And a Filipina nurse could be demoted for speaking Tagalog on the evening shift of a hospital's maternity unit, [\*1364] "not because she was unable to comply, but because she believed that it was her civil right to speak her native tongue." n70

Each of these examples demonstrates that determining who should be afforded protection under Title VII is more complicated than the simplistic constructions of "minority" admitted by racial dualism. That the markers tying claims of "national origin" discrimination to "national origin" victims appear to have less precision than those markers evidencing racial discrimination does not render English-only rules less odious.

The Black/White race paradigm is inadequate especially in its failure to address the importance of language issues to Latinos. Although the history of the oppression of African Americans undeniably includes the destruction of ancestral languages, it cannot be said today that "non-English speaking" ability plays exactly the same role in discrimination against Blacks that it does against Latinos. n71 For the most part, Whites and Blacks in the United States are monolingual speakers of related dialects of the same language: English. But Latinos, whether fluent Spanish speakers or not, "all have some common connection with the [Spanish] language." n72 If we do not speak it ourselves, n73 then it is the language of our ancestors.

The Spanish language is central to Latino identity in at least two crucial ways. First, sociologists and sociolinguists tell us that Spanish, like any primary language, is a fundamental aspect of ethnicity. n74 If [\*1365] ethnicity is "both the sense and the expression of collective, intergenerational cultural continuity," n75 then for Latino people the Spanish language is the vehicle by which this sense and expression are conveyed. Spanish-speaking bilinguals associate the use of Spanish with family and friendship and values of intimacy. n76 After all, 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 areas of interaction that typify every speech community. n77

Second, Spanish-speaking ability is the historic basis upon which Anglo society discriminates against Latinos. Prejudice against the language is recognized as a cause of the low esteem with which Spanish is

often regarded. n78 "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." n79 Thus it is no accident, as the venomous tongue of La Bruja reminds the Misses Garcia, n80 that the derogatory term used by Anglos to refer to a Latino of any national origin is "spic," which emphasizes "how Latino[]s 'speak' rather than how they look." n81

Indeed, long before English-only became a rule in the U.S. workplace, Latino children, especially children of Mexican descent, were routinely humiliated, n82 disciplined, n83 or beaten n84 for speaking Spanish in [\*1366] school. In the Southwest, the story of the Mexican-American child who is punished for speaking Spanish in an Anglo teacher's classroom is nearly as common as the story of the African-American man who is pulled over by the police for the "crime" of driving through a White community. n85 Even the Supreme Court, which generally has offered a cold shoulder to the argument that language discrimination equals national origin discrimination, n86 has occasionally acknowledged "Spanish-speaking" persons as a "minority group" in need of special protection. n87

To suppress the speaking of Spanish is to suppress an essential, if not the essential, component of Latino identity. n88 This essentialism is reflected in the works of many Latino writers, such as Sandra Cisneros, n89 Octavio Paz, n90 and Earl Shorris, n91 whose essays, poems, and stories demonstrate how the Spanish language remains the lifeblood of [\*1367] Latinos. n92 Indeed, English-only rules are a painful reminder that, as descendants of the native peoples of the New World, "Latinos have lost their language twice": n93 first, when Spain conquered the Americas and substituted Spanish for the Indian languages; second, when the U.S. conquered the Southwest and substituted English for Spanish, a process that continues to the present day.

As Judge Reinhardt, who dissented from the court's denial of rehearing en banc of *Garcia v. Spun Steak Co.*, explained, "Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as 'inconvenience' to the affected employees...." n94

#### B. The False Dichotomy: Mutable vs. Immutable

Latinos have historically been subjected to discrimination based on their Spanish language usage. Nonetheless, attempts by Latino plaintiffs to challenge English-only policies as national origin discrimination have repeatedly failed because the courts insist that language usage is a mutable characteristic and thus unprotected by Title VII. Placing such importance on the false dichotomy between mutable and immutable characteristics to determine whether a policy is discriminatory ensures that courts will continue to fail to recognize that discriminatory language policies are a form of national origin discrimination.

In *Garcia v. Gloor*, the Fifth Circuit reasoned that Hector Garcia's claim must be rejected largely because Title VII "focuses its laser of prohibition" on characteristics, such as color or race, that are "beyond the victim's power to alter" n95 - and that Mr. Garcia, as the record demonstrated, had the power to alter his language ability from Spanish to English when necessary but declined to do so. n96 "No one[.]" wrote Judge Rubin,

can change his place of birth (national origin), the place of birth of his forbears (national origin), his race or fundamental sexual characteristics....[But t]he EEO Act does not support an interpretation that equates the language an employee prefers to use [\*1368] with his national origin. To 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. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice. n97

Judge Rubin's characterization of speaking one's mother tongue as volitional - as a matter of "choice" - is important, because it reflects a cherished value of a free society: a person may be condemned for engaging in conduct that can be an act of free will, but not for having a status over which the person has no control. In employment law, this value is codified in Title VII's ban on discrimination based on color, race, sex, and other so-called "immutable" characteristics. n98 Possessing such a marker is what makes a person identifiable as a minority, and it is believed that the person should not be penalized merely because of who that person is. However, individuals who have the power to act and acquire certain characteristics after birth are to be judged differently. Accordingly, they should be held accountable for what they do.

According to *Garcia v. Gloor*, the capacity to speak Spanish as well as English is a "mutable" rather than an "immutable" characteristic. n99 Because a bilingual person, by definition, has chosen to learn English as a second language, he can also choose to speak it in the workplace. n100 According to this logic, failure to comply with an employer's request to speak English is seen as simple insubordination, an offense indisputably [\*1369] punishable by termination or other discipline, n101 rather than as national origin discrimination, which is prohibited by society's collective judgment that status should not be penalized. This understanding of bilingualism allowed the court to reduce Hector Garcia's claim "to a contention that the statute commands employers to permit employees to speak the tongue they prefer," and then conclude, "we do not think that the statute permits that interpretation." n102 Similarly, other courts have emphasized the "mutability" of bilingualism as a basis for upholding English-only rules, especially in cases where the employee "chose deliberately to speak Spanish," n103 "had the ability to conform," n104 or "could have easily complied." n105

This immutable-versus-mutable dichotomy raises at least three troubling questions. First, nowhere in Title VII does it say that a protected class must be defined by its "immutable" rather than mutable characteristics. In fact, as Judge Rubin conceded n106 - but did not attempt to reconcile n107 - discrimination based on the mutable characteristic of an employee's religion is also prohibited by Title VII. Even assuming that race, sex, and the rest are indeed immutable characteristics, n108 Judge Rubin could have concluded that the framers of the statute, by specifically including the concededly mutable characteristic of religion, intended the ban on "national origin" discrimination to address such discrimination in all its manifestations, whether "mutable" or "immutable." n109 [\*1370]

Second, the mutable-versus-immutable dichotomy ignores the persuasive argument, made by a host of scholars, that even so-called "immutable" characteristics such as race n110 and sex n111 are social constructs rather than anthropological or biological facts of life. So much of human relations in the United States is the product of either, or both, the construction by Whites of social identities for non-Whites and/or the construction by non-Whites of identities for themselves. The social construction of identity has been especially true for Latinos, whose multiracial heritage, as Kevin Johnson, n112 Angel Oquendo, n113 and Deborah Ramirez n114 have noted, often perplexes bureaucracies fixated on traditional "check the box" categories. If the mutable/immutable dichotomy is not so hard-and-fast, then it makes little sense to limit our legal definitions of "national origin" discrimination in the context of language ability.

Third, the dichotomy reflects the simplistic assumption of so many monolingual people that language is interchangeable, that the words and phrases used to express a concept in Spanish can be translated so as to convey exactly the same meaning in English, and vice versa. n115 Although one does not have to be bilingual to understand that the nuances of one tongue cannot easily be expressed in another, by and large it is people from minority cultures, like Latinos, who are more likely to appreciate this. [\*1371]

For example, Octavio Paz, Mexico's premier poet, essayist, and novelist, tells the story of a female "Mexican friend" who, upon visiting him in Berkeley, California, reacted to his opinion that the town is "lovely":

Yes, it's lovely, but I don't belong here. Even the birds speak English. How can I enjoy a flower if I don't know its right name, its English name, the name that has fused with its colors and petals, the name that's the same thing as the flower? If I say bugambilia to you, you think of the bougainvillea vines you've seen in your own village, with their purple, liturgical flowers, climbing around an ash tree or hanging from a wall in the afternoon sunlight. They're a part of your being, your culture. They're what you remember long after you've seemed to forget them. It's very lovely here, but it isn't mine... n116

Yolanda Garcia, the fictional "Yo" of Julia Alvarez's novel, reveals the Latino sentiment even more clearly. As a Spanish-speaking immigrant, she spends her girlhood struggling to reconcile the concepts she understands in Spanish with the new ones that she is learning in English. For example, Yo recalls an incident that occurred on the first day of a college English literature seminar. A student with whom she would have her first romantic involvement, "Rudolf Brodermann Elmenhurst, the third," strolled into her class ten minutes late. n117 Owing to the sound of his name, Yo assumed that the young man was tardy "because he'd just whizzed in from his small barony somewhere in Austria." n118 In fact, "Rudolf Brodermann Elmenhurst, the third" was a monolingual Anglo born in the United States. When she found out, Yolanda cursed her "immigrant's failing, literalism." n119 Again and again, Yolanda finds being bilingual and bicultural to be both a blessing and a curse; n120 it permits her to see and describe the world from at least two different perspectives, yet it alienates her from Anglos "like the proudly monolingual John" described at the outset of this Part. n121 [\*1372]

The limits of racial dualism are reflected perfectly in the notion that bilingualism can be both a blessing and curse. Whereas a bilingual person can view the world in its complexity, in stereophonic sound, a monolingual person can view the world only in its simplicity, in monophonic sound. So to the extent that monolingual judges are called upon to decide the English-only cases, it should come as no surprise that the outcomes, and the reasoning upon which they are based, are recorded in mono rather than stereo sound, too.

## II Latino Invisibility In National Origin Decisions

The girls glanced at each other and looked towards their mother, who rolled her eyes. "La Bruja," she explained. "I forgot." The old woman in the apartment below, who had a helmet of beauty parlor blue hair, had been complaining to the super since the day the family moved in a few months ago. The Garcias should be evicted. Their food smelled. They spoke too loudly and not in English. The kids sounded like a herd of wild burros. The Puerto Rican super, Alfredo, came to their door almost daily. Could Mrs. Garcia turn the radio down? Could Mrs. Garcia maybe keep the girls more in line? The neighbor downstairs had been awakened by the clatter of their shoes on the floor.

"If I keep them any more in line," their mother began - and then Sandi heard her mother's voice breaking. "We have to walk around. We have to breathe."

- Sandra Garcia de la Torre n122

Latino invisibility is the consequence of racial dualism; without it racial dualism could not exist. As the limits of racial dualism might suggest, n123 one of the distinguishing features of being Latino in the United States is being treated as if our people did not exist. Latinos are conspicuous by their absence from the hallmarks of Americana both large and small: bookstores, n124 civil rights dialogue, n125 history

books, n126 [\*1373] major newspapers, n127 and even accounts of who the victims of the spring 1992 Los Angeles civil unrest were. n128 And in those rare fora where Latinos have been recognized, often their portrayal has not been in a positive light. n129 Kevin Johnson n130 and Juan Perea n131 have each used the same term to describe this invisibility: Latinos are Los Olvidados, or "the Forgotten Ones."

Latino invisibility, that is, the relative lack of a positive public Latino identity and legitimacy, n132 has not happened by accident. The United States has written a rich history in which Latinos systematically are made invisible. n133 As Laura Garcia, mother of Yolanda and the other Garcia girls learned, Latinos shall be tolerated only if they keep themselves "in line," where they won't bother Anglos like their neighbor La Bruja.

A cruel irony for Latinos is that, when we are not being criticized for refusing to stay "in line," we are being criticized for refusing [\*1374] to "assimilate." n134 Latinos' persistence in maintaining cultural ties, especially language, is often fodder for conservatives' cannons against the immigration of Mexicans and Latin Americans to the United States. n135 Properly understood, however, this "refusal to assimilate" is just another way of complaining that we refuse to remain invisible. n136

In the context of Title VII litigation challenging speak-English-only rules, Latino invisibility is demonstrated by at least two phenomena: (A) the inattention paid to the Spanish words and phrases actually uttered by the bilingual employees in violation of the challenged rules and (B) the master-servant roles presupposed for Anglos and Latinos.

A.

<qmarkx>Donde Esta el Espa<tild n>ol? n137

Without a doubt, the most curious thing about the published judicial opinions addressing attacks on English-only rules is the failure of any of their authors to state, in either the original Spanish or the translated English, exactly what the employees said (or were suspected of saying) to offend the rule. Save for the surnames of most of the plaintiffs, not so much as a single word of Spanish - or indeed, any other foreign language except perhaps Latin - appears in these opinions. This is true of every one of the ten reported cases n138 addressing challenges to English-only rules under Title VII, including the three in which the employee ultimately prevailed n139 and the six in which she [\*1375] ultimately failed. n140 And it is true of all but one of the ten major reported cases addressing challenges to similar rules under other laws. n141 [\*1376]

By omitting the words spoken in Spanish by the bilingual plaintiffs, the courts' decisions mirror the challenged work place rules that prohibit Spanish. This absence of the Spanish words from the court decisions has at least two deleterious effects.

First, omission permits us to assume the harm posed by the challenged rule is, as this Essay noted above, "insignificant." n142 An insignificant infringement on one's employment rights based on national origin is not something that we have to take seriously. The matter can be disposed of without much concern because the harm, if any, is de minimis.

For example, in *Garcia v. Spun Steak Co.*, the court omitted the Spanish words the plaintiffs used, even though it was in response to those words that the company adopted its English-only work rule. Instead, Judge O'scannlain dutifully reported the ostensibly beneficent purpose for which Spun Steak had adopted its speak-English-only rule: to address "complaints that some workers were using their bilingual capabilities to harass and to insult other workers in a language they could not understand." n143 This was a serious charge and, if true, merited a serious response. n144 But just what were the offending words or phrases? Judge O'scannlain's entire analysis never offered more than a few cryptic hints.

Instead he rejected the argument of Priscilla Garcia and her compeer Maricela Buitrago that denying the right to speak Spanish on the job worked a denial of the right to express their ethnic culture and identity. n145 Judge O'scannlain called the argument a demand for the same "privilege" given by the employer to native-English speakers: the ability "to make small talk" on the job in the language with which they felt most comfortable. n146 Thus, Judge O'scannlain, in rejecting the pair's claim, devalued the importance of their ethnic culture and [\*1377] identity to that of small talk. How important could a "privilege" to engage in "small talk" be? n147

Other courts have followed a similar pattern. One upheld a grant of summary judgment against the plaintiff despite evidence in the record that his supervisor would tell him to "shut up" when she heard him speaking Spanish in the hallway. n148 Likewise, summary judgment was entered against a bilingual Spanish-speaking disc jockey who used a few words and phrases of "'street' Spanish" on his program, because he refused to comply with a new English-only rule "merely...for personal reasons - he wanted to preserve the value of his radio personality." n149 Even a victorious plaintiff, who was fired for violating the boss's rule against "'Mesican' talk" n150 by asking a bilingual co-worker "in two Spanish words" n151 where in the store an item should be placed, learned that his was "not a substantial case from the standpoint of damages." n152

Second, omission encourages readers to assume the worst about bilingual speakers and their motivations. It makes the outlawed language seem mysterious and perhaps evil. Our imaginations about the nasty things that might actually have been said are allowed to run wild.

Recall once again Garcia v. Spun Steak Company. Having characterized Ms. Garcia and Ms. Buitrago's claim as the assertion of a mere "privilege," Judge O'scannlain then suggested why the employer's stake in withholding the privilege was strong: "A privilege, however, is by definition given at the employer's discretion; an employer has the right to define its contours." n153 In defining the "contours" of the privilege, he wrote, an employer may limit small talk to certain times of the day, to the performance of certain tasks, or to certain topics. And most important, an employer "may even forbid the use of certain words, such as profanity." n154

Mark well the implications of this reasoning. We do not know exactly what Ms. Garcia and Ms. Buitrago said, but it might have been [\*1378] profanity, and it might have been racial harassment. Few of us would hesitate to condemn either as having no place in the workplace. Such words are often "'fighting' words," n155 words that provoke chaos and violence. But to omit a report and translation of what these profane words actually were, if indeed they were uttered at all, suggests the broader, indefensible conclusion that all Spanish words are profane words, or worse, racial harassment. Yet to operate under such an assumption makes it seem sensible to ban the language altogether. Indeed, how is somebody who speaks no Spanish - usually the supervisor - to know the difference between good Spanish and "scurrilous" n156 Spanish?

A Mexican-American folk tale from Texas captures perfectly for Latino ears the fear of monolingual Anglos that secretly, behind their backs, they are being mocked by bilingual Spanish-speakers:

Well this mojado ["wetback"] had just held up a bank and was running away with the money with a rinche (Texas Ranger) after him. When the mojado went around the corner he put the money in a garbage can. Then the Texas Ranger caught him and wanted to know where the money was, but he couldn't speak Spanish and the mojado couldn't speak English. Then the rinche called a Mexican-American who was passing by and told him to ask the "Meskin" about the money. "He wants to know what you did with the money[," the bilingual man said.] The mojado answered, "I put the money in a garbage can." The rinche says, "What did he say? What did he say?" And the Chicano says, "He says you are a chicken sonofabitch and you're not man enough to kill him!" n157

Even if unintentional, the reported opinions from other cases lead us down this path. One court reported a bank manager's justification for having an English-only rule in a memorandum to employees this [\*1379] way: "How would you feel if everyone around you were speaking and laughing aloud in a language that you could not understand?" n158 Another agreed with a hospital that the speaking of Tagalog by Filipina nurses in its mother-baby unit was "rude and disruptive" and "contributed to...dissension." n159 And still another reported employers' concern that the continued speaking of non-English languages would turn the workplace into a Tower of "Babel" where "inefficiency and chaos" would reign. n160

Of course, far from reporting any evidence that multilingual employees cause "inefficiency and chaos," these courts failed even to tell us what the offending words and phrases were thought to be. In contrast, those courts do not hesitate to report exactly what was said to strike the nerve in workplace cases in which the employers and employees speak English. n161 No reason has been offered about why things should be different merely because the key words happen to be in Spanish, or indeed, any other tongue.

This is Latino invisibility at its most ironic: even when a Latino plaintiff gets her day in court, the judge fails to consider and evaluate exactly what caused all the fuss in the first place. Perhaps this is because, as Juan Perea has argued, the "mere sound of Spanish offends [\*1380] and frightens many English-only speakers, who sense in the language a loss of control over what they regard as their country." n162 If they and their language can be kept hidden from view, the reasoning might go, then perhaps we can maintain control of our institutions.

#### B. Anglo Masters and Latino Servants

The other striking thing about the reported English-only decisions is that in each of them the plaintiff was a bilingual employee of color, usually Latino, and the defendant was an employer managed by a monolingual Anglo. The plaintiffs have names n163 like de la Cruz, Flores, Garcia, Gutierrez, Jurado, Saucedo, and Yniguez; the defendants or their supervisors have names like Benson, Berman, Bertelsen, Gloor, Holliday, and Mofford. Observing this pattern, with only the names of the parties changing, one might logically conclude that the natural order of things is that Anglos are masters and Latinos are servants - a condition bound to make the former visible and the latter invisible.

Now at first glance it should come as no surprise that Title VII, a statute designed to protect the rights of disenfranchised minorities, should produce a body of reported decisions in which all the plaintiffs are persons of color and all the defendants are not. But in light of the foregoing observations about Latino invisibility, I think it worth noting for two reasons.

First, finding that Latinos are always the servants reflects a basic presumption about their proper place in the employment hierarchy. In so many of the workplaces affected by these cases, bilingual Spanish-speaking employees like Hector Garcia were employed precisely because of their bilingual capabilities; n164 so it seems odd that, with perhaps [\*1381] one exception, n165 none of the supervisors of these employees appeared to be either Latino or bilingual himself. The implication is that, although bilingual Latinos are essential to getting the work done, they should not become so prominent that they actually call the shots. Rather, they should disappear unless and until sent for.

Second, by never questioning the roles presupposed for workplace actors who perform in these case law dramas, courts ratify the historic subordination of Latinos as "peons" - servant people who may be taken for granted. This subordination is the product of centuries of oppression of the mestizo and Indian workforce, first by the Spaniards and criollos, n166 who conquered New Spain (and produced mestizos - Latinos - by miscegenation with Indians) n167 and later by Anglos and their descendants who conquered northern Mexico. n168 It is a subordination born of the fact that instead of prospering, Latinos, and especially Mexicans, actually have fallen victim to "their desirability as workers." n169 The sentiment that workers of Mexican heritage will work the hardest jobs for the longest hours at the lowest pay, all under the

watchful eye of El Patron, n170 has a rich tradition. n171 In praise of Mexican workers, one early Anglo observer advised: [\*1382]

When gold shall begin to fail, or require capital or machinery, you will want these hardy men to quarry rocks and feed your stampers....They will become the hewers of wood and the drawers of water to American capital and enterprise. n172

In a less complimentary vein, an agricultural employer admitted:

We want the Mexicans because we can treat them as we cannot treat any other living man. We can control them at night behind bolted gates, within a stockade eight feet high, surrounded by barbed wire. We make them work under armed guard in the fields. n173

Anglo perceptions of workers of Mexican heritage prompted one historian to write:

In discussing Mexican immigrants, Anglos often employed the term "peon" as a synonym for "Mexican." Just as Americans' perceptions of the Chinese became inextricably linked to the image of the coolie, so their concept of Mexicans melded with the image of the peon. The Mexican was defined by the labor he performed. n174

Octavio Paz has acknowledged this condition as the "servant mentality." n175 While cautioning against the oversimplification that may accompany the use of such a label, n176 Paz sees the "servant mentality" manifested in the Mexican tendency toward suspicion, dissimulation, irony, and courtesy in dealings with strangers, including employers - all "traits of a subjected people who tremble and disguise themselves in the presence of the master....Slaves, servants, and submerged races always wear a mask, whether smiling or sullen." n177

If the perpetual condition of a Latino in the workplace is one of subordination, then it becomes easy to forget that she deserves the same respect that any Anglo would claim, namely, that he exists. What else could explain the back-handed compliment of the judge who, perhaps [\*1383] with the best of intentions, credited the testimony of an employee who protested his employer's English-only rule, because he was "an intelligent and fairly well educated Mexican-American"? n178 Or the radio station program director who advised his bilingual disc jockey to stop speaking "street Spanish" on the air because his program was "too ethnic" and studies showed the station did not "need the Mexicans or blacks to win in L.A."? n179 Or the bank manager who screamed at two Latino employees that "the next person...speaking Spanish [is] going out the door"? n180 [\*1384]

Octavio Paz recalled a servant in his own employ who seemed to have internalized others' wishes for her invisibility, who had become a "nobody":

I remember the afternoon I heard a noise in the room next to mine, and asked loudly, "Who is in there?" I was answered by the voice of a servant who had recently come to us from her village: "No one, se<tild n>or. I am." n181

### III Legal Indeterminacy Of National Origin Discrimination Law

Yolanda gazes at the cake [shaped like the Caribbean island of Hispaniola]. Below her blazes the route she has worked out on a map for herself, north of the city through the mountains to the coast....She leans forward and shuts her eyes. There is so much she wants, it is hard to single out one wish. There have been too many stops on the road of the last twenty-nine years since her family left this island behind. She and her sisters have led such turbulent lives - so many husbands, homes, jobs, wrong turns among them. But look at her cousins, women with households and authority in their voices. Let this turn out to be my home, Yolanda wishes.

- Yolanda Garcia de la Torre n182

"In every legal system," according to H.L.A. Hart, "a large and important field is left open for the exercise of discretion by the courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying [\*1385] rules only broadly communicated by authoritative precedents." n183 Seizing on this truth, a wide range of legal thinkers, including legal realists, n184 pragmatists, n185 and critical legal scholars, n186 have argued that the law is indeterminate in the sense that legal materials - statutes and court decisions interpreting them - often permit a judge to justify multiple outcomes to lawsuits. n187

As George Martinez has pointed out, the indeterminacy of the law in the areas of bilingual education, land grants, public accommodations, restrictive covenants, racial slurs, and school desegregation has permitted jurists to manipulate outcomes in cases affecting Latino litigants, especially Mexican Americans. n188 In each of these areas, the text of the applicable statute or authoritative case law was so general that the court, far from being "bound" by precedent to rule against the Mexican-American litigant, "could have gone the other way." n189 "Exposing the [\*1386] lack of inevitability in civil rights judicial decision-making," writes Professor Martinez, "may help eliminate barriers to racial reform." n190

For the reasons I explore below, we may now add employment discrimination to the list of areas of civil rights law in which the indeterminacy of the law permits multiple outcomes to national origin claims brought under Title VII. The primary source of indeterminacy in judicial decisions addressing English-only rules is the uncertain statutory definition of what constitutes a prima facie case of national origin discrimination under Title VII.

The plain language of Title VII offers no definition of what constitutes "national origin" discrimination, let alone an answer as to whether an employer's implementation of an English-only rule constitutes such discrimination. Section 703 merely makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his...terms, conditions, or privileges of employment because of such individual's...national origin." n191 The only "direct definition" n192 of the term was offered by Congressman Roosevelt, chairman of the House subcommittee which reported out the bill that eventually became Title VII, who said during the floor debate: "It means the country from which you or your forbears came....You may come from Poland, Czechoslovakia, England, France, or any other country." n193

The bill's mark-up seemed to support this interpretation, however vague. An earlier version of the bill had referred to discrimination because of "race, color, religion, national origin, or ancestry." n194 Although the word "ancestry" was deleted from the version that passed, a House report stated that the deletion was not intended to be a material change, n195 suggesting that Congress considered the terms "national origin" and "ancestry" to be synonymous. n196

Lacking a clear definition, then, courts hearing claims of national origin discrimination under Title VII faced a wide open field; they had plenty of discretion to decide whether and to what extent English-only

rules, and an employer's implementation of them, would be considered [\*1387] unlawful. As we have seen, n197 the Fifth Circuit, which in *Garcia v. Gloor* became the first federal appellate court to report an English-only decision, exercised this discretion by ruling against Hector Garcia. n198 Curiously, Judge Rubin sought to make a case of first impression seem as though the statute compelled only the result that the court finally reached. Mr. Garcia's argument, Judge Rubin explained, "reduces itself to a contention that the statute commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the preference be slight or strong or even closely related to self-identity." n199

Responding to *Garcia v. Gloor*, n200 as well as to the spread of English-only rules in private workplaces, the EEOC issued its "Guidelines on Discrimination Because of National Origin." n201 The Guidelines, which essentially codified the agency's administrative disposition of several early complaints on the subject, n202 provided then as now that promulgation of an English-only rule burdens the employee whose primary language is not English, and so makes out a prima facie case of national origin discrimination against the employee. n203 But this prima facie case, according to the Guidelines, may be overcome by the employer's proof that the rule is based upon legitimate business necessity, such as promoting workplace safety. n204 [\*1388]

Since the EEOC adopted the Guidelines, the Ninth Circuit has been the first and only federal appellate court to decide any challenges to English-only rules. The court has published opinions in three cases: *Jurado v. Eleven-Fifty Corp.*, n205 *Gutierrez v. Municipal Court*, n206 and *Garcia v. Spun Steak*. n207 The wildly inconsistent results produced by various panels of the Ninth Circuit in these cases is a classic illustration of how legal indeterminacy may be exploited to manipulate the law and to achieve preferred results.

In *Jurado*, the court affirmed a grant of summary judgment against a bilingual disc jockey "of Mexican-American and Native-American descent" who challenged his discharge for violating the radio station's new rule prohibiting him from using some words and phrases of "street Spanish" on the air. n208 Although Judge Wiggins, who wrote for the court, justified the ruling with what I characterized above as some dubious reasons, n209 he did predicate his conclusion that *Jurado* had not made out a prima facie case upon "insufficient evidence that [the radio station] discharged him for discriminatory motives." n210 According to Judge Wiggins, the undisputed evidence showed that the English-only rule was "a programming decision motivated by marketing, ratings, and demographics concerns." n211 The station's program director was worried that *Jurado*'s bilingual format would confuse listeners and hurt listenership. n212 In fact, Judge Wiggins found *Jurado*'s old bilingual format "had not improved [the radio station's] performance in the target Hispanic community." n213

Which brings us back to the EEOC Guidelines. Although I might argue with Judge Wiggins about whether these concerns truly scuttled *Jurado*'s claim for failure to present sufficient evidence of the radio [\*1389] station's discriminatory motive, n214 I would find it difficult to accuse him of ignoring the Guidelines. Indeed, Judge Wiggins cited them with apparent approval. n215 Although nothing in the Guidelines says the EEOC's presumption of national origin discrimination may be ignored if it is shown that the employer was more worried about ratings than race, nothing says such a showing is insufficient to rebut the presumption, either. Moreover, *Jurado* might be interpreted as a case that actually satisfies the Guidelines, insofar as Judge Wiggins' emphasis on ratings might be considered as establishing a business necessity defense. n216 In short, the question of how to interpret even the Guidelines themselves may be considered indeterminate. Authority exists to support the opposite outcome.

But in *Gutierrez*, another panel of the same court saw the merits of an English-only rule somewhat differently. There the Ninth Circuit enjoined a rule requiring bilingual municipal court clerks, whose official duties included translating for monolingual, Spanish-speaking members of the public, to refrain from speaking Spanish while on duty except when translating. n217 Writing for the court, Judge

Reinhardt relied in part on the Guidelines, which he said were entitled to considerable deference, because they were not inconsistent with Title VII. n218 "The EEOC Guidelines, by requiring that a business necessity be shown before a limited English-only rule may be enforced, properly balance the individual's interest in speaking his primary language and any possible need of the employer to ensure that in particular circumstances only English shall be spoken." n219 Jurado was distinguished, alternatively, as either an "ability to conform" case outside the Guidelines, or as a "business necessity" defense case within the Guidelines. n220

Then a fateful thing happened: Alva Gutierrez quit her job as a clerk with the Los Angeles Municipal Court. As a result, the Supreme Court vacated the Gutierrez panel's published opinion as moot. n221 [\*1390] Although the published opinion remained on the books as persuasive authority, it no longer carried the weight of binding precedent in the Ninth Circuit. n222

So in *Garcia v. Spun Steak Co.*, Judge O'scannlain felt unconstrained by any determinate rules of law. He was free to write on a relatively clean slate. Relying on *Garcia v. Gloor* rather than *Gutierrez*, n223 he found that Priscilla Garcia had not stated a prima facie case of national origin discrimination for the two reasons that I noted above: n224 first, because the burden imposed by Spun Steak's English-only rule was not "significant enough to amount to the denial of equal opportunity"; n225 and second, because she was able but unwilling to comply with the rule. n226 In a three-sentence footnote, Judge O'scannlain dismissed *Gutierrez* as non-binding and declined to address the arguments embraced by Judge Reinhardt. n227

There still remained one obstacle: the EEOC Guidelines. But even these did not prevent Judge O'scannlain from reaching "a conclusion opposite to the EEOC's longstanding position." n228 The court rejected the English-only Guideline, because of "compelling indications that it was wrong" n229 - namely, the absence of any mention of English-only rules in the legislative history. n230 Once dismissed as incorrect, the Guidelines could no longer prevent the court from being "impressed by Judge Rubin's pre-Guidelines analysis" in *Garcia v. Gloor*. n231

Judge Reinhardt, the author of *Gutierrez*, blasted Judge O'scannlain's legal manipulations in his dissent from denial of [\*1391] rehearing en banc, n232 decrying Judge O'scannlain's legal reasoning for its manipulation of precedent. n233 Judge Reinhardt gave three reasons of consequence here. First, *Gutierrez*, as the most recent ruling by the Ninth Circuit on the subject, deserved better treatment than a conclusory footnote. n234 After all, the validity of an opinion's reasoning remains unaffected even though the merits are vacated as moot. n235 Second, *Garcia v. Gloor* was a pre-Guidelines case - a factor that even Judge O'scannlain acknowledged. n236 Such authority should not have been elevated to so persuasive a position once Title VII's expert agency, the EEOC, had issued interpretive Guidelines. Finally, *Garcia v. Spun Steak*'s application of the law of judicial deference to statutory interpretation by administrative agencies was "incomprehensible" n237 and "a total non sequitur." n238 Judge O'scannlain relied on the absence of legislative history to conclude that the EEOC's interpretation must be invalid, thereby

elevating legislative history to a new height. Those who believe that even affirmative legislative history is, in general, not compelling may be surprised to learn that its absence can be so crucial as to constitute a basis for invalidating an agency rule...

The real basis of the majority's objection to the EEOC presumption is that the majority does not agree with the Guideline on the merits. This substantive disagreement is at least rational (though the majority's view is wrong), but it should not be transformed into a wholly baseless attack on agency authority to promulgate general rules. n239[

Judges use their discretion not only to decide cases involving indeterminate authority, but also to manipulate determinate authority so that they may insert their discretion into subsequent decisions. Exposing both the exercise of judicial discretion and the lack of inevitability in these cases reveals the extent to which courts can - or can refuse - to [\*1392] address the claims of victims of discriminatory language policies that constitute national origin discrimination. n240

#### Conclusion

The radio is all static - like the sound of the crunching metal of a car; the faint, blurry voice on the airwaves her own, trapped inside a wreck, calling for help. In English or Spanish? she wonders. That poet she met at Lucinda's party the night before argued that no matter how much of it one lost, in the midst of some profound emotion, one would revert to one's mother tongue. He put Yolanda through a series of situations. What language, he asked, looking pointedly into her eyes, did she love in?

- Yolanda Garcia de la Torre n241

In this Essay, I have shown how judges and parties, by their use of language - phraseology, choice of metaphor, or silence - offer insights into why the bilingual population receives a second-class (if any) form of protected status. The language of judicial opinions approving English-only rules in the workplace is better understood as the product of three interrelated but distinct themes that have become the subject of recent scholarship studying Latinos and the law: the limits of racial dualism, Latinos' invisibility, and legal indeterminacy. With the help of the cousins Garcia and others, I hope to persuade courts and combatants alike to change their belief systems and accord victims of discriminatory English policies which constitute national origin discrimination the respect they truly deserve. Our courts should recognize and address the inescapable relationship between discriminatory English-only policies and valid national origin discrimination claims under Title VII.

Although much of this Essay has focused on the application and interpretation of formal Title VII doctrine, I have taken the opportunity to illustrate some of the lessons of the law with anecdotes borrowed from Latino literature, both serious and sublime, touching on language issues. Nothing better captures my desire that barriers to the improved treatment of these issues be razed than the following Mexican-American folktale: [\*1393]

A gringa walked in [to a pet store] and asked, "How much is this parrot?" The owner said, "Oh, ma'am, this is a very expensive parrot, because he speaks both Spanish and English."

"Oh really, can you get him to speak in both languages?"

"Oh yes. Look: if you pull his left leg, he speaks English." And he pulled the parrot's leg and the parrot said, "Good morning!" "And if you pull his right leg like this, he speaks Spanish." And the parrot said, "<excl>Buenos dias!"

Asked the gringa: "What happens if you pull both of his legs - will he speak Tex-Mex?"

And the parrot said: "No, I'd fall on my ass, you stupid gringa." n242

None of us need think as the gringa did. Instead, we should appreciate the essential role that bilingualism plays, especially at work, in the proper classification and recognition of claims of national origin discrimination.

**FOOTNOTE-1:**

n1. Julia Alvarez, *How the Garcia Girls Lost Their Accents* 81 (1991).

n2. [Garcia v. Gloor, 618 F.2d 264, 266 \(5th Cir. 1980\).](#)

n3. [Id. at 267.](#) Given a choice, I prefer the term "Latino." See generally Angel R. Oquendo, *Re-imagining the Latino/a Race*, [12 Harv. Blackletter J. 93, 96-99 \(1995\)](#) (discussing the origins and meanings of the terms "Hispanic" and "Latino" and arguing that "Latino" is the preferable term). However, I shall use the term used by the litigant or court where appropriate.

n4. [Garcia, 618 F.2d at 267.](#)

n5. [Id. at 269.](#)

n6. [Id. at 266.](#) Precisely what the offending Spanish words or phrases were does not appear in the decision - a remarkable omission by itself because uttering them got Mr. Garcia fired. See *infra* Part II.A.

n7. See [Garcia, 618 F.2d at 266.](#)

n8. See [Garcia v. Spun Steak Co., 998 F.2d 1480 \(9th Cir. 1993\).](#) The opinion does not specify Ms. Garcia's ancestry, other than to suggest she is "Hispanic."

n9. [Id. at 1483](#) ("Virtually all of the Spanish-speaking employees are Hispanic.").

n10. *Id.*

n11. See *id.*

n12. *Id.*

n13. *Id.*

n14. See *id.*

n15. See [id. at 1484.](#)

n16. Alvarez, *supra* note 1, at 7, 19, 168; cf. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, [100 Yale L.J. 1329 \(1991\)](#) (examining related problem of whether classification based on employee's accent is national origin discrimination). Professor Alvarez's book has provided useful illustrations for

some of my colleagues as well. See, e.g., Rachel F. Moran, Foreword: Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond, 8 *La Raza L.J.* 1, 19 (1995) (recounting story from Alvarez's book about how Papi became a U.S. citizen). Professor Alvarez has elaborated on the adventures of the de la Torre family, this time from the perspective of everyone other than Yolanda. See Julia Alvarez, *<exclx>Yo!* (1997).

n17. See, e.g., Alvarez, *supra* note 1, at 3-23 (describing Yolanda's antojos, or cravings, for things from her Dominican Republic homeland).

n18. *Id.* at 170.

n19. *Id.* at 171.

n20. See [Garcia v. Gloor](#), 618 F.2d 264 (5th Cir. 1980).

n21. See [Garcia v. Spun Steak Co.](#), 998 F.2d 1480 (9th Cir. 1993).

n22. The Ninth Circuit panel remanded to the district court to determine whether the company's English-only rule discriminated against monolingual Spanish-speakers. See [id.](#) at 1490.

n23. See [Garcia](#), 618 F.2d at 270; [Garcia](#), 998 F.2d at 1487-88.

n24. See [Espinoza v. Farah Mfg. Co.](#), 414 U.S. 86, 95 (1973).

n25. [42 U.S.C. 3604](#) (1994).

n26. The provision reads as follows:

It shall be unlawful -

(a) To refuse to sell or to rent after the making of a bona fide offer...a dwelling to any person because of...national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling...because of...national origin.

*Id.* [42 U.S.C. 3604](#)(a)-(b).

n27. See [Hernandez v. New York](#), 500 U.S. 352, 369 (1991).

n28. See [id.](#) at 356.

n29. [Id.](#) at 371.

n30. At least eighteen states have adopted "official English" laws, including Alabama, Ala. Const. amend. DIX; Arkansas, [Ark. Code Ann. 1-4-117](#) (Michie 1996); Arizona, Ariz. Const. art. XXVIII; California, Cal. Const. art. III, 6; Colorado, Colo. Const. art. II, 30a; Florida, Fla. Const. art. II, 9; Georgia, 1986 Ga. Laws 529; Hawaii, Haw. Const. art. XV, 4; Illinois, [5 Ill. Comp. Stat. Ann. 460/20](#) (West 1993); Indiana, [Ind. Code Ann. 1-2-10-1](#) (West Supp. 1996); Kentucky, [Ky. Rev. Stat. Ann. 2.013](#) (Michie 1992); Mississippi, [Miss. Code Ann. 3-3-31](#) (1991); Nebraska, Neb. Const. art. I, 27; North Carolina, [N.C. Gen. Stat. 145-12](#) (1995); North

Dakota, [N.D. Cent. Code 54-02-13](#) (1989); South Carolina, [S.C. Code Ann. 1-1-696](#) (Law Co-op. Supp. 1996); Tennessee, [Tenn. Code Ann. 4-1-404](#) (1991); and Virginia, [Va. Code Ann. 22.1-212.1](#) (Michie Supp. 1996).

n31. See [Yniguez v. Arizonans for Official English, 69 F.3d 920 \(9th Cir. 1995\)](#) (en banc), cert. granted sub nom. [Arizonans for Official English v. Arizona, 116 S. Ct. 1316 \(1996\)](#) (granting review of question whether Ariz. Const. art. XXVIII, requiring state government officials and employees to "act" in English only, unconstitutionally restricts free expression), vacated as moot, [117 S. Ct. 1055 \(1997\)](#). Yniguez marks the second time the Supreme Court has vacated as moot an important Ninth Circuit opinion by Judge Stephen Reinhardt finding an English-only rule to constitute national origin discrimination. See [Gutierrez v. Mun. Court, 838 F.2d 1031 \(9th Cir. 1988\)](#), vacated as moot, [409 U.S. 1016 \(1989\)](#). For an analysis of Yniguez, see Ivan A. Tamayo, "Official Language Legislation: Literal Silencing/Silenciando La Lengua," [13 Harv. BlackLetter J. 107 \(1997\)](#).

n32. (a) 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...national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...national origin.

[42 U.S.C. 2000e-2\(a\) \(1\)-\(2\)](#) (1994).

n33. See, e.g., [Griggs v. Duke Power Co., 401 U.S. 424, 430-31 \(1971\)](#) (holding that an employer's requirement, as applied to Black applicants, that prospective employees possess a high school diploma or pass an aptitude test when the practice is unrelated to job performance establishes a paradigmatic prima facie Title VII violation).

n34. See id. But even a Black plaintiff will face serious obstacles in attempting to make out a prima facie case if he presents a discrimination charge that falls outside this immediately recognizable paradigm. See, e.g., [Odima v. Westin Tucson Hotel, 53 F.3d 1484 \(9th Cir. 1995\)](#) (reversing grant of summary judgment against national origin discrimination challenge by qualified Nigerian-born Black, who spoke clear but accented English, for hotel's failure to promote him from laundry room to accounting department); [Rogers v. American Airlines, 527 F. Supp. 229 \(S.D.N.Y. 1981\)](#) (granting summary judgment against race and sex discrimination challenge by African-American woman to airline's rule prohibiting the wearing of braided hairstyles). For an insightful critique of judicial reliance on false dichotomies, including the purported contrast between "mutable" (e.g., hairstyle) and "immutable" (e.g., "race") characteristics in cases like Rogers, see Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, [1991 Duke L.J. 365, 370](#) ("Hair seems to be such a little thing. Yet it is the little things, the small everyday realities of life, that reveal the deepest recesses and values of a culture....").

n35. See, e.g., [Garcia v. Spun Steak Co., 13 F.3d 296, 298 \(9th Cir. 1993\)](#) (Reinhardt, J., dissenting) (denial of rehearing en banc); accord [McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 \(1950\)](#) (segregating Black public law school student by requiring him to sit only in portion of classroom reserved for his exclusive use violated the Equal Protection Clause).

n36. Neither this Essay nor my criticisms of the cases cited herein is primarily concerned with the employer's right, as protected by long established Title VII law, to adopt and enforce English-only rules demanded by business necessity, such as the need for safety during work hours. Instead, I focus here on challenges to such rules preventing the speaking of non-English languages, especially Spanish, between employees during working hours when there is no proof in the record that tangible harm to the employer's business either has been caused or could be caused by such activity. See, e.g., [Garcia v. Spun Steak Co., 13 F.3d 296, 302 & n.11 \(9th Cir. 1993\)](#) (Reinhardt, J., dissenting) (denial of rehearing en banc) ("No reasonable person would suggest that Title VII requires the operator of an English language radio station to permit a hired broadcaster to broadcast in whole or in part in another language, contrary to the station's policies."); see also Juan F. Perea, English-Only Rules and the Right to Speak One's Primary Language in the Workplace, 23 U. Mich. J.L. Reform 265, 299 (1990) ("[A] bilingual stage actor cast in the role of Hamlet would not have a right to deliver the soliloquy in Spanish... [The actor's use of Spanish] would constitute poor performance, and the employer could properly discipline or discharge a poorly performing employee.").

n37. See, e.g., Alfredo Mirande, "En la Tierra del Ciego, El Tuerto Es Rey" ("In the Land of the Blind, the One Eyed Person Is King"): Bilingualism as Disability, [26 N.M. L. Rev. 75 \(1996\)](#).

n38. See supra pp. 11-13. For purposes of writing this Essay, I have identified, labeled, and perhaps oversimplified these themes as I understand them to be present in the body of literature cited herein and in the thinking of some but not all of the panelists who presented papers at the First Latino/a Legal Critical Studies Conference held in May 1996 in La Jolla, California. I make no representations that the authors whose work I have cited would agree with my characterizations, understandings, or uses of these themes.

For a word of caution on the difficulty of undertaking "Latino" scholarship in general, see Kevin R. Johnson, Some Thoughts on the Future of Latino Legal Scholarship, 2 Harv.-Latino L. Rev. (forthcoming 1997) (offering "circumspection about the possibility of formulating a coherent 'Latino' vision," but contending there exists "a distinct need for the development of Latino legal scholarship").

n39. See, e.g., Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, [81 Calif. L. Rev. 1241, 1245-50 \(1993\)](#); Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 La Raza L.J. 42, 64-66 (1995); Moran, supra note 16, at 10-13, 16-19; Oquendo, supra note 3, at 99-102; Juan F. Perea, Ethnicity and the Constitution: Beyond the Black and White Binary Constitution, [36 Wm. & Mary L. Rev. 571, 571-72 \(1995\)](#); Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, [47 Stan. L. Rev. 957, 958-60 \(1995\)](#); William R. Tamayo, When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration, [2 Asian L.J. 1, 9-11 \(1995\)](#); see generally Ian F. Haney Lopez, White By Law: The Legal Construction of Race 63-80 (1996) (discussing how Latinos, Asians, and other minorities sought to characterize themselves as "Whites" rather than "Blacks" so as to enjoy the benefits of White persons codified in federal immigration laws).

n40. See, e.g., Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (rev. ed. 1995); Raphael J. Sonenshein, *Politics in Black and White: Race and Power in Los Angeles* (1993). Americans who get their news from television rather than from print media sampled this perspective recently when a popular network program hosted by journalist Ted Koppel broadcasted an otherwise insightful series on race relations. See *Nightline: America in Black and White* (ABC television broadcasts, Sept. 23-27, 1996).

n41. See *La Raza: Forgotten Americans* (Julian Samora ed., 1966); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, [1993 BYU L. Rev. 1139 \(1993\)](#); Juan F. Perea, *Los Olvidados: On the Making of an Invisible People*, [70 N.Y.U. L. Rev. 965 \(1995\)](#); see also George I. Sanchez, *Forgotten People* (1967) (recounting the history of New Mexicans).

n42. See George A. Martinez, *Legal Indeterminacy, Judicial Discretion, and the Mexican-American Litigation Experience: 1930-1980*, [27 U.C. Davis L. Rev. 555, 557-60 \(1994\)](#); see generally *The Politics of Law: A Progressive Critique* (David Kairys ed., 1982); Richard A. Posner, *The Problems of Jurisprudence* (1990); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, [94 Yale L.J. 1 \(1984\)](#); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, [96 Harv. L. Rev. 781 \(1983\)](#).

n43. Alvarez, *supra* note 1, at 72.

n44. See Moran, *supra* note 16, at 4, 10.

n45. See *id.* at 13, 16-17.

n46. Oquendo, *supra* note 3, at 99.

n47. *Id.* at 99-100.

n48. See Moran, *supra* note 16, at 10.

n49. My grandfather Frank X. Ruiz and my colleague J. Michael Echevarria, each bearing a phenotype much darker and more Indian than mine, have both related to me childhood stories in which Anglo youths welcomed them to a new neighborhood or school by calling out, "Hi, nigger!" *Conversation with Frank X. Ruiz* (July 1996); *Conversation with J. Michael Echevarria* (July 1992).

n50. Which is not to deny the essential role that race played in the establishment and stratification of Mexican colonial society following the Conquest. As the historian Ramon Eduardo Ruiz has put it:

The Spaniards...had established a pigmentocracy, with status based, to a large extent, on appearance. To be light of skin, a European characteristic, was a mark of honor and prestige; to be dark of skin, or *moreno*, was not.

Whites, whether peninsulares, criollos, or fair-skinned mestizos, were the "happy few." Without a close examination of racial pedigrees, they made up, at best, no more than one-fifth of the population. Of New Spain's 6.1 million inhabitants in 1810, just over 1 million were of the "white race."...

Given these statistics, and the value attached to being of Spanish descent, one's racial classification acquired major importance. Everyone wanted to be white...

Ramon Eduardo Ruiz, *Triumph and Tragedy: A History of the Mexican People* 119 (1992).

n51. See generally Richard Griswold del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict* (1990) (offering excellent in-depth study of the events leading up to and following the Treaty of Guadalupe Hidalgo, which transferred about one-half of sovereign Mexican lands to the U.S.).

n52. See Moran, *supra* note 16, at 17.

n53. See generally Griswold del Castillo, *supra* note 51 .

n54. See Perea, *supra* note 41, at 972; Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, [77 Minn. L. Rev. 269, 271-81 \(1992\)](#).

n55. See Bill Piatt, *Language on the Job* 4-5 (1993); Bill Piatt, *Only English? Law and Language Policy in the United States* 3-11 (1990) [hereinafter Piatt, *Only English?*].

n56. See Piatt, *Only English?*, *supra* note 55, at 11-12.

n57. [Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 \(9th Cir. 1993\)](#) (emphasis added).

n58. [Id. at 1487-88](#).

n59. See [id. at 1488](#).

n60. *Id.* (emphasis in original). Judge O'scannlain also explained that there is no disparate impact with respect to a privilege of employment "if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference." [Id. at 1487](#) (quoting [Garcia v. Gloor, 618 F.2d 264, 270 \(5th Cir. 1980\)](#)).

n61. Compare *id.* at 1486 (citing [Connecticut v. Teal, 457 U.S. 440, 446 \(1981\)](#)), with *id.* at 1488 (citing no authorities whatsoever). Teal does not use the modifier "significant" to describe adverse impact.

n62. In making this point, I understand Judge O'scannlain to be assigning to the term "significant" the meaning that most laypersons would assign to it - namely, "meaningful," "important," or "weighty." Webster's II New Riverside Dictionary 643 (1984). Nowhere does Title VII use the adjective "significant" in such a way. I recognize, however, that it is long-settled under Title VII that a plaintiff seeking to prove that a purportedly neutral employment policy discriminates against a protected class of persons must offer statistically significant evidence of its disparate impact, which is quite another matter altogether. See, e.g., Mack A. Player, *Federal Law of Employment Discrimination* 90 (3d ed. 1991).

n63. See *supra* note 32 (reprinting text of Title VII).

n64. See generally Jeanne M. Jorgensen, Comment, "English Only" in the Workplace and Title VII Disparate Impact: The Ninth Circuit's Misplaced Application of "Ability to Comply" Should be Rejected in Favor of the EEOC's Business Necessity Test, [25 Sw. U. L. Rev. 407 \(1996\)](#).

- n65. [Garcia v. Spun Steak Co., 998 F.2d 1480, 1488 \(9th Cir. 1993\).](#)
- n66. See [Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1494 \(9th Cir. 1995\)](#) (finding national origin discrimination against qualified Nigerian-born Black who spoke clear but accented English).
- n67. Cf. Haney Lopez, *supra* note 39, at 56-57, 61, 163 (discussing our law's difficulty addressing racial hierarchies imposed by socialization); see also *supra* note 34 (discussing [Rogers v. American Airlines, 527 F. Supp. 229 \(S.D.N.Y. 1981\)](#) as a non-traditional case, brought by an African-American woman, that failed).
- n68. [Garcia v. Gloor, 618 F.2d 264, 270 \(5th Cir. 1980\).](#)
- n69. [Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 \(9th Cir. 1987\).](#)
- n70. [Dimaranan v. Pomona Valley Hosp. Med. Ctr., 775 F. Supp. 338, 344 \(C.D. Cal. 1991\).](#) Curiously, Judge Rafeedie insisted that the hospital's no-Tagalog rule was not really an English-only rule. See [id. at 342-43.](#)
- n71. In light of the recent debate over whether teachers in the Oakland, California public school system ought to teach Black English, or "Ebonics," to their pupils, I take care not to overstate the point.
- n72. Oquendo, *supra* note 3, at 94; see also Deborah A. Ramirez, Excluded Voices: The Disenfranchisement of Ethnic Groups From Jury Service, [1993 Wis. L. Rev. 761, 762 n.5](#) (citing U.S. Bureau of the Census data that 75% of all Latinos speak Spanish).
- n73. Like many second-and third-generation Latinos, I did not learn Spanish in my parents' home, and the Spanish that I do speak I learned in high school or here and there around older relatives - as did my mother, who grew up in my bilingual, Mexican-born grandfather's home. Many of my contemporaries tell a similar story. See, e.g., Steven W. Bender, Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace, [45 Am. U. L. Rev. 1027, 1032 n.17 \(1996\)](#) ("Although I was born and raised in an East Los Angeles barrio, I spoke English at school and home and know only some Spanish."); Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 *La Raza L.J.* 42, 67-72 (1995) ("My mother speaks some Spanish but never taught the language to her sons.").
- n74. See Joshua A. Fishman, The Rise and Fall of the Ethnic Revival: Perspectives on Language and Ethnicity 71, 146 (1985); see also Perea, *supra* note 36, at 276-79 (summarizing views of sociologists and sociolinguists).
- n75. Fishman, *supra* note 74, at 4 (internal quotations omitted).
- n76. See Lawrence 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 (Joshua A. Fishman ed., 1972); see also Joshua Fishman, The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society, in 1 *Advances in the Sociology of Language* 217, 251 (Joshua Fishman ed., 1971) [hereinafter Fishman, *The Sociology of Language*] (stating that, among bilinguals, Spanish is primarily associated with family and friendship, which constitute the "intimacy value cluster").
- n77. Fishman, *The Sociology of Language*, *supra* note 76, at 219 (emphasis in original).
- n78. See, e.g., Nancy Faires Conklin & Margaret A. Lourie, *A Host of Tongues: Language Communities in the United States* 193 (1983).

n79. Id. at 192.

n80. See Alvarez, *supra* note 1, at 171.

n81. Oquendo, *supra* note 3, at 94.

n82. See, e.g., Juan F. Perea, Presentation to the First Latino/a Critical Legal Studies Conference in La Jolla, California (May 2-5, 1996). I was impressed by the courage of Professor Perea, who publicly shared the torments he suffered as the immigrant son of parents from Colombia and Costa Rica, when on U.S. schoolyards his classmates called him "greaser" and taunted him for speaking English with an accent.

n83. See, e.g., Jorge C. Rangel & Carlos Alcala, Project Report: De Jure Segregation of Chicanos in Texas Schools, 7 Harv. C.R.-C.L. L. Rev. 307, 310 n.20 (1972) ("Even today, some schools in Texas have what is referred to as Spanish detention, whereby a child caught speaking Spanish is usually held after school. Persistence by the child in using his native language may result in a spanking from the principal or even expulsion.").

n84. See, e.g., Kevin Baxter, Finding His Roots - and a Powerful Voice, L.A. Times, Apr. 19, 1996, at 81 (relating classroom experiences of author Victor Villaseca).

n85. Although the analogy is mine, I am indebted to Margaret Montoya for underscoring the frequency of this experience among Mexican Americans who grew up in Arizona, California, New Mexico, and Texas. See, e.g., [United States v. Texas, 506 F. Supp. 405, 412 \(E.D. Tex. 1981\)](#) ("Mexican-American children were prohibited from speaking their native language anywhere on school grounds. Those who violated the 'no Spanish' rule were severely punished."), *rev'd on other grounds*, [680 F.2d 356 \(5th Cir. 1982\)](#).

n86. See [Hernandez v. New York, 500 U.S. 352, 369 \(1991\)](#).

n87. See [Fullilove v. Klutznick, 448 U.S. 448, 454 \(1980\)](#).

n88. See, e.g., Rachel F. Moran, Bilingual Education as a Status Conflict, [75 Calif. L. Rev. 321, 345-55 \(1987\)](#) (analyzing controversy over bilingual education as representing status conflict between Latinos and Anglos). In saying this, however, I am mindful that the discourse of "essentialism" has many pitfalls. See, e.g., Francisco Valdes, Foreword: Under Construction: LatCrit Consciousness, Community, and Theory, [85 Calif. L. Rev. 1087, 1106-08 \(1997\)](#), [10 La Raza L.J. 1, 20-22 \(1997\)](#); see generally Angela P. Harris, Race and Essentialism in Feminist Legal Theory, [42 Stan. L. Rev. 581 \(1990\)](#) (criticizing essentialism for silencing important voices, including those of Black women).

n89. See Sandra Cisneros, Woman Hollering Creek 146, 153 (1991) (describing Flavio Munguia Galindo: "When Flavio accidentally hammered his thumb, he never yelled 'Ouch!' he said 'Aay!' The true test of a native Spanish speaker.").

n90. See Octavio Paz, The Labyrinth of Solitude 18 (Lysander Kemp trans., Grove Press ed. 1985) (describing reaction of author's "Mexican friend" who, upon visiting Berkeley, California, agreed that the town was "lovely" but that she "didn't belong" there because "even the birds speak English").

n91. See Earl Shorris, Latinos: A Biography of the People 3 (1992) (describing the demise of Jewish immigrant Bienvenida Petion, who dies "not of illness but of English" when she is confined to a nursing home where nobody else speaks Spanish).

n92. See James Harvey Domengeaux, Comment, Native-Born Acadians and the Equality Ideal, [46 La. L. Rev. 1151, 1167 \(1986\)](#) ("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.").

n93. Antoinette Sedillo Lopez, Introduction to Latino Language and Education: Communication and the Dream Deferred ix (Antoinette Sedillo Lopez ed., 1995).

n94. [Garcia v. Spun Steak Co.](#), 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting).

n95. [Garcia v. Gloor](#), 618 F.2d 264, 269 (5th Cir. 1980).

n96. See *id.*

n97. [Id. at 269-70](#) (emphases added).

n98. This value is also reflected in federal laws forbidding discrimination based on an individual's disability. See Americans with Disabilities Act of 1990, [42 U.S.C. 12101-12213](#) (1994).

n99. See [Garcia v. Gloor](#), 618 F.2d at 269 ("Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin....") (emphasis omitted) (quoting [Willingham v. Macon Tel. Publ'g Co.](#), 507 F.2d 1084, 1091 (5th Cir. 1975)).

n100. To 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. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice. No claim is made that Garcia and the other employees engaged in sales were unable to speak English. Indeed, it is conceded that all could do so and that this ability was an occupational qualification because of the requirement that they wait on customers who spoke only English or who used that language by choice.

*Id.* at 270.

n101. See Adolph M. Koven & Susan L. Smith, Just Cause: The Seven Tests 245 (Donald Farwell ed., rev. ed. 1992) (noting that insubordination is usually considered just cause supporting termination).

n102. [Garcia v. Gloor](#), 618 F.2d 264, 271 (5th Cir. 1980).

n103. [Id. at 268](#)

n104. [Jurado v. Eleven-Fifty Corp.](#), 813 F.2d 1406, 1411 (9th Cir. 1987).

n105. [Dimaranan v. Pomona Valley Hosp. Med. Ctr.](#), 775 F. Supp. 338, 344 (C.D. Cal. 1991).

n106. See [Garcia v. Gloor](#), 618 F.2d at 269 (asserting that, "save for religion," Title VII bans discrimination based on immutable characteristics or the exercise of fundamental rights).

n107. We need not here explore the extent to which the EEO Act forbids discrimination based on characteristics that are not immutable. For the purpose of this opinion, we accept the thesis that there may be a disparate impact based on some mutable conditions, such as where an employee lives. Religion is, of course, a forbidden criterion, even though a matter of individual choice.

[Id. at 270 n.6.](#)

n108. An increasingly dubious assumption, especially in light of the literature making the persuasive case that so much of one's ethnic, racial, and even sexual identity is a matter of personal choice as well as social construction. See works cited *infra* notes 112-114.

n109. See discussion *infra* Part III (discussing legal indeterminacy under Title VII).

n110. See, e.g., Haney Lopez, *supra* note 39, at 79-80, 102-07; Mary C. Waters, *Ethnic Options: Choosing Identities* 166 (1990); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, [29 Harv. C.R.-C.L. L. Rev. 1, 47 \(1994\)](#).

n111. See, e.g., Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, [43 UCLA L. Rev. 263, 283-84 \(1995\)](#) (discussing how peoples are assigned to "Yes or No" categories to identify labels, including homosexual or heterosexual). For an interesting discussion of the latter, see generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation"* in *Euro-American Law and Society*, [83 Calif. L. Rev. 1 \(1995\)](#).

n112. See Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 *Berkeley Women's L.J.* 142, 151-52 (1996) (discussing racial hierarchies and multiracial issues among Latinos); Kevin R. Johnson, "Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience, [85 Calif. L. Rev. 1259, 1262-63 \(1997\)](#), [10 La Raza L.J. 173, 176-77 \(1997\)](#) (relating mixed Anglo and Mexican-American heritage of author and his family to same among greater Latino population).

n113. See Oquendo, *supra* note 3, at 95 (recalling author's reaction to the query on the Scholastic Aptitude Test ("SAT") that he identify his heritage by checking a single appropriate box).

n114. See Ramirez, *supra* note 39, at 964-69 (discussing how commonly the heritage of Latinos and other minorities is found to be multiracial).

n115. Juan Perea has gone a step further by making the persuasive case, supported by linguists' research, that an adult's primary language ability is practically immutable. See Perea, *supra* note 36, at 279-87.

n116. Paz, *supra* note 90, at 18.

n117. Alvarez, *supra* note 1, at 88-89.

n118. *Id.* at 89.

n119. *Id.*

n120. For the hundredth time, I cursed my immigrant origins. If only I too had been born in Connecticut or Virginia, I too would understand the jokes everyone was making on the last two digits of the year, 1969; I too would be having sex and smoking dope; I too would have suntanned parents who took me skiing in Colorado over Christmas break, and I would say things like "no shit," without feeling like I was imitating someone else.

*Id.* at 94-95.

n121. See *id.* at 72.

n122. *Id.* at 170

n123. See, e.g., Johnson, *supra* note 38, at 12-13 ("The predominance of seeing race issues as black/white conflict contributed to the call for the first annual Lat/Crit conference, where a group of Latino/as, as well as other minorities and kindred spirits thinking critically about issues of race, came together to explore changing the tenor of the dialogue.").

n124. See, e.g., Perea, *supra* note 41, at 970 ("When I travel, I spend a lot of time in bookstores searching for books on Latino life and history. It is hard to find such books.").

n125. See, e.g., Moran, *supra* note 16, at 10 (Although the Black/White race paradigm "has elevated race and ethnicity to a position of central importance in defining equality of opportunity...race and ethnicity have proven to be somewhat artificial organizing principles for Latinos because they have different racial origins and come from a range of countries."); Ramirez, *supra* note 39, at 958 n.5 ("When courts and legislatures first created race-conscious remedies in the 1960s, the United States was seen as a black and white society....Blacks were, for all practical purposes, the only racial minority group of significant size.").

n126. See, e.g., Griswold del Castillo, *supra* note 51, at 113 (discussing an influential college textbook that emphasized political and military aspects of the Mexican-American War and Treaty of Guadalupe Hidalgo, but ignored their effects on "the 100,000 Mexicans citizens annexed in the bargain" who "remained invisible in this national history.").

n127. See, e.g., Johnson, *supra* note 38, at 9 ("Los Angeles' [Eastside], the area east of downtown - from East Los Angeles to Montebello to the San Gabriel Valley - where a great many Latinos live, simply does not exist in the eyes of the regional newspaper of record, the Los Angeles Times.").

n128. See Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-first Century*, 8 *La Raza L.J.* 42, 64 (1995) ("Let us return briefly to the disturbances in South Central Los Angeles in the spring 1992. In the reconstruction process, Latino leaders complained that government ignored the impact of the violence on the Latino community.").

n129. See, e.g., Johnson, *supra* note 38, at 9 ("When East Los Angeles is mentioned in the news, it generally is a story about crime, a shooting, robbery, gangs, and the like."); see also Johnson, *supra* note 41, at 1144-47.

n130. See Johnson, *supra* note 41, at 1139.

n131. See Perea, *supra* note 41, at 966.

n132. See *id.*

n133. See Johnson, *supra* note 38, at 13 ("The long history of subordination of Asian Americans, Mexican Americans, Native Americans, and other groups in the United States demonstrates the unfortunate richness of subordination American style."); see generally Ronald Takaki, *A Different Mirror: A History of Multicultural America* (1993).

n134. See, e.g., Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, [32 \*Harv. C.R.-C.L. L. Rev.\* 275, 296 \(1997\)](#) (discussing pressure on Latinos to assimilate); Johnson, *supra* note 39, at 79 (collecting statements about why Latinos should give up Spanish and adopt English).

n135. See, e.g., Arthur M. Schlesinger, Jr., *The Disuniting of America* 107-10 (1992) (criticizing bilingual education spurred by a "flood of immigration from Spanish-speaking countries"); see also Peter Brimelow, *Alien Nation: Common Sense About America's*

Immigration Disaster 272 (1995) (identifying "bright spots" in Hispanics' chances for assimilation).

n136. See, e.g., George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective* 19 *UCLA Chicano-Latino L. Rev.* (forthcoming 1998) (paper prepared for Yale Law School's 10th Anniversary Critical Race Theory Conference); see also Sylvia Lazos Vargas, *Coming to Terms with Diversity: A Trans-disciplinary Critique of Homogeneity as Cultural Ideology* 72 *Tul. L. R.* (forthcoming 1998) (criticizing law and legal institutions for elevating homogeneity over diversity).

n137. "Where's the Spanish?"

n138. These ten cases actually produced 16 published opinions, of which only Justice Kennedy's opinion for the Supreme Court in *Hernandez* contains even a word of the offending language.

n139. See [Gutierrez v. Municipal Court](#), 838 F.2d 1031 (9th Cir. 1988); [Flores v. Hartford Police Dep't](#), 25 *Fair Empl. Prac. Cas. (BNA)* 180 (D. Conn. 1981); [Saucedo v. Brothers Well Serv., Inc.](#), 464 F. Supp. 919 (S.D. Tex. 1979); see also [Hernandez v. Region Nine Housing Corp.](#), 670 A.2d 95 (App. Div.), rev'd, 684 A.2d 1385 (1996) (allowing challenge to plaintiff's termination for speaking Spanish in the apartment lobby where he worked despite EEOC's having issued adverse administrative determination).

n140. See [Garcia v. Spun Steak Co.](#), 998 F.2d 1480 (9th Cir. 1993); [Garcia v. Gloor](#), 609 F.2d 156 (5th Cir. 1980); [Dimaranan v. Pomona Valley Hosp. Med. Ctr.](#), 775 F. Supp. 338 (C.D. Cal. 1991); [Jurado v. Eleven-Fifty Corp.](#), 630 F. Supp. 569 (C.D. Cal. 1986), aff'd, 813 F.2d 1406 (9th Cir. 1987); see also [Long v. First Union Corp. of Va., No. 95-1986](#), 1996 U.S. App. LEXIS 12431 (4th Cir. May 29, 1996) (rejecting challenge to alleged discriminatory application of bank's English-only rule); [De la Cruz v. New York City Human Resources Admin. DSS](#), 884 F. Supp. 112 (S.D.N.Y. 1995) (rejecting challenge to plaintiff's transfer to another department despite the charge that a supervisor had told plaintiff to "shut up" when she heard him speaking Spanish), aff'd, 82 F.3d 16 (2d Cir. 1996).

n141. Compare [Yu Cong Eng v. Trinidad](#), 271 U.S. 500 (1926) (sustaining free expression challenge to Philippines Island law outlawing the keeping of business records in any language except English, Spanish, or a Filipino dialect), [Meyer v. Nebraska](#), 262 U.S. 390 (1923) (same), [Farrington v. Tokushige](#), 11 F.2d 710 (9th Cir. 1926), aff'd, 273 U.S. 284 (1927) (sustaining free expression challenge to state law strictly regulating Japanese language schools), [Hernandez v. Erlenbusch](#), 368 F. Supp. 752 (D. Or. 1993) (sustaining 42 U.S.C. 1981 challenge to English-only rule in public tavern), [Yniguez v. Mofford](#), 730 F. Supp. 309 (D. Ariz. 1990), aff'd sub nom. [Yniguez v. Arizonans for Official English](#), 42 F.3d 1217 (9th Cir. 1994), reh'g granted, 53 F.3d 1084, aff'd en banc, 69 F.3d 920 (9th Cir. 1995), vacated as moot, 117 S. Ct. 1055 (1997) (sustaining First Amendment challenge to English-only rule for state government officials and employees), [Asian Am. Bus. Group v. City of Pomona](#), 716 F. Supp. 1328 (C.D. Cal. 1989) (enjoining enforcement of municipal ordinance requiring business sign with foreign alphabetical letters to devote at least 50% of sign space to English), and [Bartels v. Iowa](#), 132 N.E. 20 (Ohio 1921), rev'd, 262 U.S. 404 (1923) (sustaining free expression challenge to statute forbidding teaching of German and other non-English languages to school children), with [Vazquez v. McAllen Bag & Supply Co.](#), 660 F.2d 686 (5th Cir. Unit A 1981) (rejecting 42 U.S.C. 1981 challenge to English-only rule for hiring truck drivers), and [Hernandez v. State](#), 528 N.Y.S.2d 625 (1986) (rejecting equal protection challenge to listen-to-English-translation-only rule for bilingual Latinos called to jury duty in criminal cases in which official interpreter relates testimony of Spanish-speaking witnesses), aff'd, 75 N.Y.2d 350, 552 N.E.2d 621 (1990).

aff'd sub nom. [Hernandez v. New York, 500 U.S. 352, 369 \(1991\)](#). Although in Hernandez Justice Kennedy omitted the Spanish words or phrases that might have been at issue in that case, he did, in a footnote, report the prosecutor's citation of [United States v. Perez, 658 F.2d 654 \(9th Cir. 1981\)](#), to illustrate "the sort of problems that may arise where a juror fails to accept the official translation of foreign-language testimony":

DOROTHY KIM (JUROR NO. 8): Your honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado [sic]. You say that is a bar.

THE COURT: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me -

DOROTHY KIM: I understood it to be a restroom. I could better believe that they would meet in a restroom rather than a public bar if he is undercover.

THE COURT: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the -

DOROTHY KIM: I understand the word La Vado [sic] - I thought it meant restroom. She translates it as bar.

MS. IANZITI: In the first place, jurors are not to listen to the Spanish but to the English. I am a certified court interpreter.

DOROTHY KIM: You're an idiot.

[Hernandez, 500 U.S. at 360-61 n.3](#) (quoting [Perez, 658 F.2d at 663](#)). Upon further questioning, Justice Kennedy reported, "the witness indicated that none of the conversations in issue occurred in the restroom. The juror later explained that she had said 'it's an idiom' rather than 'you're an idiot,' but she was nevertheless dismissed from the jury." *Id.* at 361 (quoting [Perez, 658 F.2d at 663](#)) (citation omitted).

n142. See supra Part II.A.

n143. [Garcia v. Spun Steak, 998 F.2d at 1483](#).

n144. Of course, an employer should take steps to combat such hostile conduct even if the harassment and insults are made in a language the victims can understand. Such conduct often takes the form of racial or ethnic slurs. See, e.g., Richard Delgado, *Words That Wound: A Tort*

Action for Racial Insults, Epithets, and Name Calling, 17 Harv. C.R.-C.L. L. Rev. 133, 146 (1982) (contending racial insults cause psychological harm because they evoke and intensify past "stigmatization, labeling, and disrespectful treatment").

n145. See [Garcia v. Spun Steak](#), 998 F.2d at 1487.

n146. See *id.*

n147. In fact, Judge O'scannlain's point is irrelevant. Title VII clearly outlaws discrimination against any individual "with respect to...privileges of employment" based on national origin. [42 U.S.C 2000e-2\(a\) \(1\)](#) (1994) (emphasis added).

n148. See [De La Cruz v. New York City Human Resources Admin. DSS](#), 82 F.3d 16, 19 (2d Cir. 1996).

n149. [Jurado v. Eleven-Fifty Corp.](#), 813 F.2d 1406, 1408, 1411 (9th Cir. 1987).

n150. [Saucedo v. Brothers Well Serv., Inc.](#), 464 F. Supp. 919, 921 (S.D. Tex. 1979).

n151. *Id.* The words were probably, "<qmarkx>Donde va?" ("Where do you want it?").

n152. [Id. at 922](#).

n153. [Garcia v. Spun Steak Co.](#), 998 F.2d 1480, 1487 (9th Cir. 1993).

n154. *Id.* (emphasis added).

n155. See [Chaplinsky v. New Hampshire](#), 315 U.S. 568, 572 (1942). But see [Cohen v. California](#), 403 U.S. 15, 16 (1971) (reversing conviction under California "offensive conduct" law for wearing jacket emblazoned with inscription "Fuck the Draft"); [Yniguez v. Arizonans for Official English](#), 69 F.3d 920, 935 (9th Cir. 1995) (en banc) ("Under Article XXVIII, of course, the state [of Arizona] is not singling out one word for repression, but rather entire vocabularies.").

n156. See [Yniguez](#), 69 F.3d at 935 ("The languages of Cervantes, Proust, Tolstoy, and Lao-Tze, among others, can hardly be described as "scurrilous.""). As someone who specializes in labor and employment issues, I find the solution to the alleged problem of bilingual employees misbehaving in their native tongues to be quite simple: hire bilingual supervisors. This seems to me to be not only more desirable than banning non-English languages but also necessary to manage the workforce.

n157. John O. West, *Mexican American Folklore: Legends, Songs, Festivals, Proverbs, Crafts, Tales of Saints, of Revolutionaries, and More* 105 (1988) (emphasis added).

n158. [Long v. First Union Corp. of Va.](#), 1996 U.S. App. LEXIS 12431, at \*3 n.5 (4th Cir. May 29, 1996). The manager also called one of the plaintiffs, who refused to acknowledge the memo by signing it, a "troublemaker." *Id.* at \*3.

n159. [Dimaranan v. Pomona Valley Hosp. Med. Ctr.](#), 775 F. Supp. 338, 341 (C.D. Cal. 1991).

n160. See [Yniguez v. Arizonans for Official English](#), 69 F.3d 920, 936, 943 (9th Cir. 1995) (en banc), vacated as moot sub nom., [Arizonans for Official English v. Arizona](#), 117 S. Ct. 1055 (1997).

n161. See, e.g., [Harris v. Forklift Sys., Inc.](#), 510 U.S. 17, 19 (1994) (upholding hostile work environment claim of female plaintiff whose employer told her, "You're just a dumb woman, what do you know" and "Let's go to the Holiday Inn to negotiate [your] raise."). For a more recent example, see *Delph v. Dr. Pepper Bottling Co.*, No. 1:94-CV-71 (E.D. Mo. Sept. 19,

1996), reported in 1996 Daily Lab. Rep. (BNA) No. 185, at p. D-12 (Sept. 24, 1996) (awarding Black plaintiff, whose supervisor frequently called him "nigger," damages of \$ 225,000 in hostile racial working environment case). Even Judge Reinhardt, whose authorship of the majority opinions in Gutierrez and Yniguez and whose dissent from denial of rehearing and suggestion for en banc in Garcia v. Spun Steak Co. stand out as especially sensitive to Latino language issues, failed to report what Spanish words and phrases offended. But making an analogy to the speaker's protected use of a well-known but controversial idiom, he did not hesitate to defend the bilingual plaintiff's choice of the Spanish language to communicate with bilingual members of the public:

The Supreme Court recognized the First Amendment status of choice of language in somewhat different circumstances when it ratified a speaker's freedom to say "fuck the draft" rather than "I strongly oppose the draft." Like the proponents of Article XXVIII, the state in Cohen had described Cohen's choice of language as conduct equivalent to burning a draft card [which is prohibited as unprotected conduct rather than free speech]. The Court unequivocally rejected the comparison, stating that Cohen's conviction rested "solely upon speech."

[Yniguez, 69 F.3d at 935](#) (Reinhardt, J.) (citations omitted).

n162. Perea, *supra* note 41, at 965. Conversely, Professor Perea has speculated, it is because Spanish also frightens many Latinos, "for it proclaims their identity as Latinos, for all to hear." *Id.* The price for becoming so identified may include the loss of a job, scapegoating, or simply invisibility as an outsider - a price that, for some Latinos, may be simply too high to pay. See *id.*

n163. Of course, I must be among the first to concede that having a traditional Spanish surname is not the definitive marker of a Latino; in my own case, I have my father's Anglo surname. Indeed, in my own extended Mexican-American family, many surnames - such as Adam, Carr, and Mallett, to mention but a few - would seem to belie our family's heritage just as others - such as Ruiz, Nevarez, and Zamora - would seem to confirm it.

n164. See [Garcia v. Gloor, 618 F.2d 264, 266 \(5th Cir. 1980\)](#); see also, e.g., [Yniguez, 69 F.3d at 924](#) (involving plaintiff Maria-Kelley Yniguez, a medical malpractice claims administrator who, prior to the enactment of Arizona's English-only law, communicated in Spanish with monolingual Spanish-speaking claimants and in a combination of Spanish and English with bilingual claimants); [Gutierrez v. Municipal Court, 838 F.2d 1031, 1036 \(1988\)](#) (in addition to her other duties, plaintiff Alva Gutierrez, a bilingual deputy court clerk with the Los Angeles Municipal Court, translated for the non-English-speaking public).

n165. See [Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919, 920 \(S.D. Tex. 1979\)](#) (identifying one of owners of employer as Jarrel Nohavistza); cf. [Odima v. Westin Tucson Hotel, 53 F.3d 1484 \(9th Cir. 1995\)](#) (identifying laundry room supervisor of Nigerian-born plaintiff, who brought accent discrimination claim against hotel, as Larry Garcia).

n166. A Spaniard born in the New World. See, e.g., Juan Gomez-Quiñones, *Mexican-American Labor, 1790-1990* at 19 (1994); Ramon Eduardo Ruiz, *Triumphs and Tragedy: A History of the Mexican People* 54 (1992).

n167. According to historian Juan Gomez-Quiñones:

The group consciousness and identity of this population [Mexicans] developed in a manner consistent with the fact that they were neither Indian nor Spaniard. Regardless of the attitudes

of the criollos (American-born Spaniards), the mestizos' consciousness and numbers were to be important in the future. Mestizaje mitigated distinct ethnic divisions. Furthermore, although criollo, mestizo, negro, and indio all held prejudices against each other, they all suffered prejudice from a common source - the Spaniards - for the common reason of colonization.

Gomez-Quinones, *supra* note 166, at 19.

n168. See *id.* at 39, 45. Ken Burns' recent six-part documentary for public television about the settlement of the American West illustrated the extent to which Mexican descendants of the Spaniards and others who first settled the California, New Mexico, and Texas territories were treated as "foreigners" and displaced from their centuries-old homelands by American Anglos in the mid- to late-nineteenth century. *The West* (PBS broadcasts Sept. 15-18 & 23-24, 1996).

n169. Gomez-Quinones, *supra* note 166, at 3.

n170. "The Boss." Even my mother, an easygoing Mexican-American woman who prides herself on treating employees with respect and dignity, says the Latino workers she has managed in various distribution warehouses tend to refer to her as La Patrona. Conversation with Sylvia Ruiz Cameron (July, 1991).

n171. A chapter of one book, entitled "The Anglo Perception of the Mexican Worker," contains quotation after quotation from employers who alternately praise and scorn Mexicans and Mexican Americans for their willingness to work under difficult conditions. See Mark Reisler, *By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900-1940* at 127-50 (1976).

n172. Gomez-Quinones, *supra* note 166, at 17 (quoting Walter Colton).

n173. *Id.* at 3 (quoting unidentified grower).

n174. Reisler, *supra* note 171, at 132 (citations omitted).

n175. Paz, *supra* note 90, at 70.

n176. See *id.* at 71.

n177. *Id.* at 70. For a feminist perspective on the wearing of masks by Latinas, see Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, [17 Harv. Women's L.J. 185, 193 \(1994\)](#).

n178. [Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919, 922 \(S.D. Tex. 1979\)](#). What is remarkable about Judge Cowan's statement in Saucedo is not that he thought it probative to describe Perez as "fairly well educated" but that he thought it necessary to say Perez was a "fairly well-educated Mexican-American" - suggesting there was something unusual about discovering a Chicano who actually had attended a postsecondary institution other than a trade school. It is doubtful that Judge Cowan would have bothered to describe in quite the same way an Anglo witness cast in Perez's role (*viz.*, "Perry is a fairly well educated Anglo").

The remark reminds me of a recent incident in my own home involving my 80-year-old grandfather, who was born in Aguascalientes, Mexico, and entered the U.S. when he was 3. My abuelo came to live with us during a period when his advancing age made it difficult for my grandmother to take care of him by herself. Like most folks in my neighborhood, our family pays a Latino man who works for himself to mow the lawn and trim the shrubs once a week. One day, an elderly but vigorous Anglo man came to the door to promote his landscaping business. I had answered the door when my abuelo came shuffling up behind me. The man was explaining how thorough his work would be when my abuelo interrupted, "Will you do all the

work yourself?" "Heavens no," came the reply. "I have a couple of Mexican fellas do it." I put my arm around my grandfather and said: "You know, we're a couple of Mexican fellas." Without batting an eye, the man added: "They're very hard workers, the Mexican fellas, they just need some guidance. I show them how they can make more money working for me." Now, when I help my abuelo with things like getting in the car, he winks at me and says, "Sometimes, I just need some guidance." Our parents and grandparents often have important stories to tell. See, e.g., Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicles as Racial History*, 34 *St. Louis U. L.J.* 425 (1990).

The employer in Saucedo did not put so fine a spin on things. Steve Perez, the protesting employee, was beaten by Cleighton E. ("Doc") Holliday, an Anglo who "simply did not tolerate 'Mesican' talk" at work, for daring to complain. See [Saucedo, 464 F. Supp. at 921](#). (The decision suggests but does not say that Holliday was a foreman.) Even though the employer's owner witnessed the assault, Holliday was not so much as disciplined. See [id. at 922](#). Yet John Saucedo, the employee who violated the English-only rule by asking Perez "in two words of Spanish" where to put a heavy part, was fired for his transgression. See [id. at 921](#).

n179. [Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1410 \(9th Cir. 1987\)](#). The employer's decision was curious for two more reasons: first, because a prior station program director actually had encouraged Valentine Jurado, the disc jockey, to speak some Spanish on the air in order to attract a Hispanic audience; and second, because the station continued to permit Rick Dees, an Anglo disc jockey, to use some Spanish on his program. [Id. at 1408, 1410](#).

n180. [Long v. First Union Corp. of Va., No. 95-1986, 1996 U.S. App. LEXIS 12431](#), at \*7 n.6 (4th Cir. May 29, 1996).

n181. Paz, *supra* note 90, at 44. Paz elaborated with the plot summary of a morality play contrasting an outgoing patriarch named "Don No One" with his self-effacing son called "Nobody":

Don No One, who is Nobody's Spanish father, is able, well fed, well respected; he has a bank account and speaks in a loud, self-assured voice. Don No One fills the world with his empty, garrulous presence....He either holds office or wields influence, and his manner of not-being is aggressive and conceited. Nobody is quiet, timid and resigned. He is also intelligent and sensitive. He always smiles. He always waits. When he wants to say something, he meets a wall of silence; when he pleads or weeps or cries out, his gestures and cries are lost in the emptiness created by Don No One's interminable chatter...

It would be a mistake to believe that others prevent [Nobody] from existing. They simply dissimulate his existence and behave as if he did not exist. They nullify him, cancel him out, turn him into nothingness. It is futile for Nobody to talk, to publish books, to paint pictures, to stand on his head. He is the name we always and inevitably forget, the eternal absentee, the guest we never invite, the emptiness we can never fill.

*Id.* at 45.

n182. Alvarez, *supra* note 1, at 11.

n183. H.L.A. Hart, *The Concept of Law* 132 (1961).

n184. See, e.g., Jerome Frank, *Law and the Modern Mind* 7 (1936) ("In fields other than law there is today a willingness to accept probabilities and to forego the hope of finding the absolute certain....Since legal tentativeness is inevitable and often socially desirable, it should not be considered an avoidable evil."); Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* 122-23 (1962) ("When the urges of justice and policy are clear enough, [judges] can find a distinction to avoid or whittle almost any precedent....The precedents are capable of being shaped as they are followed or applied, so as to bring judgment out on one side or the other."); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 833 (1935) ("The really creative legal thinkers of the future will not devote themselves...to the taxonomy of legal concepts and to the systematic explication of principles of 'justice' and 'reason,' buttressed by 'correct' cases. Great legal thought will more and more look behind the pretty array of 'correct' cases to the actual facts of judicial behavior."); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 *Harv. L. Rev.* 697, 707 (1931) ("Radical neo-realism seems to deny that there are rules or principles or conceptions or doctrines at all, because all judicial action, or at times much judicial action, can not be referred to them; because there is no definite determination whereby we may be absolutely assured that judicial action would proceed on the basis of one rather than another of two competing principles....").

n185. See, e.g., Richard A. Posner, *The Problems of Jurisprudence* 23 (1990) ("The American legal tradition is now so rich, variegated, conflicted, and ambivalent that a strand of it can easily be found to support either side in difficult cases.").

n186. See, e.g., David Kairys, *The Politics of Law: A Progressive Critique* 140, 160-61 (1982) ("Since precedents and reasoning can be distinguished, modified, or discarded, they do not require any particular rule or result....The law merely provides a variety of bases for justifying choices made on other grounds."); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, [96 \*Harv. L. Rev.\* 781, 819 \(1983\)](#) (arguing prior decisions cannot restrain present decisions because "it turns out that the limits of craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants.").

n187. See Martinez, *supra* note 42, at 558.

n188. See *id.* at 559, 573, 584, 606, 611, 618; see also George A. Martinez, *Some Thoughts on Law and Interpretation*, [50 \*SMU L. Rev.\* 1651, 1653-62 \(1997\)](#) (discussing distinctive role of interpretation in law from a philosophical perspective).

n189. *Id.* at 583.

n190. *Id.* at 560.

n191. [42 \*U.S.C.\* 2000e-2\(a\) \(1\) \(1994\)](#).

n192. [Espinoza v. Farah Mfg. Co.](#), [414 \*U.S.\* 86, 89 \(1973\)](#).

n193. 110 *Cong. Rec.* 2549 (1964) (remarks of Rep. Roosevelt). Tellingly, the few examples offered by Congressman Roosevelt were of persons of European origin only.

n194. H.R. Rep. No. 88-7152, at 804 (1963) (emphasis added).

n195. See H.R. Rep. No. 88-914, at 87 (1963).

n196. See [Espinoza](#), [414 \*U.S.\* at 89](#).

n197. See *supra* Part I.A.

n198. See [Garcia v. Gloor](#), [618 \*F.2d\* 264, 269-71 \(5th Cir. 1980\)](#) (Garcia I).

n199. [Id. at 271](#) (emphasis added).

n200. See [Garcia v. Spun Steak Co., 13 F.3d 296, 299 n.5 \(1993\)](#) (Reinhardt, J., dissenting from denial of rehearing en banc) ("In fact, the Guideline at issue here was enacted shortly after [the lower court decided the case], probably in order to reserve the effect of that decision.").

n201. [45 Fed. Reg. 85, 636 \(1980\)](#) (codified at [29 C.F.R. 1606.7](#) (1996)). In pertinent part, the Guidelines provide:

(a) When applied at all times. A rule requiring employees to speak English only at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. 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. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) When applied only at certain times. An 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\(a\)-\(b\)](#).

n202. See [29 C.F.R. 1606.7\(a\)](#) n.7 (1996) (citing EEOC decisions).

n203. See *id.* 1606.7(a).

n204. See *id.* 1606.7(b). The six reasons most commonly proffered by employers to defend English-only rules out of business necessity are (1) ensuring worker safety, (2) assuring effective supervision, (3) increasing productivity and efficiency, (4) promoting worker harmony, (5) improving customer relations and satisfaction, and (6) improving employees' English proficiency. See Jorgensen, *supra* note 64, at 421-27 (explaining application of same). But see Perea, *supra* note 36, at 302-17 (critiquing application of same).

n205. [813 F.2d 1406 \(9th Cir. 1987\)](#).

n206. [838 F.2d 1031 \(9th Cir. 1988\)](#), vacated as moot, [490 U.S. 1016 \(1989\)](#).

n207. [998 F.2d 1480 \(9th Cir. 1993\)](#).

n208. [813 F.2d at 1408](#).

n209. See *supra* Part I.A. (discussing court's references to bilingual Jurado's "ability to conform" to the English-only rule); see also [Jurado, 813 F.2d at 1411](#).

n210. [Jurado, 813 F.2d at 1409](#).

n211. [Id. at 1410](#).

n212. See *id.*

n213. *Id.*

n214. Jurado made a strong case that the ratings defense was a smokescreen for racial animus. For example, a consultant wrote that the station was "preoccupied with ethnicity to a frightening degree." And the program director thought Jurado's show was "too ethnic" and claimed that the station "did not need the Mexicans or the blacks to win in L.A." [Id. at 1410.](#)

n215. See [id. at 1411](#) (citing [29 C.F.R. 1606.7](#)).

n216. See [Gutierrez v. Municipal Court, 838 F.2d 1031, 1041 \(9th Cir. 1988\)](#) (characterizing Jurado as such).

n217. See [id. at 1036.](#)

n218. See [id. at 1039 n.7](#) (Reinhardt, J.) (citing [Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 \(1973\)](#)).

n219. *Id.* at 1040.

n220. See *id.* at 1041.

n221. [490 U.S. 1016 \(1989\)](#).

n222. [Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 \(9th Cir. 1993\)](#); see also 13A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 3533.10 (1984) (vacating court of appeals judgment as moot vacates opinion's status as binding precedent but not its persuasiveness); accord [Garcia v. Spun Steak Co., 13 F.3d 296, 301 \(9th Cir. 1993\)](#) (Reinhardt, J., dissenting from denial of rehearing en banc) (citing same).

n223. See [Garcia v. Spun Steak, 998 F.2d at 1487, 1489 \(9th Cir. 1993\)](#) (citing [Garcia v. Gloor, 618 F.2d 264 \(5th Cir. 1980\)](#)).

n224. See supra Part I.A-B.

n225. [Garcia v. Spun Steak, 998 F.2d at 1488.](#)

n226. See [id. at 1487-88.](#)

n227. See [id. at 1487 n.1](#) ("The Spanish-speaking employees rely on the reasoning in Gutierrez...which held that English-only policies adversely impact Spanish-speaking employees. The case has no precedential authority, however, because it was vacated as moot by the Supreme Court. We are in no way bound by its reasoning.") (citations omitted).

n228. [Id. at 1489.](#)

n229. *Id.* (quoting [Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 \(1973\)](#)).

n230. See *id.* at 1490.

n231. *Id.* at 1489.

n232. See [Garcia v. Spun Steak Co., 13 F.3d 296 \(9th Cir. 1993\)](#) (Reinhardt, J., dissenting from denial of rehearing en banc).

n233. See [id. at 299-301.](#)

n234. See [id. at 301.](#)

n235. See *id.* (citing 13A Charles A. Wright Jr. & Arthur R. Miller, Federal Practice and Procedure 3533.10 (1984)).

n236. See [id. at 301 n.10.](#) (quoting [Garcia v. Gloor, 618 F.2d 264, 268 n.1 \(5th Cir. 1980\)](#)) (The EEOC "has adopted neither a regulation stating a standard for testing such language rules nor

any general policy, presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.").

n237. *Id.* at 229.

n238. *Id.* at 300.

n239. *Id.* at 300 & n.7.

n240. See Martinez, *supra* note 42, at 618.

n241. Alvarez, *supra* note 1, at 13.

n242. West, *supra* note 157, at 92 (reprinting popular version of this tale).