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ENGLISH-ONLY OR ETHNOCENTRISM? TOWARD A SOCIOLOGICAL UNDERSTANDING OF ENGLISH-ONLY CASE LAW

Ian Peacock and Pablo Tapia¹

I. INTRODUCTION

Héctor García was a second generation Mexican-American who grew up speaking Spanish in his home. García was hired by Gloor Lumber and Supply as a salesman, in part because of his bilingual abilities.² The store, located in Brownsville, Texas, served a large Hispanic demographic, which engendered the demand for the ability to speak Spanish proficiently. Management often praised García's work and he received a bonus in his first year of employment.³ Gloor Lumber however, objected to García's tendency to violate the company's rarely enforced English-only rule.⁴ Gloor employees, 31 out of 39 of whom were Mexican-American,

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2 *Garcia v. Gloor*, 618 F.2d 264, 266-267 (5th Cir. 1980).

3 *Id.*

4 *Id.*

were prohibited from speaking Spanish on the job unless they were helping Hispanic customers. On June 10, 1975 a fellow Mexican-American employee asked García about an item that a customer was looking for. García responded in Spanish that the item was not available. Alton Gloor, an officer of the lumber store, overheard the exchange and subsequently informed García that he was fired for violating the English-only rule.

Invoking Title VII, a statute designed to protect employees from discrimination based on national origin, García went to court and charged his former employer with action of discriminatory impact. The notion was rejected, however, under the court's ruling that "neither the statute nor common understanding equates national origin with the language that one *chooses* [italics added] to speak."⁵ Moreover, because García and other bilingual employees could "readily comply" with the English-only rule, the court dismissed the claim that the rule had a disparate impact on Hispanic employees.⁶

Since *García v. Gloor*, the Equal Employment Opportunity Commission (EEOC) has provided guidelines indicating that English-only workplace rules do indeed have a disproportionate impact on those of foreign origin, even bilinguals such as Héctor García.⁷ Given that primary language is an immutable characteristic closely tied to national origin, the EEOC further suggests that courts take the mere existence of an English-only rule as a *prima facie* case of discrimination, thus making employers responsible for providing thorough business justifications for such policies. However, because the EEOC's word holds no binding authority, courts that choose to apply its interpretation are anomalies.⁸ In fact, many courts continue to legitimize employers' often arbitrary English-only rules and subsequently contribute to the marginalization of certain ethnic groups

5 *Id.*

6 *Id.*

7 Guidelines on Discrimination because of National Origin, 29 C.F.R. § 1606 (1980).

8 *See, e.g.,* Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006).

by allowing them to be reprimanded,⁹ demoted,¹⁰ and even fired¹¹ for noncompliance with rules that reinforce their “second class” status.¹²

We argue that the ambiguity of the term *national origin* in Title VII has occasioned these inconsistent interpretations of English-only workplace cases, which allows for similar cases to go through different pathways of interpretation and has often, in consequence, unduly harmed Hispanic plaintiffs. Moreover, because many courts are currently unwilling to rely on the EEOC’s guidelines designed for interpreting Title VII, they have instead fallen back on dominant ethnocentric cultural ideologies. These actions by the court have legitimized the ‘symbolic power’ of cultural ideologies and contributed to the marginalization of those of foreign origin. In light of this current ambiguity and the resulting adverse effects, we advocate an amendment to Title VII that explicitly grants protection of linguistic traits.

In part I of this article, we give a background of Title VII, explain the problematic nature of its ambiguous language, and examine the role of the Equal Employment Opportunity Commission (EEOC) guidelines in the interpretation of Title VII. Part II provides a sociological framework for understanding the mechanisms at work in English-only cases. In part III, we apply the framework to English-only cases and demonstrate that courts legitimize cultural ideologies in place of following the EEOC’s guidelines which is associated with plaintiffs’ claims being unduly discredited. In part IV, we suggest an amendment to Title VII that includes both an addition of linguistic traits, and a specification of how discrimination based on these traits would be scrutinized. In Part V we address counter-arguments and show why, despite possible uncertainty, there is a great necessity for this suggested amendment to Title VII.

9 Maldonado v. City of Altus, *supra* note 7; Pacheco v. New York Presbyterian Hosp., 593 F. Supp. 2d 599 (S.D.N.Y. 2009).

10 Pacheco v. New York Presbyterian Hospital, *supra* note 8.

11 Garcia v. Gloor, *supra* note 1; Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993).

12 Maldonado v. City of Altus, *supra* note 7, at 1301.

II. BACKGROUND ON TITLE VII, CURRENT PROBLEMS AND METHODS OF INTERPRETATION, AND THE EEOC

(i) *Title VII and National Origin*

The landmark Civil Rights Act of June 2nd, 1964, aimed to mollify discrimination because of race, color, religion, sex, or national origin in government institutions, schools, the workplace, and other public domains.¹³ The legislation intended to mitigate economic, social, and spatial inequality based on the aforementioned characteristics and bring an end to a segregation that had plagued much of the country. Title VII was a fundamental part of the Civil Rights Act, in so much as it would outlaw discriminatory and unjust hiring and employment practices that were commonplace at the time. Title VII decreed it unlawful for an employer or an employing agency

to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions or privileges of employment...or 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 [or her] status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁴

Accordingly, Title VII extended racial and religious minority groups, women, and those of foreign origin greater protection and rights in the job market.

While in many ways the statutory language of Title VII is ambiguous, it is the vagueness of the term *nation origin* that we wish to examine. That is, the concept of discrimination based on national origin is accompanied with neither a description of national origin and its significance nor recognition of the type of discrimination that should be prohibited by Title VII. For example, did this mean immi-

13 Civil Rights Act of 1964, Pub.L. No.88-352, 78 Stat. 241.

14 42 U.S.C. § 2000e-2 (1988).

grants could not be discriminated against? If so, were the children of immigrants likewise protected? What would discrimination based on national origin look like? Legal scholar Juan Perea argues that the creators of the legislation are responsible for its enigmatic nature arguing that “Congress gave no serious thought to the content of the national origin term nor to its proper scope.”¹⁵ Thus, the statutory language of Title VII, while intended to combat discrimination, makes it unclear which ethnic or social group the mandate exists for, and how the discrimination would even be manifested.

Nevertheless, since Title VII’s enactment some plaintiffs have made the case that national origin is tied to immutable ethnic traits, such as physical features, ancestry, surname, accent, and language, and have subsequently claimed that occupational discrimination on the basis of these traits is a proxy for national origin discrimination.¹⁶ Under this rationale, the characteristics one inherits from his or her own country of origin, or parents, grandparents, great-grandparents’ country of origin, for instance, should not be the reason for which he or she is not hired, fired, or subject to other kinds of occupational discrimination. Yet there is little or no consensus about an individual’s

15 Juan F. Perea, *Ethnicity and Prejudice: Reevaluating National Origin Discrimination Under Title VII*. 35 WM. & MARY L. REV. 805-870, 807 (1993).

16 See, e.g., *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981); *García v. Spun Steak Co.*, *supra* note 1; *Maldonado v. City of Altus*, *supra* note 7.

linguistic characteristics¹⁷ and whether or not the traits are rightfully ascribed to a national origin.¹⁸

(ii) *The role of the Equal Employment Opportunity Commission*

To aid with the enforcement and interpretation of Title VII, the Equal Employment Opportunity Commission (EEOC) was created at the same time.¹⁹ The EEOC's guidelines were meant to be especially helpful with the interpretation of Title VII's otherwise broad

17 See, e.g., *García v. Spun Steak Co.*, *supra* note 10; *Maldonado v. City of Altus*, *supra* note 7.

18 In the case that a court considers employees, whose first language is not English, protected under Title VII, the most common approach to making a claim of discrimination is disparate impact. Disparate impact is defined as employment action or conditions that are “facially neutral in their treatment of different groups,” but are inadvertently deleterious towards one social group more so than the same practices are towards those who are not members of the protected group. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Disparate impact is contrasted against disparate treatment approaches which happen when an employer or employing agency *intentionally* “treats some people less favorably than others because of their race, color, religion, sex, or national origin.” *Id.* For a plaintiff to successfully establish a *prima facie* case for disparate impact he or she must first provide evidence of a disparity. Next, the plaintiff must demonstrate that the employer's implementation of a specific policy or practice has caused the aforementioned disparity. Then the plaintiff must show that the practice in question is not justified by business necessity, and that the employer could have alternatively used less extreme policies which would have served the business' needs in an equal manner. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

19 Interestingly, in the early drafts of H.R. 405, the bill that would dictate the specific role of the EEOC, the House Committee intended to create a board that would not only establish guidelines for interpretation of Title VII, but would also take on the responsibility of carrying out the judicial process. In other words the EEOC would be responsible for hearing and deciding on complaints of discrimination under Title VII. However, in the final revision of this Bill the EEOC was ultimately given the role of acting as an administrative board that would investigate claims of discrimination under Title VII and provide interpretation for the statute, but the decisive judicial power remained with the courts. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM.L. REV. 431 (1966).

and vague statutory language. In fact, the EEOC developed an extensive concept from the statutory language of “national origin.” The EEOC’s *Guidelines on Discrimination Because of National Origin* delineate a clearer interpretation of national origin, stating that Title VII protects against employer’s or an employing agency’s discriminatory action “because an individual has the physical, cultural or linguistic characteristics of a national origin group.”²⁰ Going further than the bare meaning of the statute, the EEOC also openly addresses English-only rules stating:

[Any] rule requiring employees to speak only English 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.²¹

The EEOC does allow however, for employers to apply English-only rules to certain times or situations, given that the employer “can show that the rule is justified by business necessity.”²² Furthermore, the employer must inform his or her “employees of the general circumstances when speaking only in English is required and the consequences of violating the rule.”²³ Nevertheless the EEOC presumes

20 29 C.F.R. § 1606

21 *Id.* § 1606.7(a)

22 *Id.* § 1606.7(b)

23 *Id.* § 1606.7(c)

that existence of an English-only rule of any sort establishes the plaintiff's *prima facie* case.²⁴

While *Discrimination Because of National Origin* is much clearer about the meaning of national origin and how discrimination based thereon is manifested, courts have not endorsed the EEOC's guidelines with much consensus. Because the EEOC's interpretation does not establish legally binding authority,²⁵ courts have openly rejected the EEOC's English-only guideline.²⁶ The rationale for dismissal is generally that an English-only rule does not inherently imply a *prima facie* discriminatory impact on bilinguals,²⁷ and/or that linguistic characteristics or aspects of an individual's "cultural heritage" are not even protected under Title VII.²⁸

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- 24 Harold S. Lewis, Jr. & Elizabeth J. Norman, *Employment Discrimination Law and Practice* 81 (2d ed. 2004) 81 ("Even if the rule is limited to certain times, the EEOC guideline... gives it the same *prima facie* effect ...")
- 25 *See, e.g.*, *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94-95 (1973).
- 26 *See, e.g.*, *García v. Spun Steak Co.*, *supra* note 10, at 1489 (in which the court openly rejects the EEOC guidelines); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 735-36 (E.D. Pa. 1998) (court also rejects EEOC guidelines); *Tran v. Standard Motor Prods., Inc.*, 10 F. Supp. 2d 1199, 1211 (D. Kan. 1998) (court rejects, without discussion, the EEOC's presumption); *Long v. First Union Corp.*, 894 F. Supp. 933, 940 (E.D. Va. 1995) (court rejects the EEOC's presumption); *EEOC v. Beauty Enters., Inc.*, No. 3:01CV378 (AHN), 2005 WL 2764822, at *11 (D.Conn. Oct. 25, 2005) (court rejects the EEOC's presumption);
- 27 *See e.g.*, *Garcia v Gloor*, *supra* note 1 (where this argument originates); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) at 1411 (a subsequent case where the logic is reemployed when the court maintains that "An employer can properly enforce a limited, reasonable, and business-related English-only rule against an employee who can *readily comply* [italics added] with the rule and who voluntarily chooses not to observe it as 'a matter of individual preference.'") (citing *Garcia v Gloor*, *supra* note 1, at 270).
- 28 *See, e.g.*, *García v. Spun Steak Co.*, *supra* note 10 at 1487.

III. SYMBOLIC POWER, IN-GROUPING-OUT-GROUPING, AND FUNDAMENTAL ATTRIBUTION ERROR

Social theorist Pierre Bourdieu argues that language is a symbolic system, which among many other functions, can be used as an “instrument of domination.”²⁹ Put basically, our different uses of language are exhibitions of our relative positions of power in a social setting. Therefore those in positions of power can establish and maintain the legitimacy of specific linguistic and cultural ideologies. Meanwhile those who do not speak the dominant tongue are consequently subject to “symbolic domination” in a field wherein the “symbolic power [of an official language] is misrecognized as (and therefore transformed into) legitimate power.”³⁰

Dominant language ideologies often give way to binary categorization of “us vs. them,” which can subsequently result in the creation of “in-groups” and “out-groups.” The formation of these social boundaries changes how we cognitively interpret others and their behaviors. For instance, social-psychologist Susan Fiske and her colleagues have found that those whom we consider similar to us and part of our “in-group” we generally perceive as more competent and warm, meanwhile those whom we cognitively categorize as different or part of an out-group are perceived to be less competent or less warm, or both less competent *and* less warm.³¹ Subsequently the ethnocentric ideology of a dominant in-group has often resulted in the dehumanization and undue treatment of out-group members.³²

The conception of cultural ideologies and out-groups based on categorical factors like language also contributes to mechanisms of

29 PIERRE BOURDEU, LANGUAGE AND SYMOBLIC POWER 165 (John Thompson ed., Gino Raymond trans. Harvard University Press 1991).

30 *Id.* at 170.

31 Susan T. Fiske, Amy JC Cuddy, Peter Glick & Jun Xu, *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 (6) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 878 (2002).

32 *Id.*

bias that we make when interpreting the action of others. One of these mechanisms is referred to as the fundamental attribution error. The social-psychologist who coined this term, Lee Ross, found that we have the tendency to understand and over-attribute the behavior of others to their personal choice and dispositional factors, frequently underestimating the situational and other external constraints or influences.³³ Furthermore, social-psychologist Thomas Pettigrew found that members of an in-group tend to make the fundamental attribution error when explaining the behavior of members of an out-group, often grossly underestimating the situational and social contexts that shape behavior.³⁴ Thus the way in which we cognitively group people influences not only how we feel about them but also how we understand and explain their actions.

In sum, language is used for the establishment and reproduction of a cultural linguistic ideology. Those who do not use the official tongue and align with a cultural ideology held by those embedded in power are subject to symbolic and unquestioned domination and therefore are cognitively made part of an out-group. Categorization into an out-group changes the very way in which one is perceived and understood by those who belong to an in-group. Members of an in-group often overlook the structural, environmental, and situational constraint influencing an out-group member's behavior, and attribute his or her action to personal choice.

33 Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 *Advances in experimental social psychology* 173, 173-220 (1977) (Thus following this attribution logic, poor people are poor not because they were born into a disadvantaged situation with little resources or because they lost their job or experienced a divorce, rather it is due to their laziness, carelessness, irresponsibility, and lack of work ethic).

34 Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5(4), *PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN*, 461-476 (1979).

IV. ANALYSIS

This section applies the previously outlined sociological framework to English-only court cases to underline some of the social mechanisms at work with the current ambiguous interpretation of Title VII. This section further illustrates the several pathways through which courts can take a case involving English-only due the aforementioned problems of interpretation. The ambiguity of Title VII also allows courts to use ethnocentric cultural ideologies as a reference point which leads to cognitive in-grouping and out-grouping. Hispanic plaintiffs, as members of an out-group, are generally understood as having a cultural deficit from the point of view of the ethnocentric in-group; subsequently, their claims receive more scrutiny than employers, and their adverse outcomes are often understood as self-inflicted.

(i) Evidence of Cultural Bias and Out-grouping of Hispanic Plaintiffs

By closely examining the language and reasoning of courts, we can uncover subtle evidence of a cultural ideology and cognitive grouping. In certain cases, both employers and court officials demonstrate that they view the Hispanic plaintiffs as inferior in warmth, competence, or both. Take for example the case introduced in the beginning of this paper, *García v Gloor*; the court not only dismissed García's claim that the English-only rule had disparate impact on him and his fellow Hispanic-American co-workers, but also compared García's ethnic traits to a deleterious addiction:

In similar fashion [referring to Gloor's use of an English-only policy], an employer might, without business necessity, adopt a rule forbidding smoking on the job. The Act would not condemn that rule merely because it is shown that most of the employees of one race smoke, most of the employees of another do not and it is more likely that a member of the race more addicted to tobacco would be disciplined.³⁵

35 García v Gloor, *supra* note 1, at 270.

While the metaphor is flawed for several reasons, perhaps the most blatant of these is the underlying assertion that the Spanish language is easily likened to secondhand smoke. Although such a loaded statement may not be intentional, the fact that the court later refers to speaking Spanish as a “forbidden taint,”³⁶ corroborates and undoubtedly reveals the court’s ethnocentric frame of reference. The notion that primary language is immutable and considered a trait, while smoking is a behavior, also shows a major conceptual misrepresentation.

Conversely, in most other cases the court itself has not made conspicuous associations between a foreign language and negatively connotative terms. Courts have however, accepted similar correlations from employers as *a priori* in the justification of English-only rules. That is, courts have generally deferred to employers’ justification that the allowance of Spanish or other languages in the workplace creates an “offensive,”³⁷ “derisive,”³⁸ “uncomfortable,”³⁹ racially antagonistic,⁴⁰ intimidating,⁴¹ isolating,⁴² humiliating⁴³ and ridiculing⁴⁴ environment. Laden in these claims are assumptions about Hispanics and the Spanish language that are backed by scant

36 Garcia v Gloor, *supra* note 1, at 268

37 Kania v. Archdiocese of Philadelphia, *supra* note 27, at 732.

38 *Id.*

39 Pacheco v. New York Presbyterian Hosp., *supra* note 8, at 621.

40 Garcia v Spun Steak, *supra* note 10, at 1483 (Kenneth Bertelson, president of Spun Steak, claimed the English-only policy gave the company racial harmony).

41 *Id.* at 1489.

42 *Id.* at 1489.

43 *Id.* at 1483.

44 Pacheco v. New York Presbyterian Hospital, *supra* note 8, at 606.

and vague evidence.⁴⁵ Unfortunately, the fact that courts put such premises under little scrutiny, inadvertently equates Spanish in the workplace with gossip, insults, and toxic substances, and further legitimizes a dominant Anglo-centric cultural ideology.

As if the unchallenged smearing of their dignity were not enough, bilingual Hispanic employees must fight an uphill battle when it comes to debunking the *raison d'être* of their employer's discriminatory rules, even though the burden of proof that the policy is not discriminatory should rightfully fall on employers' business justification. Instead of the mere presence of any English-only rule being accepted as a *prima facie* case of discrimination, as the EEOC recommends, courts generally expect Hispanic employees to produce a "substantial [amount of] objective"⁴⁶ evidence that any harm is caused. Courts often regard as "subjective"⁴⁷ Hispanic plaintiffs' claims that being commanded to speak English or lose their jobs creates a burdensome, hostile, isolating, and intimidating work environment that makes them feel inferior or "like garbage."⁴⁸ Even the courts that acknowledge English-only rules' disparate effect tend to follow the reasoning of *García v. Spun Steak* that:

Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Rather, Title VII protects against only those policies that have a significant impact.

45 See, e.g., Alfredo Mirandé, *En la Tierra del Ciego, El Tuerto es Rey* ("In the Land of the Blind, the One Eyed Person is King"): *Bilingualism as a Disability*, 26 N.M. L. REV. 75, 102-03 (1996) (Mirandé gives a thorough examination of the assumptions being made and the lack of evidence in most English-only cases).

46 *Pacheco v. New York Presbyterian Hospital*, *supra* note 8, at 623; *Brewster v. City of Poughkeepsie*, 447 F. Supp. 2d 342, 347 (S.D.N.Y. 2006).

47 *Brewster v. City of Poughkeepsie*, *supra* note 50 (Court claimed there was little objective evidence); *Pacheco v. New York Presbyterian Hospital*, *supra* note 8, at 626 (Court finds that "Plaintiff has failed to raise a genuine issue of material fact that the conditions of Plaintiff's employment were sufficiently severe or pervasive to create an objectively hostile or abusive work environment").

48 *Brewster v. City of Poughkeepsie*, *supra* note 50, at 350.

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 opportunity⁴⁹

Thus some courts dismiss discriminatory claims, which according to the EEOC should be accepted as *prima facie*, because plaintiffs do not have enough substantial or quantitative evidence. While other courts recognize there is an impact, but cite it as a mere inconvenience to workers.

(ii) The Creation of In-group Alliances with Employers

Yet when placed under scrutiny, courts' standards of proof and accuracy appear to be contradictory. On one hand, courts reject plaintiffs' claims because they lack depth and data, while on the other hand the court exonerates employers with similarly flimsy and poorly articulated business justifications. For instance, one of the most frequently used business necessities for English-only rules is that such policies allow supervisors to better oversee their subordinates,⁵⁰ but defendants do not provide an explanation or evidence that delineates how speaking Spanish inhibits supervision. Those employers who do provide an explanation about supervision say the absence of an English-only rule leads to misunderstanding or miscommunications; while this is plausible, there is no "objective" demonstration that such is the case, nor do employers give evidence that Hispanic employees are in contact with supervisors enough to justify speaking English at all times besides breaks.

An equally cited business justification for English-only rules is that allowing Spanish and other languages to be spoken creates a "hostile work environment."⁵¹ Kenneth Bertelson, president of Spun Steak, alleged that the English-only rule existed to "promote racial harmony" in the workplace, yet he provided a singular example of

49 Garcia v. Spun Steak, *supra* note 10, at 1488.

50 See, e.g., Garcia v. Gloor, *supra* note 1, at 267.

51 Garcia v. Spun Steak, *supra* note 10, at 1489.

two Hispanic workers who were suspected of talking about another employee who was African-American.⁵² While it is a possibility that the employees' remarks were racially charged or motivated by bias, Bertelson provides no "genuine issue of material fact"⁵³ that Hispanic employees targeted the African-American employee because of race. Outside of one possible incident, Bertelson does nothing to demonstrate that there was a widespread racial tension that existed and that the environment was so problematic that a harmony promoting English-only rule became exigent.

(iii) *When Courts Follow the EEOC Guidelines*

There are, however, a few courts that have adhered to EEOC guidelines and consequently thoroughly scrutinized employers' business justifications. For example, the court ruling on the case of *Premier Operator Services*, a call center where several employees were fired for violating an English-only rule, closely examined the aforementioned business justifications of "harmony" and "improved supervision" and ruled in the plaintiffs' favor. The court maintained that there was no evidence of a "discord" in the first place that would justify an English-only rule to engender "harmonization," in fact, the rule had quite the opposite effect and "served to *create disruption* [italics added]."⁵⁴ Likewise the court in *Premier Operator Services* points out that allowing Hispanic employees to communicate with each other in Spanish did not in any way limit their ability "to communicate with their supervisors and managers... in carrying out their job duties and responsibilities."⁵⁵ In similar case, *Maldonado v. City of Altus*, the court again used the EEOC guidelines to interpret the case and ruled in favor of the plaintiff after dissecting another

52 Garcia v. Spun Steak, *supra* note 10, at 1483.

53 Pacheco v. New York Presbyterian Hospital, *supra* note 8, at 607; Garcia v. Spun Steak, *supra* note 10, at 1488.

54 EEOC v. Premier Operator Services, Inc., 113 F. Supp. 2d 1066, 1071 (N.D. Tex. 2000).

55 *Id.*

weak business justification.⁵⁶ These two courts' analyses of employers' rationales for English-only rules demonstrate that business necessities legitimized in other cases are openly rejected when placed under scrutiny.

(iv) Fundamental Attribution Error and Further Evidence of an In-group, Out-group Bias

Further reifying evidence of an in-group, out-group bias, courts are culpable of falling into the fundamental attribution error when it comes to how they understand plaintiffs, plaintiff's actions, and the contexts in which plaintiffs are located. For instance, the language used by the court in *Gloor* places an undue and unfair emphasis on Hector García's agency and personal characteristics while endorsing Gloor's grounds for firing García. The court admitted that an English-only rule could be discriminatory, but concedes that "...there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference. Mr. García could readily comply with the speak-English-only rule; as to him nonobservance was a matter of choice."⁵⁷ Further shifting the weight of the negative consequences to García, the court repeatedly accentuates that he was "fully bilingual,"⁵⁸ "fully capable,"⁵⁹ and that García constantly "exercised a preference,"⁶⁰ and thus "*chose deliberately* [*italics added*] to speak Spanish instead of English."⁶¹

56 *Maldonado v. City of Altus*, *supra* note 7, at 1307 (The court picked apart the City of Altus' trite justifications that English-speaking employees felt that Hispanics were talking about them, that allowing Spanish to be spoken led to miscommunication and a hazardous environment, and that Hispanics could not be properly supervised, pointing out that the "[d]efendants' evidence of business necessity in this case is scant").

57 *Garcia v. Gloor*, *supra* note 1, at 270.

58 *Id.* at 268.

59 *Id.* at 272.

60 *Id.* at 269.

61 *Id.* at 268.

The court's focus on García's salience as an actor alone does not, however, characterize the fundamental attribution error in the case, rather it is the combination of the aforementioned attribution with a disregard for situational, structural, and external factors that highlight the court's correspondence bias. That is, the court gives no weight to evidence that 1) García was responding to a request by an employee who spoke Spanish when he was fired⁶², that 2) García only spoke Spanish in his home⁶³, that 3) most of Gloor's employees were Mexican-Americans⁶⁴, that 4) in Brownsville, Texas, Gloor Lumber's location, at least 75% of the population was Mexican-American⁶⁵, and that 5) García was hired *because* he spoke Spanish.⁶⁶ Furthermore, because García's primary language was Spanish he was subject to a neuro-linguistic schema that did not favor English⁶⁷ and made reverting to Spanish a feat that García would frequently perform unconsciously regardless of his intentions.^{68 69}

62 *Id.* at 266.

63 *Id.* at 266.

64 *Id.* at 267.

65 *Id.* at 267.

66 *Id.* at 269.

67 BILL PIATT, LANGUAGE ON THE JOB: BALANCING BUSINESS NEEDS AND EMPLOYEE RIGHTS 121 (University of New Mexico Press, 1993) (Piatt points out that when a primary language is learned "it forms an immutable perspective and understanding," from which the learner likely cannot "consciously purge [himself]." That is, the learner cannot change the "neurological processes" controlling that language which has "been set in place from a very early age").

68 Itesh Sachdev & Howard Giles, *Bilingual Accommodation*, in THE HANDBOOK OF BILINGUALISM 353, 359-60 (Tej K. Bhatia & William C. Ritchie eds., 2004) (showing bilinguals who find themselves unconsciously code-switching consider the practice troublesome and unnecessary).

69 *Garcia v. Gloor*, *supra* note 1, at 270. (While the court for Gloor admits "language might well be an immutable characteristic like skin color, sex or place of birth," it ultimately returns to inflexible reasoning, imposing that "the language a person who is multi-lingual elects to speak at a particular time is by definition a *matter of choice* [*italics added*],").

In a similar manner, subsequent cases reproduce the faulty logic of *Gloor*, under-lining plaintiff's' choice and ability "to comply" while downplaying extenuating circumstances. In *Spun Steak*, for instance, the court argued that employees whose primary language was Spanish were not subject to a discriminatory policy because "they [were] able to speak English," stating "there is no disparate impact with respect to privilege of employment 'if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.'"⁷⁰ Furthermore, the *Spun Steak* court is quick to dismiss the plaintiffs' claims that an English-only policy is problematic to them for linguistic reasons arguing that "The fact that a bilingual employee may... 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."⁷¹ Thus the court in this case, and following cases, focuses on the plaintiffs' individual preferences, arguing that Hispanic employees can elect whether or not to "comply" with the policy, therefore such a policy could not be discriminatory. The reasoning of this argument is erroneous, however, since it rests on the premise that any policy with which one can physically comply is inherently non-discriminatory.

(v) *EEOC Guidelines Help Prevent Fundamental Attribution Error*

In other cases where the EEOC guidelines have been applied, however, courts have shown a less narrow-minded understanding of the circumstances in which plaintiffs worked and lived. Again, the court in *Premier Operator Services* recognizes the context of the discriminatory claim and dismisses the *Gloor* and *Spun Steak* reasoning that

Nonobservance of the English-only policy was not simply a matter of individual preference for the class members. On a daily basis, the Hispanic employees of Defendant were faced with the very real risk of being reprimanded or even losing their jobs if they violated the English-only rule, even if

70 Garcia v. Spun Steak, *supra* note 10, at 1487.

71 *Id.* at 1488.

such non-compliance was inadvertent. There was no comparable risk posed by the policy for Defendant's non-Hispanic employees, particularly since they would not have the same tendency to lapse into Spanish inadvertently. In fact, there is no evidence that any person other than an employee of Hispanic national origin was disciplined or terminated for objecting to or violating the English-only policy.⁷²

The court then debunks the reasoning of *Gloor* and *Spun Steak* by arguing that “[s]ome of the most objectionable discriminatory rules are the least obtrusive in terms of one’s ability to comply: being required to sit in the back of the bus for example.”⁷³ Thus, in this case, the court shifts its focus to the context of the rule and closely examines it to decide whether or not it is discriminatory, rather than centering the discrimination claim on the plaintiffs’ ability for deference to the rule, recognizing the flawed final deduction of *Gloor* and *Spun Steak*.

In sum, the ambiguous statutory language of Title VII allows for courts to make judgments from the standpoint of an in-group ethnocentric ideology. In some cases, the courts themselves devalue plaintiffs’ ethnic traits, while in other cases courts accept employers’ devaluations. This process reifies the formation of in-groups and out-groups, which is made manifest through courts’ inconsistencies in their scrutiny of plaintiffs’ and defendants’ claims. That is, while many of employers’ business justifications are likely credible, the lack of objective and quantitative evidence make them qualitatively no different than plaintiffs’ disparate impact claims. Yet the court’s willingness to connect the logical dots, and fill in the empirical blanks for employers in the majority of these cases can result in outcomes that favor employers. Further playing a role in the reifica-

72 EEOC v. Premier Operator Services, *supra* note 58, at 1070.

73 *Id.* at 1075 ([quoting Judge Reinhardt who wrote the dissent in the denial of rehearing in *Spun Steak*] The court also points out that “Under this analysis, a black employee could not challenge a rule requiring the use of separate bathrooms and drinking rooms; an Orthodox Jew could not challenge a rule forbidding the wearing of head coverings. The ease of compliance with a rule should not be the measure of its discriminatory effect”).

tion of dominant in-group ideology, courts' fundamental attribution error in terms of understanding plaintiffs' actions and experience, shapes how they misidentify discrimination and subsequently contribute to marginalization of a traditionally marginalized group.

V. POTENTIAL SOLUTIONS

Because the statutory language of Title VII prohibiting workplace discrimination based on national origin provides no clear definition of the protected class for whom the measure exists, much less how discrimination of this type would manifest itself, we recommend revisions through legislation. While certain courts have made meaning for "national origin" in their interpretation, these readings are inconsistent and fail to incorporate the EEOC's guidelines in their entirety. Furthermore, current lack of consensus among courts allows for the legitimization of a dominant cultural ideology and subsequent discrimination to occur. It is therefore exigent that Congress make an amendment to protect linguistic traits that are correlated with, but not universally accepted as part of, one's national origin. The traits protected under this amendment could also include, but not be limited to, accent, physical ethnic features and both first and last names.⁷⁴

With these changes, however, there is still some ambiguity concerning what discrimination on the basis of the aforementioned traits would look like. Consequently, we suggest that in the cases where the EEOC has previously written guidelines concerning discrimination, these guidelines should be considered by legislative bodies as

74 Perea, *supra* note 16, at 861 (In a similar vein, Perea suggests something similar calling for a protection against discrimination on basis of language, accent, surname, and ethnic appearance).

the groundwork for the proposed amendment.⁷⁵ Moreover, here we offer an example of some clear principles of the proposed subsection of the amendment dealing specifically with linguistic traits in the work place. First, the existence of *any* English-only policy should be accepted as a *prima facie* case of discrimination, and therefore, under the theory of disparate impact, the burden of proof should fall on employers. Next, in scrutinizing an employer's business justifications, the court should examine 1) whether the English-only policy is supported by a legitimate business necessity,⁷⁶ 2) whether the employer's business necessity is both logically and empirically justified given the nature of the work, 3) whether the English-only rule has been tailored as narrowly as possible to the occasions in which the previously established business necessity demands, 4) whether the policy and the justification thereof is thoroughly documented by employers, 5) whether the affected employees are aware that such a policy is in place 6) whether the affected employees are aware of and understand to which specific work situations the policy applies, and 7) whether the employees know that "isolated, accidental violations of the policy will not result in adverse employment action."⁷⁷

- 75 See, e.g., *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 91 S. Ct. 2186, 29 L. Ed. 2d 267 (1971), and Harry T. Edwards & Joel H. Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599 (1971) (The EEOC, as a federally commissioned branch of government can help inform congress and courts, but as previously demonstrated has been limited by courts' decisions to overlook suggested guidelines. In the cases which are not covered by the EEOC, I suggest the addition of clearly defined traits and the manifestation of discrimination based on those traits in different public domains such as the workplace, schools, government facilities, etc. While adapting the EEOC's guidelines uniformly has not been done with the guidelines for national origin, courts have consistently adapted the EEOC's guidelines in the case of religious discrimination).
- 76 I choose not to define this because "business necessity" is so multidimensional that any universal definition, such as what is in the business' economic interest, may be too narrow and make the burden of proof overly difficult for employers.
- 77 Josh Hill, Devin Ross, Brad Serafine, & Richard E. Levy, *Watch Your Language-The Kansas Law Review Survey of Official-English and English-Only Law and Policies*, 57 U. Kan. L. Rev. 669, 737 (2009).

VI. COUNTER ARGUMENTS

There are several premises that the previously outlined claims rest upon that can be drawn into question by counter arguments. First, a counter argument that could be made against these claims is that an English-only rule is not equally discriminatory for all bilinguals. Our presentation of bilingual abilities as equal is, indeed, somewhat of an oversimplification of bilinguals' differing abilities; as Christian Garza points out, language abilities should be thought of as different points on a wide spectrum rather than a simple binary category of bilingual or not bilingual.⁷⁸ While it is true that two Hispanic bilingual individuals' abilities to speak both English and Spanish may vary greatly, and that an English-only policy may consequently present greater linguistic difficulty for one more so than it does for another, the point of our argument is not that English-only rules are discriminatory because they may be difficult for all bilinguals to comply with. Instead, our argument is that English-only rules are unjustly burdensome and discriminatory towards all bilinguals because, as the plaintiff in *Maldonado* said, the rule is a reminder that bilinguals are "subject to rules for [their] employment that the Anglo employees are not subject to...this rule is hanging over [their] head and can be used against [them] at any point when the [employer] wants to have something to write [them up] for."⁷⁹

Furthermore, a potential counter-argument against the proposed revision is that such a measure would be overly rigid and could hinder businesses' efficiency and interests. That is, the added measure would protect employees' interests at the expense of the employer, and could result in employers wrongfully being found guilty of discrimination because the mere presence of an English-only rule would require employers to overcome a hefty burden of proof. However, it is in both employers and employees' interest that any employed business policy is clearly thought out, justified, articulated, and under-

78 Christian A. Garza, *Measuring Language Rights Along a Spectrum*, 110 Yale L.J. 379 (2000).

79 *Maldonado v. City of Altus*, *supra* note 7, at 1301 (these are the words of Plaintiff Maldonado).

stood, especially a policy determining when and where English is spoken. In fact, by tailoring such policies to make English-only situations as narrow as possible, we suggest that employee morale and employee-employer relations are more likely to improve. Moreover, the strict adherence of employers to this policy will allow them to have a clearer understanding of what is and is not acceptable under law, thereby preventing unnecessary litigation costs. Thus, if applied correctly, these types of revisions to Title VII that seemingly restrict employers could actually be an asset to their businesses.

Another possible outcome of the proposed amendment would be the transfer of discrimination to the supply networks from which businesses hire. That is, with the more rigorous criteria for English-only rules in the work place, employers, fearing or not wanting to deal with anti-discriminatory sanctions, may attempt to avoid compliance with such sanctions by choosing not to hire job candidates who are bilingual. While this is a valid concern, such discrimination would become apparent and is likewise prosecutable under Title VII. Moreover, in a nation with a growing immigrant population and with over 60 million citizens whose primary language is not English,⁸⁰ the demand for bilingual employees is already extant. Thus the failure of employers to hire bilingual employees, because of fear of complying with anti-discrimination measures, would likely stifle business success and growth in increasingly multicultural markets.

VII. CONCLUSION

The United States has been constructed, populated, re-constructed, and re-populated by people of many different ethnicities, colors, religions and languages. Despite its diverse composition and the enactment of laws designed to mitigate discrimination, the American society is still subject to tacit modes of cultural domination. While blatant discrimination is easily recognized and penalized, the sym-

80 Camille Ryan, "Language use in the United States: 2011," *Washington, DC: US Census Bureau, August (2013)* (National data show that 60,637,010 Americans speak languages that are not English in their homes).

bolic power of dominant cultural ideologies is maintained in a nearly unconscious manner in the every-day social interactions workers experience.

To the dismay of those marginalized by cultural hierarchy, such as those whose primary language is not English, courts have failed to bring justice. Instead courts have legitimized the symbolic power of the dominant cultural ideology. The failure to adhere to the legitimized cultural ideology results in those whose primary language is not English to be out-grouped and perceived as less warm, less competent and more responsible for their own suffering. Thus those who are marginalized in their workplaces are also marginalized in the American legal system. Because Title VII, the very law designed to protect those most likely to be out-grouped and marginalized, is unclear, courts often allow for further discrimination to occur. While the EEOC offers principles to guide interpretation of Title VII, the lack of EEOC's authority and courts' unwillingness to adhere to the outlined principles has resulted in disparity in terms of interpretation. It is therefore exigent that Title VII be revised to protect ethnic traits, and apply the suggestions outlined the EEOC's guidelines and in this article.