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## AGAINST COMMON SENSE: WHY TITLE VII SHOULD PROTECT SPEAKERS OF BLACK ENGLISH

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Jill Gaudio\*

*The speech of many black Americans is marked by phrases such as "we be writin'" or "we don't have no problems." Because most listeners consider such "Black English" speech patterns incorrect, these speakers face significant disadvantages in the job market. But common sense suggests that there is nothing discriminatory about employers' negative reactions to Black English because it makes sense to allow employers to insist that employees use correct grammar.*

*This article argues against this common sense understanding of Black English as bad grammar. The author first analyzes the extent of the job market disadvantages faced by Black English speakers and discusses the failure of common sense solutions designed to eliminate Black English speech patterns. The author then provides linguistic evidence to show that Black English is actually a distinct but equally valid dialect of English, which for historical reasons is largely limited to the African American community. She argues that, given this scientifically accurate understanding of Black English, employers who reject Black English speakers because of their speech patterns are in fact violating Title VII's prohibition against race discrimination. The author explains why discrimination against Black English speakers should fall under the existing Title VII disparate impact framework and suggests a possible extension of Title VII doctrine to protect those Black English speakers whose employment opportunities are limited by weak written language skills. Throughout the Article, the author challenges readers to consider the sources and effects of their own "common sense" beliefs about language and urges them to accept responsibility for solving the problem of language discrimination.*

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## INTRODUCTION

Suppose you were interviewing an applicant for a mid-level administrative position with your New York firm, and she said the following during the interview:

"I will *aks* my boss to send you a recommendation."

"In my department *we be writing* grant proposals all the time."

"I *never* had *no* problems *wit* IBM computers."

Would you hire this applicant? If your inclination is to say "no," you are not alone. Many employers would reject this applicant because she seems to lack a basic requirement for the job: the ability to speak proper English.

If you feel any qualms about this negative reaction, they probably arise from something else you noticed about this applicant: she is black.<sup>1</sup> But common sense tells you that this fact is irrelevant. The applicant lost a job opportunity because of her deficient language skills, not because of her race. If blacks

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1. See *infra* Part II.B.2 for an explanation of this observation. In brief, the interviewer and the reader could tell from the applicant's speech that she is black because her speech has the characteristic features of a dialect spoken by a large percentage of the black population of the United States. For historical and social reasons, this dialect is not usually spoken by members of other ethnic groups.

I apologize to those readers who may be offended by my choice not to capitalize the label "black." I actually agree with Professor Kimberlé Crenshaw's argument that capitalization would be more appropriate, because "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Yet I also agree with Professor Barbara Flagg's argument that the terms "white" and "black" should be treated equivalently, since we otherwise risk reinforcing the idea that only blacks, as "the other," have a race, while white ethnicity becomes the hidden norm. See Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 955 n.7 (1993). This risk also applies to the otherwise useful term "people of color."

Although Professor Flagg states that she chooses to capitalize neither term "in the interest of defusing potential charges of essentialism," *id.*, I do not believe that this is a relevant concern: Why should the capitalized labels "Black" and "White" be any more essentialist than "Asian" or "Latino"? I think the real problem is that the capitalized word "White" is visually jarring; it creates an unnerving typographical kinship to white supremacists' writings. The proper approach may be to capitalize both "White" and "Black" anyway, as this could be a step towards Professor Flagg's project of developing a positive white ethnicity. But in the interest of typographically alienating as few readers as possible, I have chosen instead to capitalize neither term.

for some reason tend to have deficient language skills, the common sense solution would be to ensure that they have the opportunity to improve those skills, perhaps by offering remedial training. Common sense suggests that a negative reaction to the applicant could not be discriminatory or unlawful.

In this Article, I will argue against common sense. I will argue that common sense solutions to blacks' language problems have failed and are likely to continue to fail because they are based on a false view of the nature of language and the nature of Black English in particular. I will argue that the proper solution is to understand differences in language as diversity, not deficiency, and that Title VII can and should be used to enforce this radical solution. Finally, I will examine some of the broader implications of the radical solution.<sup>2</sup>

## I. DIFFERENCE AS DEFICIENCY: THE COMMON SENSE VIEW OF BLACK ENGLISH

### A. *The Dilemma of the Black English Speaker*

The speech of many blacks in the United States differs from Standard English.<sup>3</sup> According to language researchers, "blacks . . . have a distinctive speech community."<sup>4</sup> Linguists have labeled this distinctive form of speech "Black English."<sup>5</sup> But

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2. The arguments in this Article have been especially inspired and influenced by Professor Mari J. Matsuda's article, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991). Some analytical differences between her approach and mine are discussed in Part III *infra*. The Article also draws heavily from two recently published linguistics books: STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE* (1995) and ROSINA LIPPI-GREEN, *ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES* (1997).

3. I capitalize "Standard" in "Standard English," in opposition to the usual practice, because I am using the term as a label for a particular dialect. The phrase "standard English," like the phrase "proper English," refers to a concept of language which I will argue against. See *infra* Part II.B.1.

4. Jeffrey E. Nash, *Race and Words: A Note on the Sociolinguistic Divisiveness of Race in American Society*, 61 SOC. INQUIRY 252, 260 (1991).

5. See, e.g., DAVID CRYSTAL, *THE CAMBRIDGE ENCYCLOPEDIA OF THE ENGLISH LANGUAGE* 96-97 (1995) (using the term "Black English"); J.L. DILLARD, *BLACK ENGLISH: ITS HISTORY AND USAGE IN THE UNITED STATES* (1972); *BLACK ENGLISH: A SEMINAR* (Deborah Sears Harrison & Tom Trabasso eds., 1976).

An alternative label is "BEV" or "Black English Vernacular," where "vernacular" refers to the fact that Black English is primarily spoken, not written. See WILLIAM LABOV, *LANGUAGE IN THE INNER CITY: STUDIES IN THE BLACK ENGLISH VERNACULAR* 3 (1972) (using the term "BEV"); Elizabeth Closs Traugott, *Pidgins, Creoles, and the*

listeners do not need any special expertise in linguistics to recognize Black English:

Quite frequently one who is at a loss in trying to define Black English is not at a loss in recognizing it. How many times have you heard someone speak on the telephone and immediately knew the person was Black? You might not be able to pinpoint how you knew, but you knew.<sup>6</sup>

It is possible to recognize Black English because it consists of a number of identifiable linguistic features.<sup>7</sup> For example, Black English speakers use different pronunciations for certain words, as with “aks” for “ask,” “wit” for “with,” “tes” for “test,” “den” for “then,” and “toof” for “tooth”;<sup>8</sup> use a bare form of the verb “to be,” as in “she be working”;<sup>9</sup> and use the

*Origins of Vernacular Black English*, in BLACK ENGLISH: A SEMINAR, *supra*, at 57, 62 (explaining terminology).

Another alternative is the term “AAVE” for “African American Vernacular English.” LIPPI-GREEN, *supra* note 2, at 15. This term may be the most accurate, since the dialect is largely limited to the United States. See *infra* Part II.B.2 (explaining how Black English arose in the United States). Some linguists prefer the shorter label “AAE” for “African American English.” See, e.g., Geoffrey K. Pullum, *Language That Dare Not Say Its Name*, 386 NATURE 321 (1997).

Yet another possible label is “Ebonics” (combining “ebony” and “phonics”). This term was coined in the 1970s as an alternative to expressions such as “nonstandard English” or “broken English.” See ROBERT L. WILLIAMS, *EBONICS: THE TRUE LANGUAGE OF BLACK FOLKS* viii–ix (1975). Although the term never became popular among linguists, the Oakland, California School Board recently resolved to recognize “Ebonics” as a language. See Lori Olszewski, *Oakland Schools OK Black English*, S.F. CHRON., Dec. 19, 1996, at A1 (discussing Board’s action); *EBONICS—the Oakland Resolution*, S.F. CHRON., Jan. 2, 1997, at A18 (containing full text of the School Board’s resolution). This decision has generated a great deal of discussion about “Ebonics” in the media. See, e.g., James E. Shaw, *Don’t Self-Inflict Another Obstacle*, L.A. TIMES, Dec. 27, 1996, at B9; Elaine Woo & Solomon Moore, *School Decision on Black English Stirs Up a Storm of Commentary*, L.A. TIMES, Dec. 21, 1996, at A24; *All Things Considered: Black English* (National Public Radio broadcast, Dec. 20, 1996). I avoid the term “Ebonics” in this Article because it tends to create confusion (e.g., that Black English only involves a different “phonics” or sound system). See Pullum, *supra* (explaining why linguists consider “Ebonics” a “misbegotten name”).

6. Ann Covington, *Black People and Black English: Attitudes and Deeducation in a Biased Macroculture*, in BLACK ENGLISH: A SEMINAR, *supra* note 5, at 255, 258.

7. Certain Black English speakers (usually teenagers) may also draw from a different vocabulary. The use of this vocabulary, or “slang,” is not what distinguishes the Black English dialect from Standard English. The use of slang is a distinct issue, both linguistically and legally. See discussion *infra* Part II.B.2.

8. See *infra* notes 140–48 and accompanying text (discussing phonological features of Black English).

9. See *infra* notes 149–53 and accompanying text (discussing durative tense in Black English).

so-called "double negative" construction, as in "I never had no problem with no computer."<sup>10</sup>

Of course, not all blacks in the United States speak Black English. The use of Black English is not a genetic trait; it is the result of other factors.<sup>11</sup> In many cases, these other factors lead to black speakers speaking Standard English. But overall, Black English is quite prevalent. Observers state that the majority of blacks in the United States speak Black English at least some of the time.<sup>12</sup>

During the 1960s, researchers compared the communication patterns of black and white schoolchildren in various age groups, and focused on the possibility that a cognitive deficiency was responsible for the patterns in black speech.<sup>13</sup> More recently, the focus has been on education. Experts note that dialects like Black English "seem to connote a lack of education,"<sup>14</sup> and politicians

10. See *infra* notes 154–58 and accompanying text (discussing negative concord in Black English).

11. See DILLARD, *supra* note 5, at 230 (emphasizing that dialect differences are more associated with social factors than with "racial" factors); see also John Kallend, *Black English*, CHI. TRIB., Jan. 8, 1995, at 2 (noting that Black English is really American Black English, since Black English is not spoken by blacks in Africa or England).

Unfortunately, the Oakland School Board contributed to public confusion regarding the nongenetic status of Black English when it stated, in its original resolution recognizing Black English, that "African Language Systems are genetically based and not a dialect of English." *EBONICS—the Oakland Resolution*, *supra* note 5. The Board denies that it intended the word "genetic" in the sense of human genetics; it later explained that "[t]he term 'genetically based' is used according to the standard dictionary definition of 'has origins in,'" and was meant to refer to Black English's origins in African languages. Nanette Asimov, *U.S. Says Ebonics Isn't a Language*, S.F. CHRON., Dec. 25, 1996, at A1. Later the Board withdrew the misleading statement entirely. See Kenneth R. Weiss & Richard Lee Colvin, *Oakland Schools Drop 2 Key Points in Ebonics Stand*, L.A. TIMES, Jan. 16, 1997, at A3.

12. See *Sonya Live: Black English* (CNN television broadcast, May 5, 1992) (June Jordan, professor of African American studies at the University of California at Berkeley, states that Black English is the first language of a majority of African Americans.); see also LIPPI-GREEN, *supra* note 2, at 176 (citing studies placing the number of Black English speakers at 80–90% of the black population). This figure is an estimate, based in part on the supposition that Black English is more commonly spoken within working class and poor communities. See *id.*

13. See Martin Deutsch, *The Role of Social Class in Language Development and Cognition*, 35 AM. J. ORTHOPSYCHIATRY 78 (1965); Vera P. John, *The Intellectual Development of Slum Children: Some Preliminary Findings*, 33 AM. J. ORTHOPSYCHIATRY 813 (1963); Harry Osser et al., *The Young Child's Ability to Imitate and Comprehend Speech: A Comparison of Two Sub-Cultural Groups*, 40 CHILD DEV. 1063 (1969). These studies have since been thoroughly discredited by linguistic analyses of Black English. See Part II.B *infra* (providing linguistic explanation for variance between Standard English and Black English).

14. Sam Roberts, *When Speaking to Mayor Koch, Ax No Questions*, N.Y. TIMES, Dec. 29, 1988, at B1 (quoting Dr. Doris F. Weisberg, chairwoman of the speech department at City College in New York); see also Felicia R. Lee, *Lingering Conflict in*

and school administrators have urged schools to do a better job teaching Standard English.<sup>15</sup>

Regardless of the supposed source of the problem—cognitive deficiencies or school failures—most seem to agree on one thing: Black English is a problem because it is an incorrect version of Standard English.<sup>16</sup> In other words, Black English is bad grammar.<sup>17</sup> Both blacks and whites hold this view.<sup>18</sup> For example, one black author refers to Black English as simply “poor language skills” and “jive.”<sup>19</sup> A black columnist explains why his mother would say “Speak English!” to him as a child when he used Black English: “It was a recurring theme with her. She always wanted me to speak in complete sentences that were grammatically correct. . . . [This was just] ‘talking proper.’”<sup>20</sup>

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*the Schools: Black Dialect vs. Standard Speech*, N.Y. TIMES, Jan. 5, 1994, at A1, D22 (Bronx schoolteacher asserts that “[w]hen my students use bad English, I tell them it is bad English and that it has nothing to do with the color of their skin.”).

15. For example, Ed Koch, then Mayor of New York City, asked the Chancellor of Education to develop a program to teach students to avoid the following: saying “aks” for “ask,” dropping the “g” from participles, using “ain’t” for “isn’t,” and using “be” in sentences like “we be going.” See Carolyn Peluso Atkins, *Do Employment Recruiters Discriminate on the Basis of Nonstandard Dialect?*, 30 J. EMPLOYMENT COUNSELING 108, 108–09 (1993) (describing Koch’s request); Roberts, *supra* note 14. At least one school board candidate has made the eradication of Black English part of his campaign platform. See Ray Allen, *Candidate Advocates Strong English Grammar Instruction*, WIS. S.J., Mar. 25, 1995, at 7A.

16. The Oakland School Board’s resolution to accept Black English as a language, see *supra* note 5, is the exception that proves the rule. The resolution itself, though confusingly written, did seem to reject the notion that Black English is simply an incorrect version of Standard English. See *EBONICS—the Oakland Resolution*, *supra* note 5; Olszewski, *supra* note 5. But the public reaction to this resolution was so overwhelmingly negative, see, e.g., Shaw, *supra* note 5; Woo & Moore, *supra* note 5, that the Board was forced to withdraw it.

17. The principal of a D.C. elementary school, speaking about his students’ use of language, stated: “They don’t speak ‘Black English.’ They use ‘bad grammar.’” ELEANOR WILSON ORR, *TWICE AS LESS: BLACK ENGLISH AND THE PERFORMANCE OF BLACK STUDENTS IN MATH AND SCIENCE* 10 (1987).

18. See LIPPI-GREEN, *supra* note 2, at 179–201 (discussing negative reactions of both blacks and whites to Black English).

19. Olivia Abraham, *The Trap of Black English*, BALTIMORE SUN, Oct. 6, 1994, at 21A.

20. Don Williamson, *Adding PEP to the Language of Success*, SEATTLE TIMES, Dec. 1, 1992, at A10. Many other sources demonstrate that this view of Black English is widely held. See, e.g., Wayne Lionel Aponte, “Talkin’ White,” ESSENCE, Jan. 1989, at 11 (the put-down of “talkin’ white” is addressed to those whose speech is grammatically correct); Jo-Ann Armao, *Black Student English Class Offends Some*, WASH. POST, Feb. 1, 1991, at D1 (black County Council president stated that “the message we should be sending out is that there is no place for bad English by anyone”); Clarence Page, *For Royal Treatment, Speak King’s English*, ST. LOUIS POST-DISPATCH, Sept. 22, 1989, at 3C (characterizing “standard” English as “proper” English, but noting that “[t]here is nothing intrinsically white about good language skills”); Rochell Denise

The public reaction to the recent decision by the school board in Oakland, California to recognize Black English as the primary language of many of its black students<sup>21</sup> demonstrates how strongly this negative view is held. The Reverend Jesse Jackson was one of many black leaders who immediately spoke out against the decision, expressing his concern that the board intended to encourage students to "talk garbage."<sup>22</sup> Commentators viewed the Board's action as "condescending" and "an excuse to justify bad grammar,"<sup>23</sup> and complained that it was "just so incredibly stupid."<sup>24</sup>

Because this is the common sense understanding of Black English, those who speak Black English are at a severe disadvantage in the job market. Employers react negatively to them because they seem to have deficient language skills. Individuals who cannot, or will not, speak proper English are simply not ideal employees.

Anecdotal evidence demonstrates that employees suffer a handicap if they speak Black English. Denise Page, a thirty-three-year-old college-educated senior trader, provides an example.<sup>25</sup> After working at the Chicago Board Options Exchange for nine years, she hoped to be promoted to manager.<sup>26</sup> Her supervisor commended her job skills and knowledge but said that her ability to articulate that knowledge was impaired by her use of Black English.<sup>27</sup> The supervisor recommended that she attend a special class to try to eliminate Black English features from her speech.<sup>28</sup>

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Thomas, *A Manner of Speaking: Black English Is a Difference, Not a Disability*, WIS. S.J., Mar. 22, 1995, at 1A (noting that some middle class blacks view Black English as a "display of ignorance and a lack of education").

21. See *supra* note 5. Once again, I choose not to use the label "Ebonics" for Black English because it reflects confusion about the nature of the differences between Black English and Standard English; it is not a term used by contemporary linguists. See *id.* The virulence of the reaction to the Board's proposal may be linked to the Board's poor choice of words—not only the use of the "Ebonics" label, but also the statement that Black English is "genetically based" and "not a dialect of English." See *EBONICS—the Oakland Resolution*, *supra* note 5; see also *supra* note 11.

22. See Susan Ferriss, *Oakland School Chief Shifts on "Ebonics,"* S.F. EXAMINER, Dec. 27, 1996, at A1; see also Shaw, *supra* note 5 (stating that Black English compiles "verbal deformit[ies]"); Nanette Asimov & Lori Olszewski, *Black English Decision Hits National Nerve*, S.F. CHRON., Dec. 20, 1996, at A1 (noting that Stanford professor Shelby Steele called Black English "slang").

23. Woo & Moore, *supra* note 5, at A24.

24. *Id.*

25. See Pamela Sherrod, *Some Try to Fine-Tune a Voice of Experience*, CHIC. TRIB., June 25, 1989, at 1A.

26. See *id.*

27. See *id.*

28. See *id.*



In some cases employers are more concerned about customers' reactions to an employee's use of Black English. Michael Evans, an assistant to the president of a small business, sought help from a speech pathologist to rid himself of Black English.<sup>29</sup> He took this step at the urging of his boss, who had noticed how negatively customers reacted to speaking with Evans on the phone.<sup>30</sup>

Sometimes employers do not give employees the opportunity to seek help to alter their speech patterns; they simply fire employees who do not speak Standard English. An advisor at a job center notes: "We have some people who are going to lose their jobs partly because of the way they talk . . . . It's not a race issue but a perception issue. Their employers are feeling that maybe they aren't right for the job because of their speaking style."<sup>31</sup>

One employer's observation captures the general attitude toward Black English: "[Some black workers] do not have black accents . . . . I think the accent is a big part of it. . . . [I]f someone is black but they speak with the same accent as a Midwestern white person, it completely changes the perception of them."<sup>32</sup> Another employer describes one "problem" employee: "He did not speak really white English American. He spoke black American English. And there's a big discrepancy there. A lot of black people are very bright and speak both black and white, but some don't speak white, and that makes it very hard."<sup>33</sup>

In fact, evidence regarding the negative impact of Black English goes far beyond the anecdotal. A number of studies have concluded that speakers of Black English are at a disadvantage with respect to every aspect of employment, including hiring, promotions, and salary. One study of Chicago-area employers of sales, customer service, and clerical workers found

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29. *See id.*

30. *See id.*

31. Thomas, *supra* note 20.

32. Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But . . .": The Meaning of Race for Employers, in *THE URBAN UNDERCLASS* 203, 224 (Christopher Jencks & Paul E. Peterson eds., 1991).

33. *Id.* at 220. This employer's use of the labels "black" and "white" is interesting, since proponents of the common sense view of Black English would probably deny that the differences between Standard English and Black English could have any racial or ethnic meaning. *See, e.g.,* Lee, *supra* note 14 (quoting teacher who tells students that speaking Black English is "bad English" but that it "has nothing to do with the color of their skin"). The employer's use of these labels is actually compatible with the linguistic view of Black English discussed *infra* Part II.B.2.

that they ranked "communication skills" at the top of their job criteria lists<sup>34</sup> and that they often found that black applicants failed to meet this requirement.<sup>35</sup> One Chicago personnel officer commented that "[blacks] don't know how to speak."<sup>36</sup> Indeed, the study found, "[b]lack speech patterns were an immediate marker of an undesirable job candidate."<sup>37</sup>

Other studies have found that Standard English speakers are more successful in job interviews<sup>38</sup> and that recruiters are less likely to offer a job to a Black English speaker.<sup>39</sup> Standard English speakers have an advantage when seeking better paying jobs,<sup>40</sup> particularly supervisory jobs,<sup>41</sup> sales jobs,<sup>42</sup> technical jobs,<sup>43</sup> and jobs involving public contact.<sup>44</sup>

In one study, one hundred personnel managers of large businesses who had advertised position openings in local newspapers for secretaries were sent one of six black female college students.<sup>45</sup> Three of the test applicants spoke Standard English and three spoke Black English.<sup>46</sup> The study found that the applicants who spoke Black English were given shorter interviews (an average of 17.34 minutes versus 24.64 minutes for Standard English speakers), were offered far fewer jobs (eight for Black English speakers versus 17 for Standard English speakers), and were offered significantly lower salaries for those jobs (an average of \$3.52 per hour versus \$5.34 per hour for Standard English speakers).<sup>47</sup>

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34. See Kirschenman & Neckerman, *supra* note 32, at 218.

35. *See id.* at 223.

36. *Id.*

37. *Id.*

38. See Robert Hopper, *Language Attitudes in the Employment Interview*, 44 COMM. MONOGRAPHS, 346 (1977).

39. See Atkins, *supra* note 15 (describing study performed with 65 employment recruiters that found that they were less likely to offer a job to an applicant who spoke Black English).

40. See Darwin Turner, *Black Students, Language, and Classroom Teachers*, in TAPPING POTENTIAL 30, 37 (Charlotte Brooks ed., 1985) (stating that use of language may not matter for menial jobs, but it does matter for better paying jobs).

41. See Hopper, *supra* note 38, at 350-51.

42. *See id.*

43. *See id.*

44. See WALT WOLFRAM & RALPH FASOLD, *THE STUDY OF SOCIAL DIALECTS IN AMERICAN ENGLISH* 21 (1974) (describing study that shows employers use Standard English as a criterion for placing people in positions involving contact with the public).

45. See Sandra L. Terrell & Francis Terrell, *Effects of Speaking Black English upon Employment Opportunities*, ASHA (AM. SPEECH-LANGUAGE-HEARING ASS'N), June 1983, at 27, 27-28.

46. *See id.* at 28.

47. *See id.* at 28-29.

Thus, studies have found that “[employers] who state that they do not discriminate on the basis of race, color, sex, religion, age, national origin, or handicap [do] seem to be discriminating on the basis of nonstandard dialect.”<sup>48</sup> But most people would find the label “discrimination” inapposite here. If employers are reacting to Black English as bad grammar, rather than using Black English as a proxy for stereotypes about blacks,<sup>49</sup> their reaction is only appropriate—it is common sense. An employer who screens most job applicants on the telephone on the basis of their “grammar and English” explains: “I have every right to say that that’s a requirement for this job. I don’t care if you’re pink, black, green, yellow, or orange, I demand someone who speaks well.”<sup>50</sup>

### *B. Failures of the Common Sense Solution*

The common sense solution for Black English speakers is to improve their language skills, in other words, to learn to speak Standard English. This solution could be implemented through

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48. Atkins, *supra* note 15, at 117.

49. Pure prejudice may explain part of employers’ reactions to Black English. Studies have found that in addition to rejecting Black English as bad grammar, employers associate Black English with specific personality traits. One study conducted with four Mississippi employers showed that students who had undergone training in “Broadcast English” (Standard English) were rated more “intelligent, competent, likable, self-expressive, and employable” than their peers who lacked the training. See Judy Floyd Robbins, *Employers’ Language Expectations and Nonstandard Dialect Speakers*, *ENG. J.*, Oct. 1988, at 22. Another study found that “although respondents perceived Black English speakers to be sociable, interesting, and trustworthy, they also perceived them to be pessimistic, contrary, disreputable, unorganized, unemployable, uncertain, uncomfortable, dependent, not creative, incompetent, lazy, unintelligent, naive, inferior, negative, and unprofessional.” Atkins, *supra* note 15, at 108. Both white and black listeners make these associations. See Richard C. Doss & Alan M. Gross, *The Effects of Black English and Code-Switching on Intra-racial Perceptions*, 20 *J. BLACK PSYCHOL.* 282, 283 (1994); G. Richard Tucker & Wallace E. Lambert, *White and Negro Listeners’ Reactions to Various American-English Dialects*, in *PERSPECTIVES ON BLACK ENGLISH* 369, 375–77 (J. Dillard ed., 1975).

The point of this Article is not to argue that these reactions to Black English are wrong. If negative associations arise in response to the speaker as a black individual, rather than in response to the speaker’s language, then they are clearly discriminatory, and employers could be held liable for them under Title VII. This Article argues that even absent this blatant type of discrimination, contemporary employer reactions to Black English should be illegal. See *infra* Part III (arguing that Title VII should prevent employers from rejecting Black English as bad grammar).

50. Kirschenman & Neckerman, *supra* note 32, at 223.

mandatory or elective remedial programs in schools<sup>51</sup> or through programs in the private sector. Since many blacks agree that Black English is bad grammar<sup>52</sup> and are willing to go to some length to eliminate Black English features from their speech,<sup>53</sup> and since schools can claim some expertise in the teaching of proper English, the common sense solution should be easy to implement.

In fact, eradicating Black English or replacing it with "bidialectism" (so that speakers can speak both Black English and Standard English) has proven surprisingly difficult. Both educators and employers have attempted to teach Standard English to students or employees who speak Black English. At least one industry consultant makes a living attempting to teach Standard English skills to black employees,<sup>54</sup> and schools nationwide have instituted remedial language programs for black students.<sup>55</sup>

California schools have led recent efforts. For the past ten years, eighteen of California's 1,000 school districts have offered special instruction to black students.<sup>56</sup> In Los Angeles the PEP (Proficiency in English) program teaches Black English speakers Standard English as a second language.<sup>57</sup> Many other school districts have copied Los Angeles's program or adopted similar programs.<sup>58</sup>

Even without an official remedial program, teachers often make extra efforts to help Black English speakers learn Standard English. One high school English teacher designed a

51. See Sol Adler, *Comment on Social Dialects*, ASHA (AM. SPEECH-LANGUAGE HEARING ASS'N), Apr. 1985, at 46 (arguing for mandatory bidialectism programs); Lorraine Cole, *Response to Adler*, ASHA (AM. SPEECH-LANGUAGE HEARING ASS'N), Apr. 1985, at 47 (arguing that bidialectism programs should be elective).

52. See *supra* notes 19–25 and accompanying text (discussing negative black reaction to Black English).

53. This includes going to special classes and seeking help from a speech pathologist. See *supra* notes 25–30 and accompanying text.

54. See Veneeta Acson, *Appreciating Fluency in Other Dialects*, N.Y. TIMES, Jan. 25, 1994, at A18.

55. See *infra* notes 56–58 and accompanying text.

56. See Cynthia Walker, *Lessons Target Language as a Barrier for Blacks' Education*, L.A. TIMES, Feb. 19, 1995, at 11.

57. See Lee, *supra* note 14, at D22; Williamson, *supra* note 20, at A10; see also Laura Griffin, *Words to Teach By*, DALLAS MORNING NEWS, Jan. 23, 1997, at A1 (describing similarly named "SEP" or "Standard English Proficiency" program adopted in 1981 and now used in dozens of California schools).

58. For example, Seattle schools have instituted a program modeled on Los Angeles's PEP program, see Williamson, *supra* note 20, at A10, and a Maryland elementary school has begun a voluntary after-school program to help black students learn Standard English. See Armao, *supra* note 20, at D1; see also Lee, *supra* note 14, at A1 (describing a variety of related programs).

special unit in "Broadcast English" to emphasize differences between Standard English and Black English for the Black English speakers in her class.<sup>59</sup> These efforts do not end once students leave high school; college instructors also emphasize the importance of speaking Standard English.<sup>60</sup>

Despite these pervasive and persistent efforts, change has been elusive. High school teachers note that their efforts achieve little because "by the time they go to high school it's an uphill battle."<sup>61</sup> Indeed, traditional English teaching techniques may actually lead to an increase in the use of Black English features in student writing.<sup>62</sup> Educators have also been frustrated by the poor results of special programs designed for Black English speakers. For instance, although Los Angeles's PEP program is widely praised and imitated, it has not actually improved the reading and writing scores (or, by implication, the speaking habits) of the children involved.<sup>63</sup> Students in the program did no better on the 1991-92 California Assessment Program than students not in the program.<sup>64</sup>

Studies of speech communities confirm teachers' suspicions that the programs are failing. At one time, "[e]ducators . . . predicted that as more black people entered the mainstream, the dialect would fade not only among the middle class, as it has, but also among the poor."<sup>65</sup> They were wrong. Indeed, some language researchers have found that the use of spoken Black English is increasing, rather than decreasing. In particular, Black English is now more widespread in poor, urban neighborhoods.<sup>66</sup> A three-year study funded by the National Science Foundation and directed by University of Pennsylvania linguist William Labov found that the language of inner-city blacks is diverging further from Standard English.<sup>67</sup> Although the black middle class does not tend to

59. See Robbins, *supra* note 49, at 22.

60. See Julie L. Nicklin, "Switching" Between Black and Standard English, CHRON. HIGHER ED., Apr. 20, 1994, at A6 (explaining why a college instructor and speech pathologist teach students Standard English).

61. Lee, *supra* note 14 (quoting a New York high school teacher).

62. See HANNI TAYLOR, STANDARD ENGLISH, BLACK ENGLISH, AND BIDIALECTALISM (1989) (reporting study findings).

63. See Diane Seo, *The Talk Wars: Educators Say Street Language Has No Place in the Job Market, but the Issue of Correcting Ethnic Speech Has Ignited an Emotional Debate*, L.A. TIMES, Mar. 7, 1993, at 16.

64. See *id.*

65. Lee, *supra* note 14.

66. See *id.*

67. See William Labov & Wendell A. Harris, *De Facto Segregation of Black and White Vernaculars*, in DIVERSITY AND DIACHRONY 1, 20 (David Sankoff ed., 1986);

speak Black English, the overall number of Black English speakers is growing.<sup>68</sup>

Furthermore, we cannot expect increasing exposure to Standard English through television programs and movies to make any difference. The mass media do not contribute to Black English speakers becoming Standard English speakers because linguistic behavior is far more influenced by interactive relationships than by passive language input.<sup>69</sup>

One expert on Black English summarized the problem as follows:

Many blacks consider [the view that Black English is ungrammatical] serious enough that they seek help from teachers, linguists, therapists, and even drama coaches. Under social pressure from within and outside the vernacular black community, attempts have been made to eradicate, supplement, or replace street speech with standard English. Most approaches have failed for one reason or another, and, to the best of my knowledge, no single technique has proved successful on a large scale.<sup>70</sup>

Thus, although the common sense solution should be easy, experience shows that it is not.<sup>71</sup>

The dilemma of the Black English speaker is intensified by the reaction of some members of the black community to the pressure to speak Standard English: "black youngsters . . . ridicule each other's efforts to learn proper English as 'talking

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William K. Stevens, *Study Finds Blacks' English Increasingly Different*, N.Y. TIMES, Mar. 15, 1985, at A14 (discussing Labov's study). *But see* LIPPI-GREEN, *supra* note 2, at 184 (noting that Labov's results are still open to challenge and that the "convergence-divergence" controversy is ongoing).

68. See Stevens, *supra* note 67 ("[T]he absolute number of speakers of the black vernacular has also increased.")

69. See *id.*

70. JOHN BAUGH, *BLACK STREET SPEECH: ITS HISTORY, STRUCTURE, AND SURVIVAL* 55 (1983).

71. This is not to say that students who speak Black English cannot under any circumstances be taught Standard English in school. Teaching programs based on a linguistic understanding of Black English, see *infra* Part II.B.2, may not guarantee complete fluency in Standard English, but they have proven far more effective than standard teaching techniques that treat Black English as "bad grammar." See *infra* note 313 and accompanying text (discussing studies of teaching methods). It is a separate question whether such teaching techniques, even if completely effective, should be our answer to the "problem" of Black English. See *infra* Part IV (discussing "minimally radical" solution).

white.”<sup>72</sup> This reaction places black students in a double bind: “If they don’t speak standard English, they will be corrected at school. But if they speak standard English, their friends will ridicule them.”<sup>73</sup>

The fact that some blacks resist the pressure to speak Standard English may help to explain the failure of the common sense solution:

The persistence of the [Black English] dialect reflects, in part, the growing resistance of some black young people to assimilate and their efforts to use language as part of a value system that prizes cultural distinction. . . . [Y]oung people acknowledge an element of resistance, and even a stigma, to using standard English or “talking proper.”<sup>74</sup>

However, this stigma cannot completely explain the failure of the common sense solution because many blacks do not feel it: they clearly want to become Standard English speakers and they work hard toward this goal.<sup>75</sup>

### C. Summary

The dilemma for speakers of Black English is clear. The way that they speak is almost universally considered wrong. Their apparent lack of language skills means that they are far less likely to be hired, promoted, or given higher salaries. Recognizing these enormous disadvantages in the employment market, many Black English speakers work hard to become speakers of Standard English, with the support of educators and language consultants nationwide. And yet Black English has not been eradicated; in fact, the use of Black English is increasing.

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72. Page, *supra* note 20; see also Aponte, *supra* note 20, at 11 (describing pressure from peers not to “talk white”); Williamson, *supra* note 20 (noting peer pressure against “talking proper”).

73. See, *supra* note 63, at 16.

74. Lee, *supra* note 14, at A1; see also LIPPI-GREEN, *supra* note 2, at 191–92 (discussing pressures placed on blacks who speak Standard English); Michale D. Linn & Gene Piché, *Black and White Adolescent and Preadolescent Attitudes Toward Black English*, in DIALECT AND LANGUAGE VARIATION 574, 578 (Harold B. Allen & Michael D. Linn eds., 1986) (discussing prestige of Black English among black teens).

75. See *supra* note 70 and accompanying text.

In the face of this dilemma, common sense comes up empty. It cannot explain why some blacks stubbornly resist society's demand that they use Standard English, and it cannot explain why extensive remedial efforts have thus far been so unsuccessful. All common sense can advise is that we try more of the same: increase the number and intensity of remedial English programs and redouble efforts to convince Black English speakers that their speech is wrong and requires correction.

## II. DIFFERENCE AS DIVERSITY: A RADICAL SOLUTION TO THE "PROBLEM" OF BLACK ENGLISH

### *A. A Radical Solution*

I propose that we stop identifying Black English as the problem and acknowledge instead that the typical employer's reaction to Black English is the real problem. In other words, I argue that we should accept Black English as a legitimate form of language, as valid and correct as any other, including Standard English, and begin using Title VII to eradicate discrimination against speakers of Black English.

This may strike most readers as a dangerous abandonment of standards—isn't mainstream English called "standard" for a reason? It may also give rise to concerns about an ascent into the Tower of Babel—wouldn't this lead to the worst possible type of multiculturalism, a nation so divided that its citizens cannot even communicate with each other?

I will argue that these fears are misguided or unfounded. In order to do so, I must first provide some background information about human language in general and Black English in particular. In giving this background in the next Section, I rely on the work of cognitive scientists and linguists, whose conclusions are often contrary to "common sense."<sup>76</sup>

Once the common sense view of Black English is abandoned, the application of Title VII is relatively straightforward. Part II.C will discuss why discrimination against Black English should fall under the disparate impact framework and will then address the possible employer defenses to a Title VII claim. Given the complexities of Title VII law, this Article

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76. As a former cognitive scientist and linguist, I can verify that this is one of the frustrations of the field.



cannot possibly address all of the issues that might arise for a plaintiff who challenges employer discrimination against Black English. I hope to demonstrate, however, that such a plaintiff would have a far better chance of winning a Title VII suit than the "common sense" about Black English would have us believe.

### *B. The True Nature of Black English*

1. *The Linguist's View of Language*—Most people think of language as a cultural invention.<sup>77</sup> As with other aspects of culture, spoken language is thought to come in "higher" and "lower" varieties. According to this perspective, some individuals (those who are more gifted or more educated) speak a highly complex, expressive language, while others (less gifted or less educated) speak a simpler, more primitive, error-filled language.<sup>78</sup>

According to cognitive scientists, who study the functions of the human brain, and linguists, who study spoken language as an example of those functions,<sup>79</sup> this view is almost entirely wrong.<sup>80</sup> Steven Pinker, a professor of cognitive science and linguistics at MIT, explains why he titled his recent book *The Language Instinct*:

Language is not a cultural artifact that we learn the way we learn to tell time or how the federal government works. Instead, it is a distinct piece of the biological

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77. See LIPPI-GREEN, *supra* note 2, at 5 (identifying the common belief that "language is an ethereal, mutable thing, something we learn, something within our control"); PINKER, *supra* note 2, at 17 ("Most educated people already have opinions about language [including the belief that] it is man's most important cultural invention . . .").

78. See PINKER, *supra* note 2, at 51–56.

79. Cognitive (or theoretical) linguistics is the study of language as a function of the human brain. As a branch of cognitive science, it is closely related to other fields such as cognitive psychology and neurobiology. Research on Black English often involves both cognitive linguistics and sociolinguistics (the study of language in social context).

80. Cognitive scientists and linguists do make a distinction between spoken language and written language. See LIPPI-GREEN, *supra* note 2, at 18–25 (explaining the historical, structural, and functional differences between spoken and written language). The latter is, partially, an expression of culture. See *id.* at 20. The arguments in this Article generally refer to spoken language only. But see *infra* Part III.C (discussing how Title VII might also protect speakers of Black English where writing skills are critical to job performance).

makeup of our brains. Language is a complex, specialized skill, which develops in the child spontaneously, without conscious effort or formal instruction, is deployed without awareness of its underlying logic, is qualitatively the same in every individual, and is distinct from more general abilities to process information or behave intelligently.<sup>81</sup>

Thus, "[t]he complexity of language, from the scientist's point of view, is part of our biological birthright; it is not something that parents teach their children or something that must be elaborated in school . . . ."<sup>82</sup>

To say that "the language function is biological" could easily lead to a confusion: labeling language "biological" does not mean that humans are born knowing the particular language they end up speaking. The French, are not genetically programmed to speak French or Italians to speak Italian. Black children in the United States are in no way genetically destined to speak Black English, nor are white children in the United States genetically destined to speak Standard English.<sup>83</sup>

One should instead picture a machine built into the brain that is capable of generating only one basic language with some minor variations.<sup>84</sup> Those variations result from different settings or parameters of the basic rules of language which linguists label phonology, morphology, and syntax. In other words, the metaphorical language machine has a small set of toggle switches whose settings correspond to the rather dramatic variations in the surface form of languages. These toggle switches are set by a minimum of language input received without conscious attention at a very early age.

To give just one example: among other things, phonology rules determine how the acoustic spectrum will be divided into identifiable phonemes (the sounds that form words).<sup>85</sup> Different languages divide the acoustic spectrum in different ways; in other words, they use a different set of phonemes. The

81. PINKER, *supra* note 2, at 18.

82. *Id.* at 19.

83. Thus, the Oakland School Board's statement that Black English is "genetically based" was completely misleading. See *supra* note 11 and accompanying text (discussing the board's unfortunate choice of words).

84. The following paragraphs draw upon my own background in cognitive science and linguistics. For a more detailed and extremely readable discussion, see PINKER, *supra* note 2. See also CONTEMPORARY LINGUISTICS: AN INTRODUCTION (Mark Aronoff ed., 1993).

85. See generally PINKER, *supra* note 2, at 172-81 (discussing phonology rules).

“toggle switches” for phonemes are set very early, well before a baby begins to speak. Once set, these switches are very difficult to reset. One unfortunate result is well-known: no matter how hard most speakers struggle, they find it difficult to correctly pronounce a second language that uses a different phoneme set. For Japanese speakers, this means that the r/l distinction is very hard to hear or make. For English speakers, this means that the unaspirated “p” of French or the tonal distinctions of Chinese are difficult to distinguish or duplicate. This is why it is so hard to speak a second language without an accent.

The “toggle switches” for morphology (word structure) and syntax (sentence structure) are likewise set in response to language input at an early age—largely by age three or four. Overall, the so-called “critical period” for language learning ends at the onset of puberty, probably in response to biological factors.<sup>86</sup> Language learning after this time proceeds in an entirely different manner: after puberty, language learning involves conscious intellectual labor. As anyone who has ever studied a second language knows, it is time-consuming, difficult work—very much in contrast to the easy acquisition of a first language.<sup>87</sup>

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86. The exact nature of this critical period is still under investigation. See LIPPI-GREEN, *supra* note 2, at 248 n.6. Pinker summarizes the current state of understanding among linguists:

In sum, acquisition of a normal language is guaranteed for children up to the age of six, is steadily compromised from then until shortly after puberty, and is rare thereafter. Maturation changes in the brain, such as the decline in metabolic rate and number of neurons during the early school-age years, and the bottoming out of the number of synapses and metabolic rate around puberty, are plausible causes. We do know that the language-learning circuitry of the brain is more plastic in childhood; children learn or recover language when the left hemisphere of the brain is damaged or even surgically removed (though not quite at normal levels), but comparable damage in an adult usually leads to permanent aphasia.

PINKER, *supra* note 2, at 293.

87. Professor Rosina Lippi-Green provides a nice summary of these “linguistic facts of life”:

- There is a finite set of potentially meaning-bearing sounds (vowels, consonants, tones) which can be produced by human vocal apparatus. The set in its entirety is universal, available to all human beings without physical handicap.
- Each language uses some, but not all, sounds available.

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It is important to understand this terminology correctly: despite the misleading terms “first language” and “second language,” the distinction actually rests on timing, not the number of languages being learned. In the critical early childhood period, when the language machine is active (i.e., when the language-learning circuitry of the brain is still functioning), a child receiving the appropriate language input can acquire any number of languages and will be able to speak all of them fluently, without an accent. Each of these would be considered a “first” language. After puberty, when the language machine no longer operates in the same way (i.e., when the language-learning circuitry of the brain no longer fully functions), any language learned would be considered a “second” language.

Of course, languages differ not only with respect to their rules, but also with respect to their vocabularies. To continue the metaphor, one can picture learning vocabulary like popping a tape or a computer disk into the language machine. Unlike phonology, morphology, or syntax (the “rules” of a language), vocabulary is not static. A person can continue to add to his or her vocabulary for a lifetime.

The various world languages are each defined by their rules (the “toggle switch” settings) and their vocabularies. More closely related languages share some settings and vocabulary words, while more distantly related languages might have completely different settings and vocabulary. But even languages that appear to be very different (say, English and Japanese) can be considered variants of the same basic human language, because all human languages arise from the brain’s language “machine.”

Thus, the common distinction between “language” and “dialect” carries little meaning for linguists.<sup>88</sup> Contrary to the

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- Children are born with the ability to produce the entire set of possible sounds, but eventually restrict themselves to the ones they hear used around them.
  - Children exposed to more than one language during the language acquisition process may acquire more than one language, if the social conditioning factors are favorable.
  - At some time in adolescence, the ability to acquire language with the same ease as young children atrophies.

LIPPI-GREEN, *supra* note 2, at 45–46. Her summary focuses on the acquisition of phonology settings, but applies equally well to the acquisition of morphology and syntax settings.

88. See Pamela Burdman, *Ebonics Tests Linguistic Definition*, S.F. CHRON., Dec. 26, 1996, at A1. Burdman quotes Wayne O’Neil, chairman of the linguistics and

popular misconception, a dialect is not a second class version of a language, and languages are not more “pure” or “correct” than dialects.<sup>89</sup> When linguists distinguish between these two terms, they use “language” to refer to a group of mutually intelligible dialects.<sup>90</sup> In linguistic terms, everyone speaks one dialect or another;<sup>91</sup> when two dialects are mutually intelligible, linguists would say that they belong to the same language. But because mutual intelligibility varies gradually, linguists do not place particular emphasis on the distinction. In common usage, by contrast, the choice between the two terms tends to be based on political grounds (e.g., national boundaries or relative status of speakers) rather than linguistic ones (similarity of language rules or vocabulary).<sup>92</sup> As linguists like to say, “A language is a dialect with an army and a navy.”<sup>93</sup>

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philosophy department at the Massachusetts Institute of Technology: “By and large, linguists are not going to get into arguments about what’s a language, what’s not a language. Language is not a technical term. It is a political and ideological term.” *Id.*

Although not a technical term among linguists, the label “language” can play a significant political role. This was demonstrated in the debate over the Oakland School Board’s resolution on “Ebonics”: Because federal bilingual education funding is only available to support education efforts aimed at children who speak a *language* other than English, rather than a *dialect* other than Standard English, the question whether Black English should be termed a separate language or a separate dialect of English (a linguistically uninteresting question) has been treated as highly significant by the public and the media. See Venise Wagner, *U.S. Won’t Pay for “Ebonics” in School*, S.F. EXAMINER, Dec. 25, 1996, at A1 (exploring the relationship between classification as a language and receipt of federal funds); see also *supra* note 5 (discussing Oakland controversy).

89. See Burdman, *supra* note 88, at A1 (discussing common derogatory usage of term “dialect” and contrasting this usage with the technical linguistic meaning); see also LIPPI-GREEN, *supra* note 2, at 247–48 n.4 (“Laypersons often associate the word dialect as something less developed, capable, or worthy, and hence always subordinate to a language. This is an unfortunate and miscast use of the term.”).

90. See LIPPI-GREEN, *supra* note 2, at 43 (giving a “rough division” of terms “accent,” “dialect,” and “language”).

91. See Burdman, *supra* note 88, at A1 (quoting John McWhorter, a professor of linguistics and African-American studies at the University of California at Berkeley).

92. See *id.*; see also John R. Rickford, *Linguistics Society of America (LSA) Resolution on the Oakland “Ebonics” Issue* (last modified Mar. 19, 1997) <<http://www-leland.stanford.edu/~rickford/ebonics/LSAResolution.html>> [hereinafter *LSA Resolution*] (quoting from a resolution unanimously adopted at the annual meeting of the Linguistic Society of America in Chicago, Illinois, on Jan. 3, 1997: “The distinction between ‘languages’ and ‘dialects’ is usually made more on social and political grounds than on purely linguistic ones. For example, different varieties of Chinese are popularly regarded as dialects, though their speakers cannot understand each other, but speakers of Swedish and Norwegian, which are regarded as separate languages, generally understand each other.”).

93. See Burdman, *supra* note 88; LIPPI-GREEN, *supra* note 2, at 43 (“Max Weinreich is widely quoted as pointing out that a language is a dialect with an army and a navy; I would like to add to that observation that a dialect is perhaps nothing more than a language that gets no respect.”).

Given this scientific explanation of language, all human languages (or dialects) must be considered equally valid. No language is more grammatical than any other, none is intrinsically more complex, and none is more capable of expressing thought.<sup>94</sup> There are no primitive or "Stone Age" languages.<sup>95</sup> All spoken languages are a product of the same basic language machine, with its limited collection of rule settings, and an arbitrary selection of vocabulary.

Why then are some spoken dialects considered "standard," "proper," or "correct," while others are relegated to nonstandard status (if they are recognized as dialects at all)? The answer to this question lies outside the study of language per se, because "[a]ll linguists agree that [so-called] nonstandard dialects are highly structured systems; they do not see these dialects as accumulations of errors caused by the failure of their speakers to master [the] standard. . . ."<sup>96</sup>

The status hierarchy of languages actually reflects social facts, not linguistic ones.<sup>97</sup> The source of a dialect's status is the status of the dialect's speakers, not the dialect's inherent qualities. Nonstandard dialects are those whose speakers have been relegated to marginal positions in their societies.<sup>98</sup> "[a]s has always been the case in the United States, and in most other nations, those who are in positions of political power and social control dictate the standards of linguistic acceptability."<sup>99</sup>

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94. See LIPPI-GREEN, *supra* note 2, at 11–14 (explaining why all spoken languages are equal in linguistic terms). Critical to understanding this point is the realization that all languages change over time, both in terms of their grammar and their vocabulary. See *id.* at 10. All languages are flexible enough to develop vocabulary in order to express new concepts: if speakers of a dialect in some isolated community in Tibet suddenly needed to discuss the Internet, for example, they would be fully capable of doing so in their dialect. See *id.* at 11–12.

95. See PINKER, *supra* note 2, at 27.

96. William Labov, *The Logic of Nonstandard English*, in LANGUAGE, SOCIETY, AND EDUCATION: A PROFILE OF BLACK ENGLISH 10, 40 (Johanna S. DeStefano ed., 1973).

97. See generally LIPPI-GREEN, *supra* note 2 (discussing sources and effects of status differences among dialects).

98. See BAUGH, *supra* note 70, at 9; LIPPI-GREEN, *supra* note 2, at 53–62; see also Claudia Mitchell-Kernan, *Foreword to EDITH A. FOLB, RUNNIN' DOWN SOME LINES: THE LANGUAGE AND CULTURE OF BLACK TEENAGERS* at xv, xvii (1980) ("Across the United States, through the influence of formal education and the mass media, differences between regional dialects are waning. Differences between social dialects, however, remain quite marked and in fact may reflect the entrenchment of the class system of our society.")

99. BAUGH, *supra* note 70, at 30; cf. Robert L. Politzer, *Problems in Applying Foreign Language Teaching Methods to the Teaching of Standard English as a Second Dialect*, in LANGUAGE, SOCIETY, AND EDUCATION: A PROFILE OF BLACK ENGLISH, *supra* note 96, at 238, 243 (questioning the distinction between "permissible variations" and

Those who study this phenomenon often use the term “Standard Language Ideology,” defined as “a bias toward an abstracted, idealized, homogenous spoken language which is imposed and maintained by dominant bloc institutions and which names as its model the written language, but which is drawn primarily from the spoken language of the upper middle class.”<sup>100</sup> Standard Language Ideology is based on a number of myths. The most important of these is the myth that Standard English is somehow distinct in quality from all other American dialects.<sup>101</sup> Indeed, common usage rejects the term “dialect” for Standard English for this very reason, in a move akin to denying that whites have a particular ethnicity or that males have a particular gender.<sup>102</sup> A related myth holds that Standard English itself is unchanging and without variation.<sup>103</sup> In reality even the dialect we call Standard English is an abstraction: it permits regional variation, as long as this variation occurs within a primarily white, middle- or upper-middle-class community.<sup>104</sup>

Symptomatic of the prejudice in favor of the Standard English dialect is the fact that, just as some dialects are more equal than others, some differences are more different than others. Where two varieties of a language<sup>105</sup> (or the speakers of two varieties) have equal social status, differ-

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“substandard speech”). Politzer, in discussing the difficulty of defining what is “standard” in order to teach Standard English, notes: “Sociological criteria would be based on the simple recognition that for some strange and often undefinable reasons certain pronunciations are associated with ignorance and are considered substandard while others are not.” *Id.* at 244. But the reasons are not really “strange” and “undefinable”—they are simply not linguistic.

100. LIPPI-GREEN, *supra* note 2, at 64.

101. See LIPPI-GREEN, *supra* note 2, at 53–62 (explaining the standard language myth); see also *id.* at 6 (“There is a common conception that there is a *good* English, and following from that, *bad* English.”).

102. See Matsuda, *supra* note 2, at 1361 (“[E]veryone has a gender, but the hidden norm in law is male. . . . [E]veryone has a race, but the hidden norm in law is white . . . . And so it is with accent . . . . People in power are perceived as speaking normal, unaccented English. Any speech that is different from that constructed norm is called an accent.”); see also Flagg, *supra* note 1, at 957 (introducing the concept of “Transparency Phenomenon” in the context of Equal Protection law); cf. Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2019 n.9 (1995) (discussing the “Transparency Phenomenon,” by which only blacks have a race—whites, and white norms, are thus rendered “transparent” and neutral).

103. See LIPPI-GREEN, *supra* note 2, at 25 (stating that contrary to common understanding, “[v]ariation is intrinsic to all spoken language at every level”).

104. See *id.* at 53–62.

105. Because laypersons often use the term “dialect” in a pejorative way, some linguists prefer the term “variety.” See *id.* at 247–48 n.4.

ences between the two varieties may be the source of comment but never derision.

For example, phonological differences between the variety of English spoken on the East Coast and that spoken on the West Coast mean that some speakers distinguish the pronunciation of "Mary," "merry," and "marry," while other speakers do not.<sup>106</sup> Although the difference in pronunciation is quite noticeable, no one derides speakers of either variety for their pronunciation.<sup>107</sup> Because speakers of these two varieties have roughly equal status in our society, hearers recognize this difference as a mark of diversity, not deficiency. Indeed, Standard English is understood to include both varieties.

British English provides a more general example. Because Standard British English carries very high status in the United States, speakers of American English consistently recognize that it is simply another possible dialect of the English language family. No one would accuse a British English speaker of poor language skills simply because he or she pronounces words differently than American speakers.<sup>108</sup> This acceptance extends beyond mere phonological differences. For example, speakers of American English would never produce sentences such as "the government have failed to solve the problem" or "the committee have forwarded the suggestion," but they can recognize that British English speakers who do produce such sentences are not failing to speak proper English—they are simply following the rules of British English.<sup>109</sup>

In fact, when an outside dialect has high enough status within a second dialect community, speakers of the second dialect may accept the other so thoroughly that they fail to acknowledge any differences at all. This explains why a columnist rejecting Black English could argue that blacks

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106. See *id.* at 27. The same phonological difference between dialects determines whether a speaker distinguishes between "cot" and "caught" and "hock" and "hawk." *Id.*

107. I know this from personal experience: my college friends who spoke the East Coast dialect enjoyed having me (a West Coast dialect speaker) attempt to pronounce this trio of words with distinct vowels. The fact that I was unable to do so amused them, but they never suggested that my pronunciation was incorrect.

108. See LIPPI-GREEN, *supra* note 2, at 239 ("Immigrants from the British Isles who speak varieties of English which cause significant communication problems are not stigmatized: the differences are noted with great interest, and sometimes with laughter.").

109. See CRYSTAL, *supra* note 5, at 311 (explaining the difference between British and American English number agreement rules).



should strive instead to speak "King's English"<sup>110</sup>—despite the fact that no native-born American actually speaks that dialect.

Listeners interpret language differences quite differently where two dialects have unequal status. While Americans find British accents unproblematic, if not charming, they react negatively to differences "linked to skin that isn't white, or which signals a third-world homeland."<sup>111</sup> Ironically, perhaps, the reaction of some British citizens to American English can exemplify this point as well: since American English does not carry such high status in Britain as British English carries in the United States, some British English speakers do believe that American speech patterns are improper—that they represent a faulty version of "pure" English.<sup>112</sup>

Within the United States, certain varieties of American English elicit equally negative reactions. For example, a phonological distinction equivalent to that which produces the "Mary," "merry," "marry" contrast means that speakers of a Southern variety of English pronounce "pin" and "pen" the same way, while speakers of the Northern varieties distinguish them (in the Southern variety, short "i" and "e" are pronounced similarly when they precede nasal consonants). Once again, this difference simply represents diversity; there is nothing intrinsically correct about either type of phonological rule. But because the Southern variety has lower status, this difference elicits both comment and derision, which then causes shame among Southern speakers who try to "correct" their pronunciation.<sup>113</sup>

Status differences also explain why Americans are often more tolerant of foreign accents than of ethnic or regional "accents" (i.e., dialect differences).<sup>114</sup> A purely linguistic

110. Page, *supra* note 20.

111. LIPPI-GREEN, *supra* note 2, at 238.

112. See Letter from Professor Ted Briscoe, University of Cambridge, to author (Feb. 2, 1998) (on file with the *University of Michigan Journal of Law Reform*). According to Professor Briscoe, a British linguist with a British sense of humor, "[n]early all Brits think Yanks speak a substandard dialect of English—even those poor sods who speak a substandard dialect of British English, i.e., everyone who doesn't use 'received' pronunciation or public (in the British sense) school English."

113. See generally David Williford, *A Pin Is Not a Pen; Is a Pan? Is Southern Pronunciation Incorrect?*, ENG. J., Oct. 1988, at 25, 28.

114. Dr. Doris F. Weisberg, chair of the Speech Department at City College in New York, notes that "Americans are more tolerant of language differences among newly arrived immigrants." Roberts, *supra* note 14, at B1. In addition, "employers and teachers tend to forgive foreign-born children or adults for incorrect pronunciations, but because of racism they do not forgive black people." Nicklin, *supra* note 60. The particular status of the foreign language speaker also plays a role: Americans tend to be

analysis would suggest the opposite reaction: A foreign accent (or "L2" accent) arises when a speaker continues to apply (subconsciously) the rules of a first language when speaking a second.<sup>115</sup> Thus, it is accurate to say that these individuals speak the second language incorrectly. By contrast, people with regional "accents" (or "L1" accents) are not speaking a second language (the so-called standard dialect) incorrectly; rather, they are applying the rules of their first language (a nonstandard dialect) correctly. But once again, social prejudice, rather than linguistic fact, often controls our perception of language differences.

Just how faulty our perceptions of language difference can be has been shown by studies of intelligibility. For example, one experiment showed that undergraduate students who believed they had heard an Asian instructor give a lecture not only rated her speech as more accented than that of a control lecturer, they also scored more poorly on a subsequent comprehension exam—although the taped lecture that they had heard was made by the same non-Asian speaker who made the control tape.<sup>116</sup> In general, linguists have found that the ability of a speaker to communicate successfully is partially dependent on the listeners' active participation; if a listener (unconsciously) rejects her portion of the communicative burden, she will perceive the speaker as less intelligible—regardless of the actual characteristics of the

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far more accepting of a French or German accent, for example, than a Mexican one. See LIPPI-GREEN, *supra* note 2, at 238–39.

115. For example, an English speaker may subconsciously apply English syntax rules when speaking German, and therefore fail to place the German verb in the proper position within a sentence. English speakers speaking German with a strong English accent might say, for example, "Er sagte, daß er *liebt* seine Frau" ("He said that he *loved* his wife," following English word order rules) rather than "Er sagte, daß er seine Frau *liebt*" ("He said that he his wife *loved*," following German word order rules). See LIPPI-GREEN, *supra* note 2, at 42–43 (explaining the difference between an "L1" accent—which simply marks which variety of English is being spoken—and an "L2" accent—which represents a breakthrough of the speaker's first language into the second language).

116. See LIPPI-GREEN, *supra* note 2, at 126–27 (describing findings reported in Donald L. Rubin & Kim A. Smith, *Effects of Accent, Ethnicity, and Lecture Topic on Undergraduates' Perceptions of Non-Native English Speaking Teaching Assistants*, 14 INT'L J. INTERCULTURAL REL. 337 (1990): Students saw one of two possible photographs representing the instructor—one showing a Caucasian woman and the other an Asian woman and heard two possible lectures, one on a science topic and the other on a humanities topic recorded by the same person, a native speaker of English from central Ohio).

speaker's speech.<sup>117</sup> In other words, "[i]ntelligibility is a highly subjective criterion."<sup>118</sup>

Although the preceding discussion applies most directly to spoken language, it has implications for our understanding of written language as well. Given that children acquire most features of their first language (excluding vocabulary) well before they reach school age,<sup>119</sup> the purpose of classes labeled "English" or "Language Arts" cannot actually be to teach children language. Rather, these classes teach reading and writing. In particular, they teach the use of Standard Written English.

From a linguistic perspective, Standard (Spoken) English and Standard Written English are two very different things.<sup>120</sup> Standard Written English is a cultural construct which no one learns as a first language: it does not arise directly from the brain's "language machine." Of course, those students whose first language is most similar to Standard Written English are able to learn Standard Written English skills much more easily than those whose first language is less similar.<sup>121</sup> It is no surprise to learn that the dialect most closely related to Standard Written English is Standard (Spoken) English: the same power relations that determined the choice of Standard English as the "normal" dialect also led to the choice of Standard English as a basis for the standard written form.

2. *The Linguist's View of Black English*—Black English is not bad grammar, and it is certainly not "a linguistic sham that, with porcine gluttony, vacuum-sucks every verbal deformity from plantation patois to black slang, from rap to hip hop, from jive to crippled English"—as one outraged commen-

117. See LIPPI-GREEN, *supra* note 2, at 70–71.

118. EINAR HAUGEN, BLESSINGS OF BABEL: BILINGUALISM AND LANGUAGE PLANNING 16 (1987); see also William F. Mackey, *Bilingual Education and Its Social Implications*, in LINGUISTIC MINORITIES, POLICIES AND PLURALISM 151, 157 (John Edwards ed., 1984) (noting that in highly bilingual areas, "speakers will admit to understanding the language of highest status and not to understanding an inferior although closely related dialect of their mother tongue"). See generally ATTITUDES TOWARD LANGUAGE VARIATION (E. Ryan & H. Giles eds., 1982).

119. See LIPPI-GREEN, *supra* note 2, at 123; see also *supra* notes 86–87 and accompanying text (discussing the "critical period" for language learning, which is largely completed before age six).

120. See LIPPI-GREEN, *supra* note 2, at 18–25 (explaining why "written language and spoken language are historically, structurally, and functionally fundamentally different creatures").

121. See *infra* note 313 and accompanying text (discussing studies showing improved reading skills of Black English speakers who use textbooks based on Black English dialect, rather than Standard English dialect).

tator insisted, after the Oakland School Board decided to officially recognize what it labeled "Ebonics."<sup>122</sup> Rather, Black English is just one of many human languages.<sup>123</sup> In purely linguistic terms, it has exactly the same status as Standard English, "King's English," or, for that matter, Hochdeutsch. Like all other languages worldwide, it is a product of the brain's specialized language-learning circuitry and can be defined in terms of its phonology, morphology, and syntax rules, as well as its vocabulary.<sup>124</sup>

This view is absolutely noncontroversial among linguists.<sup>125</sup> When the Linguistic Society of America passed a resolution in support of the Oakland School Board's decision, explaining that Black English is "systematic and rule-governed like all natural speech varieties" and that characterizations such as "'slang,' 'mutant,' 'lazy,' 'defective,' 'ungrammatical,' or 'broken English'" are incorrect, the vote was unanimous.<sup>126</sup> This view of Black English is "not PC [politically correct], it's scientific fact."<sup>127</sup>

122. Shaw, *supra* note 5, at B9. It should be noted that Mr. Shaw, a consultant for the Los Angeles Office of Education, is himself black. This exemplifies two points made earlier: that the common sense view of Black English is prevalent in both black and white communities and that strong negative reactions to Black English often come from the black community itself. See *supra* notes 17–25 and accompanying text.

123. See PINKER, *supra* note 2, at 29–31 (discussing Black English as a fully complex dialect/language); see also LIPPI-GREEN, *supra* note 2, at 176–201 (same); Pullum, *supra* note 5, at 321 (noting AAE's consistent grammar and pronunciation); *LSA Resolution*, *supra* note 92 (recognizing Black English as a systematic, rule-governed language variety).

124. A vast amount of linguistics literature concerns the origins and structure of Black English. See, e.g., AFRICAN AMERICAN ENGLISH (Salikoko S. Mufwene et al. eds., forthcoming); BAUGH, *supra* note 70; ROBBINS BURLING, ENGLISH IN BLACK AND WHITE (1973); DILLARD, *supra* note 5; LABOV, *supra* note 5; JOHN R. RICKFORD & LISA A. GREEN, AFRICAN AMERICAN VERNACULAR ENGLISH (forthcoming); GENEVA SMITHERMAN, BLACK TALK: WORDS AND PHRASES FROM THE HOOD TO THE AMEN CORNER (1994); GENEVA SMITHERMAN, TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA (1986); TAYLOR, *supra* note 62; WALTER A. WOLFRAM, A SOCIO-LINGUISTIC DESCRIPTION OF DETROIT NEGRO SPEECH (1969); Geneva Smitherman, "It Bees Dat Way Sometime:" *Sounds and Structure of Present Day Black English*, in LANGUAGE: INTRODUCTORY READINGS 552 (Virginia P. Clark et al. eds., 1985).

125. See Pullum, *supra* note 5, at 321 ("[E]ssentially all linguists agree that [Black English] is a dialect of English.").

126. *LSA Resolution*, *supra* note 92; see also Ron Emmons, *Black English Has Its Place*, L.A. TIMES, Dec. 27, 1996, at B13 (noting that the American Speech, Language, and Hearing Association classifies Black English as a "legitimate social dialect with unique lexicon, grammar, phonology, syntax and semantics").

127. Judy Pasternak, *Linguists Praise Oakland's Plan to Use Ebonics*, L.A. TIMES, Jan. 4, 1997, at A1 (quoting Gregory Ward, a Northwestern University linguist who serves on the executive committee of the 6,000-member Linguistic Society of America). As linguist Geoffrey Pullum observes, a linguists' view can hardly be dismissed as

The Black English dialect developed through a complex process called "creolization."<sup>128</sup> When three or more languages first come into contact, speakers often create what is called a "pidgin" language. This is not a true language, because it lacks the complexity of other languages; it does not arise from the brain's language "machine." Rather, a pidgin system is a sort of shorthand, based on the languages that have come into contact with one another, which allows limited communication among speakers of those languages. The next step of the creolization process is rather fascinating: children who are exposed to the pidgin as their only form of communication transform it, filling in the linguistic gaps to create a new language called a creole.<sup>129</sup>

Why children? Because only children are still in the critical period of language learning, when the language "machine" is still operating. It is this "machine" (the specialized language-learning circuitry of the brain) that enables them to expand the pidgin into a complete language. In fact, linguists speculate that the rules of creoles, which are strikingly similar worldwide, reflect the basic, or default, settings of the "toggle switches." This is one reason why linguists are especially interested in creoles.

This process has occurred many times around the world.<sup>130</sup> In particular, creolization occurred when slaves were pur-

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"just left wing propaganda," because "[e]ven conservative linguists acknowledge the facts [regarding Black English]." See Pullum, *supra* note 5, at 322.

128. See BAUGH, *supra* note 70, at 16-17; DILLARD, *supra* note 5, at 6; PINKER, *supra* note 2, at 32-39; Traugott, *supra* note 5, at 58; *Introduction to Section II: The History of Black English*, in PERSPECTIVES ON BLACK ENGLISH 91 (J. Dillard ed., 1975).

129. See generally LORETO TODD, PIDGINS AND CREOLES (2d ed. 1990) (examining through detailed study the transformation from pidgin to creole); David DeCamp, *Introduction: The Study of Pidgin and Creole Languages*, in PIDGINIZATION AND CREOLIZATION OF LANGUAGES 13 (Dell Hymes ed., 1971) (describing the metamorphosis of pidgin into creole). Professor Lippi-Green summarizes the difference between a pidgin and a creole:

A pidgin has no native speakers, and is reduced, with simplified morphological and syntactical features taken from the contributing languages. Pidgins can exist over long periods of time. A creole is something very different. When pidgin speakers settle down in close proximity to each other and when children are born into a setting in which pidgin is spoken, they take the raw data of the pidgin and in the process of language acquisition they expand it into a fully functioning language.

LIPPI-GREEN, *supra* note 2, at 248 n.5.

130. See PINKER, *supra* note 2, at 36-39. Pinker offers Hawaiian creole as one example of creolization. See *id.* at 34. He also describes how deaf children in various countries around the world developed full sign languages (which like spoken lan-

posely grouped so that they would not share a native language, in order to reduce the possibility of revolt.<sup>131</sup> When slavery was first established in the United States, slaves used a pidgin based on English and their native African languages to communicate.<sup>132</sup> Children born into this pidgin-speaking community, in the process of language learning, developed the pidgin spoken by their parents into a full creole language—in essence, Black English.<sup>133</sup> Their children's children, and so on, learned Black English just as every child learns whatever language he or she is exposed to during the critical period for language learning.

This explanation may sound bizarre to a non-linguist. It is apparently easy to misunderstand the nature of creolization—the common sense view can block understanding. Consider, for example, the following erroneous summary: “Linguists say the [Black English] dialect represents the remnants of West African languages used by American slaves and the efforts of those slaves—denied formal education—to mimic white people.”<sup>134</sup>

This summary is wrong for a number of reasons. First of all, slaves' lack of formal education is irrelevant to the language learning process, since language acquisition does not normally occur at school—the vast majority of the language acquisition process occurs long before children are old enough for formal schooling.<sup>135</sup> Second, Black English did not result from blacks' attempts to “mimic” whites. Black children created Black English from the adults' pidgin system without conscious effort and without any need for exposure to Standard English. These children were not copying a language badly—they were creating a new language.

Although it accepted the validity of Black English as a language, the Oakland School Board resolution also expressed a number of confusions about the origins of Black English. By labeling Black English “Pan-African Communication Behavior” and “African Language Systems” and by stating that “African

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guages, are products of the brain's language “machine”) from pidgin sign systems. *See id.* at 36–39.

131. *See* BAUGH, *supra* note 70, at 13.

132. *See* DILLARD, *supra* note 5, at 74–75.

133. *See* BAUGH, *supra* note 70, at 16.

134. Lee, *supra* note 14, at D22.

135. The writer apparently believes that if adult slaves had been taught Standard English as a second language, they would have then taught Standard English to their children. This may be true, but it in no way relates to the actual development of Black English.

Language Systems are . . . not a dialect of English,"<sup>136</sup> the board suggested that Black English is correctly seen as an African language. This is inaccurate: to say that Black English has some of its roots in African languages spoken by slaves is not to say that Black English is an African language. Indeed, linguists debate just how many features of modern Black English can be traced to African languages.<sup>137</sup> As a creole based on English, Black English has always been a member of the English language family.<sup>138</sup>

Because they are closely related dialects of English, Black English and Standard English have very similar vocabularies. Some speakers of Black English—usually younger ones—do draw from a different vocabulary than that used by Standard English speakers in order to express group solidarity; when they do so, it is accurate to say that these speakers are using "slang."<sup>139</sup> However, this slang is no more equivalent to Black English than "valley speak" is equivalent to Standard English.<sup>140</sup>

The distinction between Standard English and Black English does not lie primarily in vocabulary differences but rather in the two dialects' phonology, morphology, and syntax. The differences a listener hears are the result of these different language rules (i.e., different settings for the phonology, morphology, and syntax "toggle switches" in the brain's language "machine"). Black English does not sound different from Standard English because it fails to follow the rules of Standard English; it sounds different because it follows its own, equally valid, rules. Indeed, the fact that Black English is rule-based,

136. *EBONICS—The Oakland Resolution*, *supra* note 5 (reprinting original resolution).

137. See, e.g., *AFRICANISMS IN AFRO-AMERICAN LANGUAGE VARIETIES* (Salikoko S. Mufwene ed., 1993).

138. See Traugott, *supra* note 5, at 58. It is also important to note that modern day Black English is not the same as the initial creole; like all languages, Black English has changed and developed over time. In particular, Black English has undergone a partial process of "decreolization." See *id.* at 61 (explaining that over the centuries Black English has adopted some of the rules of Standard English, causing the two languages to become more similar).

139. See generally Mitchell-Kernan, *supra* note 98 (reporting findings of study on black teens' use of slang).

140. See LSA Resolution, *supra* note 92 (asserting that Black English is not equivalent to slang). This is a point missed by most of the commentators reacting to the "Ebonics" decision in Oakland. See *supra* note 7; see, e.g., Asimov & Olszewski, *supra* note 22 (noting Shelby Steele's insistence that Black English is "merely slang"); Jackson Assails "Ebonics" Policy, S.F. EXAMINER, Dec. 23, 1996, at A2 (quoting Jesse Jackson: "[I]n Oakland some madness has erupted over making slang talk a second language."); Debra J. Saunders, *Oakland's Ebonics Farce*, S.F. CHRON., Dec. 24, 1996, at A15 (arguing that the Oakland decision "elevates slang").

rather than a random collection of errors, should be obvious from its very recognizability as Black English.<sup>141</sup> This is why the applicant in the Introduction could be identified as black from just a few sample sentences.

Some examples may make this explanation more clear.<sup>142</sup> The differences in word pronunciation in Black English result from a different set of phonological rules (different from Standard English, that is, but shared by many world languages). "Test" is pronounced "tes" in Black English because a regular phonological rule (one that operates subconsciously, as part of the language "machine") reduces two-consonant clusters at the end of a word.<sup>143</sup> The rule can only operate when the two final consonants are either both "voiceless"—as in "test"—or both voiced—as in "hand."<sup>144</sup> If one of the two consonants is voiced and the other unvoiced (as in "pant") then the rule does not apply ("pant" would never be pronounced "pan" in Black English).<sup>145</sup> This complicated phonological rule then interacts in a complex way with the rules of morphology (word structure): where a final "t" or "d" phoneme marks the past tense on a verb, it is not reduced.

141. See *supra* notes 7–10 and accompanying text.

142. For other examples, see BAUGH, *supra* note 70, at 80–81 (explaining that the stressed "been" in Black English, as in "we *been* lived here," means "we have lived here for some time and continue to do so"); ORR, *supra* note 17, at 121–32 (discussing differences in closed class words such as prepositions); Ralph W. Fasold & Walt Wolfram, *Some Linguistic Features of Negro Dialect*, in LANGUAGE, SOCIETY, AND EDUCATION: A PROFILE OF BLACK ENGLISH, *supra* note 96, at 116, 141–45 (discussing possessives, plurals, question formation, and "existential it" as in "it be a boy in my room name Robert" for "there is a boy in my room named Robert"); Joan G. Fickett, *Ain't, Not, and Don't in Black English*, in PERSPECTIVES ON BLACK ENGLISH, *supra* note 49, at 86 (discussing the verb tense system of Black English); Labov, *supra* note 96, at 33–34 (discussing question formation); Peter Sells et al., *Negative Inversion in African American Vernacular English*, 14 NAT. LANGUAGE & LINGUISTIC THEORY 591 (1996) (analyzing complex negative inversion construction, which reverses order of negative quantifier and auxiliary—"Nobody can't" becomes "Can't nobody"—to produce emphatic affirmative); Traugott, *supra* note 5, at 86–93 (discussing how various features of Black English fit with its creole source); Acson, *supra* note 54, at A18 (comparing other world languages to show that Black English is not anomalous: "Arabic and Hebrew both have a possessive form that has no marking on the possessive noun . . . . Oral French has no marked plural form ('jour' is day and days).").

143. See Fasold & Wolfram, *supra* note 142, at 117–20 (discussing reduction of word-final consonant clusters in Black English).

144. A "voiced" phoneme is one that requires vocal cord vibration; an "unvoiced" phoneme requires no vocal cord vibration. The difference can be felt by touching the throat while saying either "d" (voiced) or "t" (unvoiced).

145. See *Ebonics Notes and Discussion* (visited Mar. 4, 1998) <<http://www-leland.stanford.edu/~rickford/ebonics/EbonicsExamples.html>> (thanks to John Rickford for this example).



Thus, in Black English "past" is pronounced "pas," but "passed" would never be pronounced "pas."<sup>146</sup>

Similarly, systematic phonological rules produce the famous "aks" for "ask," "tin" for "thin," and "toof" for "tooth," as well as the so-called "dropped 'g'" in words like "workin" and "writin."<sup>147</sup> The label "dropped 'g'" for the last variation is a particularly nice example of the common confusion between spoken and written language. Although we write "working" with seven letters and "workin" with six, the pronunciation difference does not actually result from "dropping a 'g'"; it results from substituting one phoneme, [n], for another, [ŋ].<sup>148</sup> Once again, this phonological alteration is itself constrained by the rules of morphology (word structure): where "ing" is part of the root word, rather than a suffix, the alteration does not apply ("ring" would never be pronounced "rin" in Black English).<sup>149</sup>

Thus, these pronunciations in no way represent laziness or ignorance on the part of the speaker. All human languages allow such phonological alterations because they maximize ease of articulation. In each case, however, the pronunciation is the product of a complicated but unconscious language *rule*: "[N]o dialect allows its speakers to cut [phonological] corners at will."<sup>150</sup>

Furthermore, forms like "we be writing grant proposals" do not result from a failure to put the verb into its proper tensed form. In Black English, this *is* a tense (one not available in Standard English). It corresponds to a durative meaning; in other words, it means that the action specified by the verb continues over time.<sup>151</sup>

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146. See BAUGH, *supra* note 70, at 97-98 (explaining that the final consonant reduction rule affects the pronunciation of words like "past," "cold," or "test," but where the "t" or "d" phoneme marks the past tense, it is not reduced).

147. See LIPPI-GREEN, *supra* note 2, at 27-28, 179-80 (explaining "aks" and "dropped 'g'"); Fasold & Wolfram, *supra* note 142, at 120-29 (discussing "th" sounds, nasalization rules (loss of "g"), and plural and past tense markers); William G. Moulton, *The Sounds of Black English*, in BLACK ENGLISH: A SEMINAR, *supra* note 5, at 149, 155-56 (explaining "th" rules and the "loss of 'g'").

148. See LIPPI-GREEN, *supra* note 2, at 27.

149. See *id.* at 28.

150. PINKER, *supra* note 2, at 180.

151. See BAUGH, *supra* note 70, at 71 (Invariant "be" is not untensed; it occurs "in habitual contexts where events are nonpast or incompleted" or when the sentence has a durative meaning because the action referred to extends over a certain period of time.); see also Pullum, *supra* note 5, at 321 (explaining Black English rules for the verb "be").

This example in particular demonstrates that Black English is not an impoverished version of Standard English. Because the rules of Black English allow deletion of the "be" verb form where the sentence does not have a durative meaning, the two sentences "she be working" and "she working" carry different meanings.<sup>152</sup> The first means that she generally works (she has a regular job), while the second can only mean that she is working at the moment. Standard English fails to make this distinction.

The "be" deletion rule is also a source of misunderstanding. As with phonological variations such as the so-called "dropped 'g,'" critics often assume that speakers "carelessly" or "sloppily" leave out the "be" verb form.<sup>153</sup> The truth is just the opposite: a set of very complicated but unconscious rules govern when "be" may be omitted in Black English. The "be" verb form cannot be omitted if it is stressed (as it always is at the end of a phrase); it cannot be omitted if it is negated; and it cannot be omitted if it is in the past tense.<sup>154</sup> Thus, "he good" can only mean "he is good." Arabic, Hungarian, Russian, and other languages have a very similar rule.<sup>155</sup>

Finally, the so-called "double negative" of Black English is no more illogical than the Standard English negative.<sup>156</sup> Both dialects show what linguists call "negative concord" or agreement between indefinite determiners and a negative element in the sentence (such as "not" or "never"). Negative concord is a grammatical rule, very much like gender or number agreement between nouns and verbs.<sup>157</sup> In Standard English, negative concord is shown by using the determiner "any," as in "I did *not* have *any* problems with *any* of the computers." In Black English, negative concord is shown using the determiner "no," as in "I did *not* have *no* problems with *no* computers." These sentences mean the same thing, and they are equally complex and logical.

In fact, the Black English rule for negative concord is the more common rule among languages worldwide. It was the

152. See PINKER, *supra* note 2, at 30.

153. See Pullum, *supra* note 5, at 321.

154. See *id.*

155. See *id.* at 321-22.

156. See BAUGH, *supra* note 70, at 82-83 (explaining that so-called multiple negation is actually a rule of agreement, which operates in both Black English and Standard English); PINKER, *supra* note 2, at 375-77 (same); Fasold & Wolfram, *supra* note 142, at 137 (same); Labov, *supra* note 96, at 30-32 (same); Pullum, *supra* note 5, at 321 (same).

157. See Pullum, *supra* note 5, at 321.

form English took at the time of Chaucer's Middle English,<sup>158</sup> and "[t]he Anglo-Saxon authors of the Peterborough Chronicle were surely not illogical when they wrote *For ne waeren nan martyrs swa pined alse he waeren*, literally 'For never weren't no martyrs so tortured as these were.'<sup>159</sup> The Black English rule of negative concord is the same rule followed by hundreds of other languages,<sup>160</sup> including Russian, Spanish, French, and Hungarian.<sup>161</sup>

An Italian speaker who says "Non ha telefonata nessuno," (literally, "not has telephoned no one")<sup>162</sup> would never be asked "doesn't that mean that somebody did call?" But Black English speakers are often ridiculed by Standard English speakers with questions like "if you 'didn't have no problems,' doesn't that mean that you did have some problems?" Standard English speakers make this error because they fail to recognize difference as diversity where that difference is correlated with lower status.

Because Standard English and Black English share a large vocabulary and many language rules, they are mutually intelligible. The differences between the two dialects are recognizable, but they do not impede communication significantly.<sup>163</sup> The negative concord construction provides a perfect example: Standard English speakers can deride a Black English speaker for saying "I never had no problems" precisely because they know exactly what the speaker means. Similarly, Standard English speakers are able to follow Alice Walker's book *The Color Purple*, although much of the dialogue in that book is written in Black English,<sup>164</sup> and they are able to understand the speech of television characters who use Black English.<sup>165</sup> This is why observers often refer to a "black accent": the difference between Black English and Standard English has

158. See PINKER, *supra* note 2, at 376.

159. Labov, *supra* note 96, at 31 (emphasis in original).

160. See PINKER, *supra* note 2, at 376.

161. See Labov, *supra* note 96, at 32.

162. See Pullum, *supra* note 5, at 321 (giving example of negative concord in Italian). This Italian sentence would be expressed "ain't nobody called" in Black English.

163. See Labov, *supra* note 96, at 32-34 (contrasting superficial linguistic differences with deeper correspondences in structure, logic, and meaning).

164. See *Sonya Live: Black English*, *supra* note 12 (Professor June Jordan notes that Standard English speakers can read and follow Alice Walker's book *The Color Purple*).

165. See Marlene G. Fine & Carolyn Anderson, *Dialectical Features of Black Characters in Situation Comedies on Television*, 41 PHYLON 396 (1980) (documenting use of Black English features on television programs).

approximately the same effect on the Standard English listener as a mild foreign accent.<sup>166</sup>

Crucially, however, the relationship between two such closely related dialects as Standard English and Black English is asymmetrical: speakers of each dialect can understand the other dialect without being able to produce it themselves.<sup>167</sup> An experiment conducted by the linguist William Labov illustrates this phenomenon well. Labov asked speakers of Black English to repeat statements that involved sentence-internal questions (a construction handled differently by the syntax rules in the two dialects).<sup>168</sup> The Black English speakers uniformly understood the sentences they were asked to repeat, but were often unable to repeat them word-for-word. Instead, they would restate the sentences using Black English syntax rules. For example, they repeated the statement "I asked Alvin if he could go" as "I asked Alvin could he go" and the statement "I asked Alvin whether he knows how to play basketball" as "I asked Alvin whether—did he know how to play basketball."<sup>169</sup>

In other words, they understood the Standard English sentences and then translated them into Black English. Both Black English speakers and Standard English speakers have this asymmetrical competence, which allows understanding or reception in both dialects, but production only in one.

Acquiring symmetrical competence, or the ability to speak both dialects fluently, is extremely difficult. An adult or teenage speaker of Black English who wants to speak Standard English must learn it as a second language. This is a difficult task: "The biological and mental obstacles to the acquisition of two languages can be overcome [once a speaker is past puberty] only with a heavy expenditure of social and psychological energy."<sup>170</sup>

166. See *supra* notes 114–15 and accompanying text (discussing dialect differences and accent).

167. See Labov, *supra* note 96, at 32–34 (explaining asymmetric relationship between Black English and Standard English).

168. See LABOV, *supra* note 5, at 62.

169. See *id.*

170. J.A. LAPONCE, LANGUAGES AND THEIR TERRITORIES 21 (Anthony Martin-Sperry trans., 2d ed. 1987); see also *supra* Part II.B.1 (discussing the "critical period" for language learning); PINKER, *supra* note 2, at 290–93 (explaining why second language acquisition is difficult in adulthood); Michael H. Long, *Maturational Constraints on Language Development*, 12 *STUD. IN SECOND LANGUAGE ACQUISITION* 251 (1990) (describing near impossibility of losing accent of first language when speaking a second language).

One would think that this task would be easier than usual in this context because the two languages (or dialects) are so similar. But in fact the similarities between Black English and Standard English may make the process harder, not easier, because they make it difficult to identify the differences and keep them straight. Studies in phonetics have shown that the more alike two languages are, the more difficult it actually is for language learners to successfully target the new sounds.<sup>171</sup> Thus, to require a Black English speaker to “just speak proper English” may be just as demanding as to require him or her to “just speak French.”<sup>172</sup>

The easiest aspect of “code-switching”<sup>173</sup> between Black English and Standard English is the switch in vocabularies. One researcher observes:

[V]ernacular vocabulary is closely monitored . . . on the job. For many, the white man’s world is alienating and intimidating, a place to be on guard . . . . This can mean adopting the linguistic behavior of the white world (and hiding one’s own). As one teenager put it, “When you get a job, you got have good language. I try to make a good impression.”<sup>174</sup>

Many Black English speakers are skilled at lexical (i.e., word-level) code switching and can utilize a more “standard” lexicon while at work.<sup>175</sup> Since the core vocabularies of Black English and Standard English are so similar, this largely entails refraining from speaking “slang.”<sup>176</sup>

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171. See LIPPI-GREEN, *supra* note 2, at 248 n.9 (citing three recent studies).

172. Politzer, *supra* note 99 at 239. Lippi-Green points out that seeming exceptions to this rule, such as comedian Eddie Murphy, who can speak both Standard English and Black English (among other dialects), are actually not exceptions because they learned multiple dialects as children during the “critical period” for language learning. See LIPPI-GREEN, *supra* note 2, at 49.

173. “Code-switching” refers to the ability to speak differently depending on context. Bilingual speakers can switch between a standard and nonstandard dialect; bilingual speakers may switch between two quite different languages. The switch may occur at the level of individual words (e.g., when a speaker substitutes a Spanish word for an English one in the midst of a conversation in English) or may involve a complete shift to a second language or dialect. See generally WILLIAM LABOV, *THE SOCIAL STRATIFICATION OF ENGLISH IN NEW YORK CITY* (1966) (discussing code-switching phenomenon); Roger Shuy, *Aspects of Language Variability and Two Areas of Application*, in *DIALECT AND LANGUAGE VARIATION* 381, 388–89 (Harold B. Allen & Michael D. Linn eds., 1986) (giving examples of code-switching).

174. Mitchell-Kernan, *supra* note 98, at 213.

175. See *id.*

176. See *supra* notes 139–40 and accompanying text (explaining the difference between Black English and slang).

Other types of code switching are far more difficult because they involve the subconscious operation of language rules. According to Dorothy Reynolds, head of Wisconsin's Action Group for the Recognition of Black English Vernacular (BEV): "There are black folks who will tell me they don't speak BEV . . . . You can't tell people, 'Yes, they do.' They don't even hear themselves doing it."<sup>177</sup>

Of course, the difficulty here goes both ways: "It would be just as difficult for standard speakers to master [Black English] as it is for black vernacular speakers to learn the standard."<sup>178</sup> Indeed, at least one study has demonstrated the many mistakes Standard English speakers make when they do try to speak Black English.<sup>179</sup> But because speakers of Standard English have the political and economic power to define their own dialect as "standard," no one requires them to accomplish this difficult task: they need not worry that their dialect exposes them to employment discrimination.

### *C. Applying Title VII to Protect Black English Speakers from Discrimination*

With this background in mind, it seems appropriate to reconsider the outcome of the hypothetical job interview in the Introduction. If we abandon the common sense view of language and accept linguists' scientific explanation of Black English, it becomes much less obvious that an applicant who says "aks," "we be writing," and "I never had no problems" should be denied employment or promotion. The question is, should this applicant have a cause of action against the employer if she is rejected because of her speech? In other words, does Title VII's prohibition of discrimination "because of . . . race" include an employment decision based on an individual's use of Black English?<sup>180</sup>

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177. Thomas, *supra* note 20, at 1A.

178. BAUGH, *supra* note 70, at 134.

179. See John Baugh, *Hypocorrection: Mistakes in Production of Vernacular African American English as a Second Dialect*, 12 LANGUAGE AND COMM. 317 (1992).

180. Title VII states that employers cannot "refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(a)(1) (1994).

Given the significant disadvantages faced by Black English speakers in the workplace,<sup>181</sup> one might expect this question to have been raised and answered long ago. But in fact no court has directly addressed the question. Ironically, it seems that the pervasiveness of the common sense view of Black English not only leads to extensive discrimination against Black English speakers—it also prevents possible plaintiffs from attempting to bring a claim, or even from realizing that they might have one.<sup>182</sup>

This is not to say that no plaintiff in an employment discrimination case has ever presented evidence to show that his or her use of Black English contributed to the defendant's adverse action. In *Sparks v. Griffin*,<sup>183</sup> for example, the defendant stated that one of the reasons for the plaintiff's dismissal from her teaching job was that "[she] has a language problem. She cannot help the negro dialect, but it is certainly bad for the children to be subjected to it all day."<sup>184</sup> Similarly, in *Edwards v. Gladewater Independent School District*,<sup>185</sup> the plaintiff's teaching contract was not renewed, allegedly because of complaints received from parents and students, some of which concerned the plaintiff's "black accent."<sup>186</sup>

However, it is unclear from the opinions in these cases whether the plaintiffs meant to argue that the defendants' negative reactions to Black English, taken alone, constituted race discrimination. In *Sparks*, the court found other evidence sufficient to prove race discrimination; its only

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181. See *supra* Part I.A (describing disadvantages).

182. The fact that no test case has yet been brought, although both Title VII and linguistic research on the nature of Black English have existed for more than 30 years, is a testament to the hegemonic power of Standard Language Ideology. See *infra* Part IV. It exemplifies the third type of power discussed by Steven Lukes—the power to determine when a conflict or claim even exists:

[I]s it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial?

STEVEN LUKES, POWER: A RADICAL VIEW 24 (1974) (cited in Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 746 n.25 (1994)).

183. 460 F.2d 433 (5th Cir. 1972).

184. *Id.* at 436 n.1.

185. 572 F.2d 496 (5th Cir. 1978).

186. *Id.* at 498.

comment on the language issue was limited to a footnote questioning the administrator's ability to diagnose a language problem, given the numerous errors in his written statements.<sup>187</sup> Similarly, the court in *Edwards* merely repeated the trial court's finding that the plaintiff could be easily understood and found that other evidence was sufficient to prove race discrimination.<sup>188</sup> Thus, in each of these cases (and no doubt others like them) the court was able to avoid addressing the "concededly delicate" question of whether discrimination against Black English speakers constitutes race discrimination.<sup>189</sup>

1. *Disparate Treatment Framework*—A plaintiff wishing to pursue this question under the disparate treatment framework<sup>190</sup> might take as a model a recent Title VII action concerning the Hawaiian Creole dialect. The plaintiff in *Kahakua v. Friday*<sup>191</sup> was an experienced meteorologist who applied for a promotion to a radio broadcaster position.<sup>192</sup> The position entailed reading weather reports from prepared scripts which were written in Standard English.<sup>193</sup> Because Mr. Kahakua speaks a variety of Hawaiian Creole which linguists term "Acrolectal Hawaiian Creole English" or "Standard Hawaiian English," evaluators from the Weather Service found his speech unacceptable for weather broadcasts; they gave the position to another applicant with far less experience who spoke Standard English.<sup>194</sup> Mr. Kahakua brought a disparate treatment suit against the Weather Service—and lost. The judge accepted the Weather Service's argument that the other candidate had "better pronunciation" and "better understandability," and thus found that race was not a factor in the decision.<sup>195</sup>

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187. See *Sparks*, 460 F.2d at 442 n.2.

188. See *Edwards*, 572 F.2d at 498.

189. See Rosina Lippi-Green, *Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts*, 23 LANGUAGE IN SOCIETY 163, 178–80 (1994) (discussing *Sparks* and *Edwards*).

190. For a discussion of the disparate impact framework, see Part II.C.2 *infra*; for a discussion of a reasonable accommodation approach to discrimination against speakers of Black English, see Part II.C.3 *infra*.

191. 876 F.2d 896 (9th Cir. 1989), *aff'g sub nom. Kahakua v. Hallgren*, No. 86-0434 (D. Haw. 1987). The facts of this unpublished decision have been taken from Matsuda, *supra* note 2, at 1340–46.

192. See generally Matsuda, *supra* note 2, at 1344–46.

193. See *id.* at 1341.

194. See *id.* at 1341–45.

195. See *id.* at 1345.



Of course, since the plaintiff in *Kahakua* was unsuccessful, *Kahakua* would appear to be a model for a future Black English discrimination suit only in so far as it involved a dialect that resembles Black English in many ways: Like Black English, Standard Hawaiian English originally developed as a creole; like Black English, it is intelligible to Standard English speakers—in fact, it has undergone even more decreolization and now differs from Standard English only in its pronunciation rules; and like Black English, it is a stigmatized variety spoken by non-whites (Asians and native Hawaiians).<sup>196</sup>

But *Kahakua* also demonstrates where the point of controversy would lie in a Black English disparate treatment suit. The debate should not center on the plaintiff's prima facie contention that she was qualified for the job; rather, the factfinder would need to decide whether the defendant's rejection of the plaintiff's speech was in reality a pretext for race discrimination.<sup>197</sup> The defendant could meet its burden of production on this issue by articulating, as a legitimate, nondiscriminatory reason for its action, its claim that the plaintiff spoke incorrectly.<sup>198</sup> The plaintiff

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196. See *id.* at 1342–44.

197. On the respective burdens of production and persuasion in a disparate treatment case, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252–56 (1981).

The plaintiff's prima facie case is made by showing: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas*, 411 U.S. at 802 (footnote omitted).

Here, "qualified" means only a threshold ability to do the job; it does not involve a comparative analysis of applicants. See *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977). In general, courts have held that any subjective criteria forming part of the applicant's qualifications, which would normally be part of the plaintiff's prima facie case, are more properly considered at the pretext stage, because the "evaluation[] that a plaintiff lacks these qualities [is] more susceptible of abuse and more likely to mask pretext." *Fowle v. C & C Cola*, 868 F.2d 59, 64 (3d Cir. 1989).

Once the plaintiff has presented a prima facie case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged action. *McDonnell Douglas*, 411 U.S. at 802–04. The plaintiff then has an opportunity to show that the defendant's proffered reason is merely a pretext for discrimination. *Id.* at 802–05. The burden of persuasion on the issue of pretext remains at all times with the plaintiff. *Burdine*, 450 U.S. at 256.

198. See *McDonnell Douglas*, 411 U.S. at 802–04. A plaintiff could argue, of course, that the requirement that employees speak the Standard English dialect rather than the Black English dialect is neither legitimate nor nondiscriminatory and thus that an employer who offered this reason failed to meet its burden of production. As the *Burdine* Court made clear, however, the defendant does not have "the burden of per-

would then need to persuade the factfinder that this reason was pretextual.<sup>199</sup>

Despite the outcome of *Kahakua*, it is conceivable that a plaintiff in a Black English case would be able to persuade the factfinder of this. If the trier of fact accepts the linguists' view of Black English, it should find that Black English is neither grammatically incorrect nor unintelligible to Standard English speakers, and thus that the defendant's proffered reason is not credible.<sup>200</sup> However, this finding alone would not lead inexorably to the plaintiff's victory. Under *St. Mary's Honor Center v. Hicks*,<sup>201</sup> the ultimate issue of discrimination in a disparate treatment suit remains open even after the plaintiff has rebutted the defendant's proffered explanation for its action.<sup>202</sup> The final outcome depends on the factfinder's willingness to infer pretext from the defendant's inability to provide a convincing, nondiscriminatory explanation.

It is at this point exactly that Title VII law becomes most controversial, or more colloquially, murky.<sup>203</sup> The disparate treatment framework was originally designed to apply to cases of intentional discrimination: those in which defendants were consciously motivated by discriminatory animus against blacks or members of another protected class.<sup>204</sup> As many

suading the court that it had *convincing, objective* reasons." *Burdine*, 450 U.S. at 257 (emphasis added). Rather, the defendant must merely provide "reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (emphasis in original) (citing *Burdine*, 450 U.S. at 254-55 & n.8).

199. See *McDonnell Douglas*, 411 U.S. at 802-05 (stating that an employer may not use an employee's illegal conduct as a pretext for discrimination); *Burdine*, 450 U.S. at 256 (stating that a plaintiff must show that the offered reason is not the true reason for an employment decision).

200. See *supra* Part II.B (explaining the linguists' view of Black English). The argument that Black English is neither ungrammatical nor unintelligible is further discussed below as part of the analysis of "business necessity" under the disparate impact framework. See *infra* notes 254-82 and accompanying text.

201. 509 U.S. 502 (1993).

202. See *id.* at 510-11 (stating that rejection of defendant's proffered reason permits, rather than compels, the trier of fact to infer discrimination).

203. Indeed, the *McDonnell Douglas-Burdine-Hicks* trilogy has resulted in such unpredictable—and undesirable—outcomes at the lower court level that at least one commentator has recommended eliminating the framework altogether. See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2236 (1995).

204. See *Hicks*, 509 U.S. at 516-17 (citing *Burdine*, 450 U.S. at 256); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168-77 (1995) (explaining that, in the context of race discrimination but not age discrimination, most courts have equated disparate treatment with intentional discrimination).

critics have argued, however, this type of discrimination no longer represents—if indeed it ever did—the most common or problematic type of discrimination.<sup>205</sup> More often, unfavorable treatment of women or minorities stems from employers' unconscious instincts<sup>206</sup> or cognitive biases.<sup>207</sup> Because the resulting discrimination is no less pernicious for its victims, courts have often been willing to apply a notion of “constructive intent”<sup>208</sup> (or, as one of my first-year law professors would have put it, “fake” intent). Without explicitly changing the rationale of the disparate treatment framework, some courts appear to have refocused the central inquiry from one of intent to one of negligence.<sup>209</sup>

Nevertheless, prospects for the plaintiff in a Black English disparate treatment suit are less than bright. Although under some interpretations of disparate treatment law defendants may be found liable when they have only been negligent, most judges and juries still see the central question in a disparate treatment suit to be whether the defendant is “a racist and a liar.”<sup>210</sup> This characterization simply doesn't fit the facts in *Kahakua* or in a future Black English discrimination case. Due to their subconscious rejection of the communicative burden, the evaluators in *Kahakua* actually did perceive Mr. Kahakua to be less intelligible than the applicant who spoke Standard English.<sup>211</sup> A factfinder searching for a liar will not find one in

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205. Numerous authors have criticized the emphasis on intent or conscious discriminatory motive in the disparate treatment framework. See, e.g., Krieger, *supra* note 204 (discussing the fact that Title VII jurisprudence rejects evidence of nonconscious, unintentional bias in disparate treatment cases); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that equal protection doctrine should also respond to the problem of unconscious racism).

206. See Lawrence, *supra* note 205 (drawing on psychoanalytic theory to argue that much disparate treatment results from subconscious instincts and motivations).

207. See Krieger, *supra* note 204 (drawing on research in cognitive psychology to argue that most disparate treatment stems from cognitive biases). Because of cognitive bias, “[a]n employee's group status may [affect] the decisionmaker in completely nonconscious ways by affecting what he saw, how he interpreted it, the causes to which he attributed it, what he remembered, and what he forgot.” *Id.* at 1170.

208. See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 924 (1993) (discussing courts' willingness to find constructive intent).

209. See *id.* at 917–67.

210. Krieger, *supra* note 204, at 1163.

211. See *supra* notes 116–18 and accompanying text (explaining that intelligibility is subjective and depends in part on listener's assumption of part of the communicative burden); see also Matsuda, *supra* note 2, at 1345, 1362 & n.124, 1386–87 (discussing role of intelligibility in *Kahakua*).

an employer who honestly believes that an objective intelligibility problem exists.<sup>212</sup>

In an influential article, Professor Mari Matsuda has proposed a creative solution to this dilemma. She suggests that courts adopt an altered framework for accent discrimination which combines aspects of disparate treatment analysis with aspects of disparate impact analysis.<sup>213</sup> In her proposed framework, the plaintiff's prima facie case would be the same as that under disparate treatment analysis, but the defendant's burden would more closely resemble that in a disparate impact case. Defendant employers would need to show, in essence, that their decision reflected business necessity, because after a fair evaluation, they found that the plaintiff could not communicate with relevant, nonprejudiced listeners at the level required for the job.<sup>214</sup>

Plaintiffs like Mr. Kahakua or the plaintiff in our hypothetical Black English case actually have another option open to them within the disparate treatment framework itself. Unlike accent discrimination plaintiffs with an "L2" accent (whose speech contains errors caused by interference from their first language), speakers of Standard Hawaiian English or Black English do not actually commit errors when they speak; they are speaking their first language—a dialect of English—correctly.<sup>215</sup> They have an accent—an "L1" accent—only in so far as speakers of every variety of English, including Standard English, have a particular accent.<sup>216</sup>

Thus, the plaintiff in an L1 accent discrimination case brought under the disparate treatment framework could ask the factfinder to focus on a *conscious* aspect of the employer's

212. In other words, "if the plaintiff must prove a deliberate scheme to use accent as a cover for discrimination, plaintiffs in accent cases will always lose." Matsuda, *supra* note 2, at 1383.

213. See Matsuda, *supra* note 2, at 1383.

214. See *id.* at 1383-84. Professor Matsuda also argues that employers should have to produce some evidence to show that a reasonable accommodation could not alleviate the plaintiff's inability to communicate at the level required for the job. See *id.* This aspect of her proposed framework goes beyond existing Title VII law. See *id.* at 1368. Borrowed from disability law, it is meant to eliminate the potential anomaly of treating physical speech impediments more favorably than accents. See *id.* at 1368, 1379-82 (explaining rationale for reasonable accommodation requirement).

215. This holds true for Mr. Kahakua even though he was reading a text written in Standard (Written) English, since Standard Hawaiian English differs from Standard English only at the level of pronunciation. See Matsuda, *supra* note 2, at 1344 & n.56 (explaining differences between Basilectal Hawaiian Creole and Acrolectal Hawaiian Creole (or Standard Hawaiian English)).

216. See *supra* note 115 and accompanying text (describing difference between L1 and L2 accents).

negative reaction: the assumption that her speech is incorrect or ungrammatical. The conscious, linguistically inaccurate belief that some dialects of English are less grammatical than others could be analogized to a conscious belief (once also widely held) that women are less intelligent than men. Seen in this light, discrimination against stigmatized L1 accents appears to be a form of intentional discrimination, amenable to analysis under the disparate treatment framework.<sup>217</sup>

But once again, the results in *Kahakua* suggest caution. As Professor Matsuda notes, the judge in *Kahakua* “discounted the testimony of the linguist who stated that Hawaiian Creole pronunciation is not incorrect, [but rather] one of the many varieties of pronunciation of standard English.”<sup>218</sup> According to the judge, “[t]he linguist . . . was not an expert in speech.”<sup>219</sup>

It may be that the judge in *Kahakua* was unwilling to directly confront the question of L1 accent discrimination under the disparate treatment framework because of the continuing influence of that framework’s original rationale: identifying employers who lie about their true racist motivations. The judge’s reluctance was understandable, because holding conscious, false beliefs about language—the result of a lifetime steeped in Standard Language Ideology<sup>220</sup>—does not make one a liar. As one scholar explains, “[ideology] is not (quite) the same as lying . . . ‘whereas the liar tries to falsify the thought of others while his own private thought is correct . . . a person who falls for an ideology is himself deluded in his private thought, and if he misleads others, does so unwillingly and unwittingly.’”<sup>221</sup> Thus, as long as the disparate treatment framework is applied to search for “racists and liars,” it is unlikely to be an effective means of combatting Standard Language Ideology and the subordination of Black English speakers.

2. *Disparate Impact Framework*—Fortunately, yet another option remains open to these speakers (and speakers of any other fully intelligible but stigmatized dialect of English which

217. Professor Matsuda does not emphasize this possibility because she treats L1 accents and L2 accents identically, focusing on the problem of intelligibility which is common to both. See Matsuda, *supra* note 2.

218. *Id.* at 1345–46.

219. *Id.* at 1346.

220. See generally LIPPI-GREEN, *supra* note 2 (explaining how American institutions, including the education system, the media, and the entertainment industry, introduce and reinforce Standard Language Ideology).

221. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 196 (1973) (quoting W. STARK, *THE SOCIOLOGY OF KNOWLEDGE* 48 (1958)).

is largely confined to a nonwhite community).<sup>222</sup> Rather than asking courts to adopt Professor Matsuda's alternative accent discrimination framework, they could avoid the need to prove discriminatory intent by pursuing a claim under the existing disparate impact framework.<sup>223</sup>

Professor Matsuda rejects this possibility because, as she sees it, "[i]mpact cases typically involve large numbers of potential plaintiffs and statistical evidence to show systematic employment discrimination[,] [while] [l]inguistic discrimination by definition focuses on the odd accent, the isolated difference in speech that stands out and is called 'an accent.'"<sup>224</sup> Here the labels "isolated" and "odd" must refer to an employer perspective tainted by Standard Language Ideology, since, in purely numerical terms, disfavored accents may actually dominate a community.<sup>225</sup> Doctrinally speaking, however, this characterization of the misfit between disparate impact analysis and accent discrimination is accurate, at least with respect to L2 accents. Plaintiffs in L2 accent discrimination cases must claim protection because of their national origin.<sup>226</sup> But because the term "national origin" in Title VII has been defined to refer to an individual's ancestry as well as his or her place of birth, it is difficult to show that an employer's anti-accent stance has a disproportionate impact on a particular

222. Although this Article focuses on Black English, its analysis could be broadened to include other nonstandard dialects of English as long as these dialects are equally intelligible to Standard English speakers and as long as they are spoken by a racially cohesive group. Standard Hawaiian English, discussed *supra* notes 192-96 and accompanying text, provides one example. "Chicano English" or "Spanglish" might also qualify, but it is hard to be certain because these varieties have not yet received as much attention from linguists as Black English. *But see generally* FORM AND FUNCTION IN CHICANO ENGLISH (Jacob Ornstein-Galicia ed., 1988) (discussing linguistic and sociocultural dimensions of Chicano English).

223. Title VII's disparate impact framework was originally developed by the courts, *see* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), but has since been given a statutory basis, *see* Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A) (Supp. V 1993). One critical difference between the disparate treatment framework and the disparate impact framework is that the latter does not require the plaintiff to prove that the employer acted with discriminatory intent. *See Griggs*, 401 U.S. at 430-32 (employment practices that disproportionately exclude blacks and are unrelated to job performance struck down despite lack of discriminatory intent); *see also* *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 334 n.15 (1977) (absence of intent distinguishes disparate impact from disparate treatment).

224. Matsuda, *supra* note 2, at 1382-83.

225. Spanish accents in certain parts of Florida could provide one example. *See Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349 (S.D. Fla. 1997) (describing Florida employer's treatment of Spanish-accented employee).

226. *See* 42 U.S.C. § 2000e-2(a)(1) (1988) (forbidding discrimination because of national origin).

national origin class; too many individuals belonging to the class will not share the plaintiff's L2 accent.<sup>227</sup>

Crucially, however, this doctrinal problem does not arise for speakers with racially linked L1 accents, such as Standard Hawaiian English or Black English. As I hope to demonstrate, Black English speaking plaintiffs should have no trouble making out a prima facie case in a Title VII disparate impact suit.

A clarification regarding the difference between L1 and L2 accents may be necessary at this point: I am not arguing that discrimination against speakers with L2 accents should be acceptable merely because it is linguistically accurate to say that L2-accented speech contains errors. Rather, the difference between L2 and L1 accents means that current Title VII doctrine applies differently to L2 accent discrimination and L1 accent discrimination. The law as currently interpreted does not provide adequate protection for speakers with L2 (or "foreign") accents; they require a doctrinal modification along the lines suggested by Professor Matsuda.<sup>228</sup> In contrast, the law as it is currently interpreted does protect Black English speakers from discrimination—as long as the factfinder is willing to accept linguistic facts in place of ideologically driven "common sense."

The plaintiff's prima facie case in a Title VII disparate impact case requires a showing that a facially neutral employment practice has a disproportionately adverse impact on a protected class.<sup>229</sup> Once the plaintiff reaches that thresh-

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227. Professor Matsuda's accent discrimination framework represents one solution to this problem. See Matsuda, *supra* note 2, at 1367–87. Stephen Cutler has suggested another solution: where employers discriminate against an ethnic trait such as accent, courts could use as the comparison group for disparate impact analysis the subclass of "less assimilated" members of a national origin class. See Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 *YALE L.J.* 1164, 1172–73 (1985). Professor Juan Perea argues for a third solution to what he terms the "correlation problem" between national origin and ethnic traits: an amendment to Title VII specifically forbidding discrimination based on ancestry or ethnicity. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 *WM. & MARY L. REV.* 805, 810 (1994). Under this approach, the national origin category would no longer be read to include an individual's ancestry; thus, victims of ethnic discrimination would no longer have to plead a "different" national origin than that of the "normal" Americans in the comparison class (who in reality also have "non-American" ancestry). See *id.* at 853–57.

228. For other possible approaches to the problem of L2 accent discrimination, see *supra* note 227.

229. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. V 1993) (codifying the Civil Rights Act of 1991's disparate impact framework); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

old, the burden of persuasion then shifts to the employer to demonstrate that the challenged practice is job-related and justifiable as a matter of business necessity.<sup>230</sup>

Thus, the plaintiff's initial burden in a Black English disparate impact suit could be divided into three components: (1) identifying a specific employer practice; (2) showing a disproportionate impact of this practice on a protected class; and (3) demonstrating that this impact is truly "adverse."

The first hurdle is often the hardest for potential disparate impact plaintiffs, because it can be difficult to separate one specific employment practice from the employer's general mode of operation.<sup>231</sup> But the plaintiff in a Black English disparate impact suit could easily identify a specific employer practice: the requirement that employees speak the Standard English dialect. Seen through linguists' eyes, of course, such a "Standard English Only" rule is anything but neutral: unlike the typical employment requirement with disparate impact, such as a requirement that employees have a high school diploma,<sup>232</sup> requiring employees to speak the Standard English dialect rather than the Black English dialect does reflect a

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230. See 42 U.S.C. § 2000e-2(k)(1)(A)(i). Where the employer carries this burden, the plaintiff has an opportunity to prove that there exists an alternative practice that would serve the employer's objectives equally well but have a less severe adverse effect. See *id.* § 2000e-2(k)(1)(A)(ii).

231. Linda Hamilton Krieger explains:

Because most individual employment decisions do not implicate identifiable practices that can be shown to have a statistically significant disparate impact on members of a protected group, very few Title VII cases are actually amenable to disparate impact treatment. According to an American Bar Foundation study, disparate impact cases comprised only 1.84% of all employment-related civil rights cases in the federal court docket between 1985 and 1987.

Krieger, *supra* note 204, at 1163 n.3 (citing American Bar Foundation Employment Discrimination Litigation Survey, Computer File (1990), cited in John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1991)); see also Flagg, *supra* note 102, at 2027 (describing difficulty with identifying a specific practice where an employer's subjective selection procedure works against individuals with mutable ethnic traits). The hypothetical plaintiff in Professor Flagg's article also experiences discrimination in part because she speaks Black English. See *id.* at 2011 n.4. However, because Professor Flagg treats this as a mutable characteristic—her hypothetical plaintiff is fully "bilingual," able to speak both Black English and Standard English—her analysis of the application of the disparate impact framework to Black English speakers differs in significant respects from mine.

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



specific prejudice against blacks, albeit an unconscious one.<sup>233</sup> But it is nonetheless in the plaintiff's interest to treat the requirement as if it were neutral, since a direct attack on the requirement's neutrality would have to take place under the disparate treatment framework, which was shown above to be an unattractive option.

The plaintiff's second hurdle—showing a disproportionate impact of this practice on a protected class—should present no insurmountable difficulties, given that such a large percentage of the black community speaks Black English rather than Standard English. As in other disparate impact cases, however, the exact measurement of the disproportionate impact would involve some complexities.<sup>234</sup> Although linguists estimate that the majority (80–90%) of blacks nationwide speak Black English,<sup>235</sup> the percentage of Black English speakers in a particular community or applicant pool could vary from this figure. In working class and poor communities the figure might approach 100 percent, while in middle class communities the percentage would be much lower.<sup>236</sup> The extent of the disproportionate impact would then depend in part on the geographic boundaries of the applicant pool chosen for comparison, since that would determine both the percentage of blacks able to meet a Standard English requirement and the percentage of non-blacks able to meet the requirement.<sup>237</sup> But even assuming

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233. See *supra* Parts II.A–B (explaining that the status difference between Standard English and Black English reflects the relative status of each dialect's speakers and not any intrinsic difference between the dialects themselves).

234. A short list of the issues that could arise at this stage of the litigation would include "the choice of comparison groups—e.g., general population versus qualified labor force—the geographic region and time frame within which the comparison is made, the degree of disproportion between the compared groups, the accuracy of the relevant data, and the statistical methods employed to assess the significance of identified disparities." Flagg, *supra* note 102, at 2021 (footnotes omitted); see also Elaine Shoben, *Defining the Relevant Population in Employment Discrimination Cases*, in *STATISTICAL METHODS IN DISCRIMINATION LITIGATION* 55 (D.H. Kaye & Mikel Aickin eds., 1986) (discussing relevant factors).

235. See *supra* note 12 and accompanying text.

236. See *supra* notes 66–68 and accompanying text (noting linguists' finding that Black English is more widespread in working class and poor communities); see also LIPPI-GREEN, *supra* note 2, at 36–37 (discussing subtleties in distribution of Black English dialect features).

237. The EEOC guidelines suggest that a "four-fifths rule" be applied to measure disparate impact:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse

that this statistical hurdle would bar some individuals from proving the obvious—that an employer's rejection of Black English has a disparate impact on blacks—a significant number of potential plaintiffs should be able to surmount this hurdle.<sup>238</sup>

It might seem that the final component of the plaintiff's prima facie case—proving that this impact is truly “adverse”—would be trivial: how could a “Standard English only” requirement not have an adverse impact, if it means that speaking Black English results in a loss of employment opportunities? But because some courts have concluded that employer requirements cannot have an adverse impact where they involve mutable characteristics, plaintiffs challenging discrimination against Black English would have to produce evidence showing that speaking Black English is essentially immutable, rather than a matter of personal choice.

The “mutable conditions” exception was initially carved out in *Garcia v. Gloor*,<sup>239</sup> a Fifth Circuit case involving an “English Only” rule. The employer in *Gloor* had forbidden his employees to speak Spanish during work time unless they were assisting a Spanish-speaking customer.<sup>240</sup> An employee fired for violating the rule brought suit under Title VII, claiming both that the rule had a disparate impact on bilingual Hispanic employees and that his firing qualified as disparate treatment.<sup>241</sup> The court rejected the disparate treatment argument on several grounds, denying the link between language and national origin and finding that the employer was not using the rule as a

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impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

EEOC Uniform Guidelines on Employee Selection Procedures 29 C.F.R. § 1607.4(d) (1997). In this context, this would mean that if 100% of the nonblacks in the applicant pool spoke Standard English, the plaintiff would need to show that fewer than 80% of the blacks in the comparison group spoke Standard English in order to prove disparate impact. If, on the other hand, only 75% of the comparison group spoke Standard English (because some members spoke other stigmatized dialects of English or had L2 accents) then the plaintiff would need to show that fewer than 60% of the blacks in the comparison group spoke Standard English in order to prove disparate impact. For a discussion of other technical difficulties related to this second hurdle, see Flag, *supra* note 102, at 2025–27.

238. A successful suit would benefit more than just the individual plaintiffs involved, since it would also serve to educate other employers and the public at large about the true nature of Black English. See *infra* Part IV (discussing implications of the radical solution).

239. 618 F.2d 264 (5th Cir. 1980).

240. *Id.* at 266.

241. *Id.* at 270.

pretext to discriminate.<sup>242</sup> The court further concluded that the plaintiff had failed to prove a prima facie case of disparate impact because the rule did not represent a hardship for bilingual employees (as bilinguals they could simply choose to follow the rule) and because it did not create an atmosphere of ethnic oppression.<sup>243</sup> Under *Gloor*, there can be “no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.”<sup>244</sup> After *Gloor* was decided, the EEOC took a contrary position, adopting guidelines which presume that “English Only” rules have an adverse impact on those whose primary language is not English.<sup>245</sup> But the Ninth Circuit, in its most recent decision on this issue, refused to defer to these guidelines, choosing instead to adopt the mutable characteristics approach introduced by *Gloor*.<sup>246</sup>

The mutable characteristics doctrine has been applied outside the language context as well. In *Rogers v. American Airlines, Inc.*,<sup>247</sup> for example, the court denied that a “No Braided Hair” rule had an adverse impact on black women, since they could choose to wear an alternative hairstyle.<sup>248</sup> The court cited *Gloor* for the proposition that an employer does not need to show the business necessity of a rule concerning mutable characteristics, even where those characteristics implicate ethnic or racial identity.<sup>249</sup>

This line of cases could be challenged on a number of different grounds.<sup>250</sup> As an initial matter, one could question just

242. *Id.* at 268–69.

243. *Id.* at 270.

244. *Id.*

245. See 29 C.F.R. § 1606.7(a) (1997).

246. See *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993). The court in *Garcia* also rejected its own earlier decision on this issue. See *Gutierrez v. Municipal Ct.*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

247. 527 F. Supp. 229 (S.D.N.Y. 1981).

248. *Id.* at 232.

249. *Id.*

250. For an analysis critical of the court’s decision in *Rogers*, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 40 DUKE L.J. 91. Many authors have also criticized the courts’ approach to employer-imposed “English Only” rules. See, e.g., Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 889–07 (1995) (critiquing the analysis in several circuits); Martha Chamallas, *Racial Segregation and Cultural Domination: A Rubin Trilogy on Title VII*, 52 LA. L. REV. 1457, 1471–79 (1992) (analyzing *Garcia v. Gloor* and subsequent cases); 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, 287–88 (1990) (challenging the basis of the *Garcia* decision); Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 TEX. L. REV. 871, 900–07, 911–16 (1995) (questioning the relevance of choice in Title

how simple it is for employees—even those labeled “bilingual”—to abide by an “English Only” rule;<sup>251</sup> one could also question whether such rules can really be imposed without creating an atmosphere of ethnic tension and oppression.<sup>252</sup> More fundamentally, one could question the courts’ assumption that employers have the right to demand assimilation to white/Anglo norms regarding language or appearance; as the *Gloor* court itself noted, Title VII does not permit employers to demand assimilation in the context of religion, despite the fact that religious traits are mutable.<sup>253</sup>

But plaintiffs who have experienced discrimination based on their use of Black English would not need to challenge the mutable characteristics doctrine in order to show that a Standard English requirement has an adverse effect because their status as Black English speakers is essentially immutable. If the factfinder accepts the linguistic understanding of Black English presented in Part II.B, it should recognize that, unlike the bilingual employees in *Gloor*, who could switch between Spanish and (perhaps accented) English if necessary, most Black English speakers cannot simply choose to speak Standard English any more than Standard English speakers can choose to speak Black English.

Once the plaintiff proves a prima facie case of disparate impact discrimination, the burden of proof shifts to the employer to show that the practice in question is job related and consistent with business necessity.<sup>254</sup> Although Congress intended to

VII judgment). For discussions of the related controversy over the “Official English” movement, see JAMES CRAWFORD, *HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF “ENGLISH ONLY”* (1992); *LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY* (James Crawford ed., 1992); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 340–50 (1992); Susan Kiyomi Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221, 227–29 (1997).

251. The phenomenon of “code-switching” between two languages is actually quite complex and, to some degree, beyond conscious control. See *supra* notes 173–77 and accompanying text (describing “code-switching”); see also 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 a Disability*, 26 N.M. L. REV. 75, 93–98 (1996) (describing complexities of code-switching and implications for Title VII analysis of English Only rules).

252. See Adams, *supra* note 250, at 901.

253. See 618 F.2d at 270 n.6.

254. See 42 U.S.C. § 2000e-2(k)(1)(A); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”).

clarify these concepts in the Civil Rights Act of 1991, the exact nature of the employer's burden remains unclear: "The overarching issue continues to be whether the term 'necessity' in the business necessity defense literally requires that the discriminatory practice be essential to the continued viability of the business, or whether it requires something less."<sup>255</sup> The Supreme Court has provided definitions of varying strictness,<sup>256</sup> at a minimum, however, the defendant must show that the challenged practice has a "manifest relationship to the employment in question"<sup>257</sup> by showing that "goals [of safety and efficiency] are significantly served by—even if they do not require—[the defendant's] rule."<sup>258</sup>

This may be a much harder question than whether discrimination against the Black English dialect has an adverse effect upon blacks. Employers will argue that they should be able to require employees to speak Standard English because communication skills are critical to job performance. The employer must be right with respect to the latter part of this argument: no one can deny that communication skills are important for many jobs. The debate must instead focus on the first part of the argument: is speaking Standard English a necessary component of good communication skills?

Common sense says "yes"—of course Standard English is a necessary component of good communication skills. How could an employee communicate effectively if he or she could not speak proper, grammatical English?<sup>259</sup> The plaintiff has two main counter-arguments. The first concerns the dialect's intelligibility: Black English is not difficult for Standard English speakers to understand (or vice versa). The second concerns the dialect's linguistic acceptability: Black English is not an incorrect version of Standard English. If Black English is a fully intelligible English dialect with the same linguistic status as Standard English, there is no reason to consider the rejection of Black English a business necessity.

The plaintiff's intelligibility argument depends on the linguistic evidence presented in Part II.B. Black English is not

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255. Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 387 (1996); see also Flagg, *supra* note 102, at 2021–22 (explaining why nature of the employer's burden remains unclear even after the Civil Rights Act of 1991).

256. See Flagg, *supra* note 102, at 2022.

257. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979) (quoting *Griggs*, 401 U.S. at 424).

258. *Id.* at 587.

259. See *supra* Part I.A for further examples of the common sense view.

difficult for Standard English speakers to understand because the two dialects are very closely related—they share a number of language rules and have nearly equivalent vocabularies. Speakers of both dialects have asymmetrical competence: they can only produce speech in one dialect but are able to understand both.

The judge or the jury members should be able to grasp this argument using personal experience, since they have probably interacted with Black English speakers and had no trouble understanding their speech. (Alternatively, if they are Black English speakers, they should know that they have no trouble understanding Standard English.) To the extent that factfinders think otherwise, their experience may well be based on unacknowledged prejudice—the subconscious rejection of their portion of the communicative burden in response to the lower status accorded to the Black English dialect. Given the subjective nature of intelligibility judgments, the factfinder should apply a protocol like the one suggested by Professor Matsuda for the evaluation of accents in order to fairly evaluate the intelligibility of the plaintiff's speech for the relevant pool of nonprejudiced listeners.<sup>260</sup> If such a protocol is adopted, factfinders should hold that Black English does not present a communication problem in the workplace for lack of intelligibility.<sup>261</sup>

The plaintiff's second counter-argument to the employer's claim of business necessity, the acceptability argument, also depends on the linguistic evidence presented in Part II.B. According to linguists, there is nothing intrinsic to Standard English that makes it more correct, grammatical, or proper than Black English. The label "Standard" is just that—a label. Standard English acquired that label for social and political reasons, not linguistic ones.

Although the explanation of Black English presented above is not controversial among linguists—they emphasize that it

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260. See Matsuda, *supra* note 2, at 1368–82.

261. Under Professor Matsuda's suggested protocol, the full communicative burden might be placed on the speaker in certain rare situations, where (i) the consequences of miscommunication are grave; (ii) the job is substantially oral in nature; (iii) the setting is stressful and time is of the essence; and (iv) the interaction is contextless and typically restricted to one-time exchanges. See Matsuda, *supra* note 2, at 1369. Professor Matsuda gives as an example the job of a 911 operator. *Id.* Even here, however, the employee's language abilities would have to be evaluated in context: if the typical 911 caller in a certain area speaks Black English, an operator who speaks Black English might actually communicate more effectively than one who speaks Standard English.

is scientific fact, not political correctness<sup>262</sup> or "left-wing propaganda"<sup>263</sup>—it may prove quite controversial in the courtroom. Thus, regardless of the weight of the evidence showing that Black English is not bad grammar, one might wonder whether the jury or the judge could be convinced—even where expert testimony is provided by linguists.<sup>264</sup> Since this is an empirical question, not a legal question, the answer can only be speculative.

Certainly the court's conclusion in *Kahakua*, which discounted the linguist's testimony that Standard Hawaiian English is not an incorrect version of Standard English because the linguist "was not an expert in speech,"<sup>265</sup> is less than encouraging. Other courts, in the few published cases involving Black English, have shown a similar reluctance to apply linguistic fact to resolve legal issues. *Tyler v. Vickery*,<sup>266</sup> a challenge to the constitutionality of the Georgia bar exam, provides one example. The court in *Tyler* gave a reasoned analysis for its rejection of the plaintiffs' first argument—that the examiners were intentionally discriminating against blacks, using Black English "cues" from the written exams in order to recognize black examinees.<sup>267</sup> By contrast, the court limited to a single footnote its comments on the plaintiffs' second argument regarding the validity of the Black English dialect:

Appellants also contend that Black English may result in overt discrimination even if the examiner does not recognize its use as a racial characteristic but merely reacts negatively because he conceives it to be incorrect. As this claim is equally susceptible to all of the other reasons we cite for concluding that no material issue of

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262. See Pasternak, *supra* note 127.

263. See Pullum, *supra* note 5, at 322 ("[Linguists' objective attitude toward non-standard dialects [is often dismissed by nonlinguists] as if it were just left-wing propaganda. But it is not. Even conservative linguists acknowledge the facts mentioned above [concerning Black English's status as a dialect]. When the Linguistic Society of America voted in January on a resolution in support of the Oakland school board, the vote was unanimous.")

264. Expert testimony would be appropriate in a Title VII case concerning Black English because of the disparity between common sense (a layperson's view of Black English) and linguistic theory. See MCCORMICK ON EVIDENCE § 13, at 33 (Edward W. Cleary ed., 3d ed. 1984).

265. Matsuda, *supra* note 2, at 1345-46.

266. 517 F.2d 1089 (5th Cir. 1975).

267. See *id.* at 1093-95.

fact exists on this claim, we need not address ourselves to its intrinsic merits.<sup>268</sup>

In fact, it is not at all clear from the opinion why this argument presents “no material issue of fact.” The court might have accepted the linguistic evidence concerning Black English and still not found that negative assessments of exams showing Black English features constitutes discrimination, since written language and spoken language are, linguistically speaking, two quite different things.<sup>269</sup> But one senses from the opinion that the court simply wished to dispose of the argument with as little analysis as possible in order to avoid explicitly confronting the Standard Language Ideology which underlies the common sense rejection of Black English as poor grammar.

In a different context, another court did demonstrate a greater willingness to accept linguistic evidence regarding the nature of Black English. In *Martin Luther King Jr. Elementary School Children v. Ann Arbor School District Board*,<sup>270</sup> the court held that the defendant school district had violated a federal law guaranteeing equal educational opportunity by failing to recognize the special difficulties that face Black English speaking students who are learning to read and write Standard Written English. In order to reach this conclusion, the court had to accept linguists’ testimony that Black English is “a distinct, definable version of English, different from standard English . . . [with its own] definite language patterns, syntax, grammar and history.”<sup>271</sup> The court required the school district to educate its teachers about the true nature of Black English so that they could effectively teach Standard Written English skills to Black English speaking students.<sup>272</sup>

However, the court’s willingness to accept linguistic fact only went so far. In a feat of cognitive dissonance, the court managed to accept the scientific fact that Black English is not “an inferior method of speech,”<sup>273</sup> while simultaneously accepting, without question, the social fact that Black English is “not an acceptable method of communication in the educational world,

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268. *Id.* at 1094 n.3.

269. *See supra* notes 118–20 and accompanying text (discussing the difference between written and spoken language).

270. 473 F. Supp. 1371 (E.D. Mich. 1979).

271. *Id.* at 1378.

272. *See id.* at 1383.

273. *See id.* at 1377.



in the commercial community, in the community of the arts and science, or among professionals."<sup>274</sup>

The opinions in *Tyler* and *Martin Luther King Jr. Elementary School Children* demonstrate that courts will go to some length to avoid a direct challenge to the common sense view of Black English. But the issue of Black English's acceptability as a dialect would stand in the very center of a Title VII disparate impact suit. Forced to consider the issue thoroughly and explicitly, the factfinder in a Title VII suit should conclude that Black English is not simply an inferior version of Standard English. Certainly, if evidence and reason play a greater role in the decision than unexamined, ideologically driven "common sense," the plaintiff should succeed on this issue.

A defendant employer might argue that a Standard English requirement nonetheless constitutes a business necessity, because the average person who comes into contact with its employees will not be aware of "obscure" linguistic research concerning nonstandard dialects:

Some jobs . . . require incumbents who can promote an organization's cultivated public image. This can be a bona fide requirement for many receptionists, customer service representatives, and certain sales associates. In such cases, a personnel test might legitimately impose more rigorous [spoken language] requirements . . . .<sup>275</sup>

But here the court should find just the opposite. It is true that Title VII permits employers "to hire and employ . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise . . . ."<sup>276</sup> But Congress chose not to allow this BFOQ defense in race discrimination suits.<sup>277</sup>

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274. *See id.* at 1378.

275. Don Rubin, *Cultural Bias Undermines Assessment*, PERSONNEL J., May, 1992, at 47, 52.

276. 42 U.S.C. § 2000e-2(e) (1988).

277. *See Swint v. Pullman-Standard*, 624 F.2d 525, 534-35 (5th Cir. 1980) (refusing to extend Title VII's BFOQ defense to race discrimination cases). A very narrow judge-made exception does allow employers to select employees based on race in those few instances where it is truly necessary (e.g., for an acting job). *See, e.g., Miller v. Texas State Bd. of Barber Examiners*, 615 F.2d 650 (5th Cir. 1980) (discussing extent of judge-made exception); *Knight v. Nassau County Civil Service Comm'n*, 649 F.2d 157 (2d Cir. 1981) (same).

Furthermore, employers pleading a BFOQ defense may not rely on customer or client preferences. As one court explained, in an opinion rejecting an airline's claim that customer preference required them to hire only female flight attendants: "[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was . . . these very prejudices the Act was meant to overcome."<sup>278</sup> Thus, "it is [also] clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race."<sup>279</sup>

An employer might argue in response that the case law rejecting the customer preference defense is simply not applicable in a disparate impact suit where customer preferences appear to involve language characteristics, not race. One could understand *Gloor* and *Rogers* to support this argument, since courts in those cases permitted employers to cater to the (perceived) desires of customers not to see braided hair or hear Spanish spoken in the workplace, although these characteristics also implicate racial or ethnic identity.<sup>280</sup> But, crucially, the courts in these cases were not considering whether a "No Braids" or an "English Only" rule constituted a business necessity; rather, they were deciding whether such rules had an adverse impact on protected classes. The imposition of the mutable characteristics doctrine at the prima facie case stage of litigation should mean that the job related/business necessity defense is strictly interpreted.<sup>281</sup> Under this doctrine, employers

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278. *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting employer's BFOQ argument based on purported customer preference for female flight attendants because of their "soothing" qualities); see also *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (rejecting BFOQ argument that a female cannot be an oil company executive because customers from other cultures would refuse to do business with a woman).

279. *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1983).

280. See *supra* notes 239-53 and accompanying text (discussing *Gloor* and *Rogers*).

281. See *supra* notes 239-53 and accompanying text. This may be a hidden advantage of the mutable characteristics doctrine which critics of *Gloor* and *Rogers* have missed: if the question of adversity is determined purely from the plaintiff's perspective, as some have suggested, see *Kirtner, supra* note 250, then courts would have to interpret the job related/business necessity defense to permit a customer preference argument in some cases. The line that critics would like to draw between permissible job requirements (say, that employees not smoke on the job) and impermissible ones (such as those in *Rogers* and *Gloor*) which implicate racial, sexual, or ethnic identity may actually prove easier to draw in the context of the adversity question. In other words, arguing that the rules in cases such as *Gloor* and *Rogers* do in fact have an adverse impact (based on ethnic and racial considerations) may prove more effective

need only defend job requirements in those instances where the members of a protected class cannot simply choose to meet the requirement. Because speaking Black English is basically an immutable trait (given that adult speakers of one dialect cannot easily learn to speak another dialect fluently), employers should not be permitted to reject Black English speakers based on customer preference. To allow a customer preference argument at this stage of disparate impact litigation would in essence permit customers or clients to choose employees' race—exactly what Title VII was intended to prevent.<sup>282</sup>

Employers might protest, finally, that a finding for the plaintiff would leave them with no ability to screen out applicants whose speech is careless or contains mistakes or errors. But the court should also reject this argument, because it reflects a continuing confusion about the nature of spoken language. Just as no dialect is more grammatical than other dialects, no dialect permits its speakers to make more speech errors. To the extent that sentence fragments, slips of the tongue, and so on, occur, they are a product of our general speech capacity and occur equally frequently in every dialect. Employers should certainly be allowed to prefer employees who speak eloquently or effectively—but they should not be permitted to assume that only Standard English speech can be eloquent or effective.

Given these arguments, the applicant in the Introduction might be well-advised to take the employer to court if she is rejected because she speaks Black English. Although her claim might be a case of first impression, the law and evidence are on her side. Title VII should prevent employers from discriminating against speakers of Black English, because this practice has an adverse impact upon a protected class, and no business necessity justifies it.

3. *Reasonable Accommodation of Differences in Reading and Writing Skills*—A variant of this radical solution would extend protection even further to cover speakers of Black English where written language skills are critical to job performance. As explained above, written language, unlike spoken language, is a cultural artifact; it does not arise di-

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than assuming an adverse impact and arguing that the rules do not constitute a business necessity.

282. See Matsuda, *supra* note 2, at 1376–79 (arguing against customer preference defense in accent discrimination cases).

rectly from the brain's language machine.<sup>283</sup> Standard written forms tend to be based on those dialects whose speakers enjoy the greatest political and economic power. In the United States, this means that Standard Written English most closely resembles the Standard English dialect. Because Black English speakers have historically lacked political and economic power, Black English remains a "vernacular": it lacks a standard written form.<sup>284</sup> Thus, it is not possible to argue that employers must allow Black English speakers to write Black English as well as speak it, because there is no such written form for Black English speakers to use.

Nonetheless, it seems unjust to insist that Black English speakers demonstrate exactly the same skill level in Standard Written English as individuals who are fortunate enough to speak the dialect upon which Standard Written English (for purely political and social reasons) is based. Standard English speakers are able to learn Standard Written English more easily than speakers of Black English, both because Standard Written English is based on their dialect and because teachers create additional barriers for black students by treating Black English as bad grammar.<sup>285</sup> Ignoring these facts could mean perpetuating current societal inequalities indefinitely.

283. See *supra* Part II.B.1.

284. Authors who use Black English dialog are essentially creating their own form of written Black English. See *Sonya Live: Black English*, *supra* note 12 (discussing the Black English dialog in Alice Walker's book *The Color Purple*); see also *supra* note 5 (explaining term "vernacular").

285. See Pullum, *supra* note 5, at 322 (summarizing empirical evidence, including Oakland study which found that "teachers who condemned [Black English] pronunciations and interpreted them as reading errors got the worst results in teaching black children to read, while teachers who used [Black English] creatively in class got the best results"); see also *Role of "Ebonics" in Education: Hearing Before the Subcomm. on Labor, Health & Human Serv. & Educ. of the Senate Comm. on Appropriations*, Jan. 23, 1997 (testimony of Stanford linguistics professor John Rickford, summarizing research); TORE OSTERBERG, BILINGUALISM AND THE FIRST SCHOOL LANGUAGE (1961) (describing experiments with nonstandard Swedish dialect speakers); TAYLOR, *supra* note 62 (contrasting the success of the scientific approach, which compares features of Black English and Standard English, with failure of traditional remedial language teaching techniques); Tove Bull, *Teaching School Beginners to Read and Write in the Vernacular*, in TROMS LINGUISTICS IN THE EIGHTIES (1990) (describing successful results of program for nonstandard Norwegian dialect speakers); Ann McCormick Piestrup, *Black Dialect Interference and Accommodation of Reading Instruction in First Grade*, in 4 MONOGRAPHS OF THE LANG. BEHAVIOR RES. LAB. (1973) (comparing results of scientific and "common sense" approaches); John R. Rickford, *Unequal Partnership: Sociolinguistics and the African American Speech Community*, 26 LANGUAGE IN SOCIETY 161 (1997) [hereinafter Rickford, *Unequal Partnership*] (describing implications of research on Black English for elementary education); Gary Simpkins & Charlesetta Simpkins, *Cross-Cultural Approach to Curriculum Development*, in BLACK ENGLISH AND THE EDUCATION OF

The best solution may be for courts to apply a reasonable accommodation framework:<sup>286</sup> employers would then have to make any costless or low cost accommodations that would permit a Black English speaker to take a position in which written language skills were critical to job performance.<sup>287</sup> Possible accommodations could include providing a word processor with spelling and grammar check programs or providing extra secretarial assistance.

In the context of disability or religious differences, reasonable accommodation law helps avoid arbitrary exclusion. It steps in where the majority's contingent choices about "normal" employees would otherwise prevent individuals from participating

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BLACK CHILDREN AND YOUTH (Geneva Smithermann ed., 1981) (describing successful use of vernacular "bridge" readers and comparing failure of traditional remedial reading techniques); Doug Cumming, *A Different Approach to Teaching Language*, ATLANTA CONST., Jan. 9, 1997, at B1 (describing successful "Bidialectal Communication" program in DeKalb County, Georgia, which emphasizes learning to "code switch" between Black English and Standard English); John R. Rickford, *Ebonics Succeeds Where Traditional Methods Do Not*, SAN JOSE MERCURY NEWS, Dec. 26, 1996, at 8B (describing results of various studies).

286. Courts might interpret Title VII as it is currently written to include such an obligation, just as courts once interpreted the statute to include an obligation to accommodate religious differences. See *Dewey v. Reynolds Metals Co.*, 300 F. Supp. 709, 714 (W.D. Mich. 1969) (following EEOC guidelines in imposing reasonable accommodation requirement in religious discrimination case), *rev'd*, 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam*, 402 U.S. 689 (1971). Congress might then respond by codifying the obligation, just as it did in the context of religious discrimination. See 42 U.S.C. § 2000e(j) (1988) (stating that employers have an obligation to accommodate reasonable religious observances and practices).

A statutory amendment would allow Congress to divide the financial burden of accommodation between employers and society at large: employers could bear that portion of the cost which reflects their long term investment, while the government could bear any additional "reasonable" costs. See generally Sue A. Krenek, Note, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969 (1994) (arguing that the Americans with Disabilities Act should be amended to provide for such public-private partnerships). This approach would avoid unduly burdening or blaming employers; it would also avoid creating economic incentives for discrimination against Black English speakers.

287. Cf. Matsuda, *supra* note 2, at 1379-82 (arguing that the reasonable accommodation framework should be applied in the context of accent discrimination). Professor Matsuda borrows this framework from disability law, in particular the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. V 1993), and 47 U.S.C. §§ 225, 611 (Supp. III 1991). See Matsuda, *supra* note 2, at 1381. Professors Karlan and Rutherglen have also suggested that reasonable accommodation law might be applied appropriately to assist black employees with limited reading and writing skills. See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 4-5 (1996). They assume that such deficits are "a direct result of having attended inferior, poorly funded public schools beset by the lingering effects of *de jure* segregation . . ." *Id.* at 4. I agree with this assessment, but I would add that such deficits are also a direct result of speaking a stigmatized—indeed, unrecognized—dialect which is less closely related to Standard Written English than the Standard English dialect.

fully in the workforce or society at large.<sup>288</sup> Black English speakers with weak written language skills experience a type of disability that is especially contingent: if history had been otherwise, our standard written language could have been based on Black English, and Standard English speakers would be those who required accommodation. Thus, both the general principle of avoiding arbitrary exclusion and the particular responsibility we collectively bear for creating this disability point towards the application of a reasonable accommodation requirement for Black English speakers with weak written language skills.

The likelihood of any court adopting this solution is admittedly rather low, since it requires both a sophisticated understanding of language facts and an extension of Title VII doctrine. The use of Title VII to prevent discrimination against spoken Black English is comparatively less radical: once the linguistic facts concerning Black English are made clear, it is hard to deny that Title VII should protect speakers of Black English from discrimination by employers.

#### IV. THE BROADER CONTEXT

What, then, is “radical” about the radical solution? It cannot be the legal argument: a fairly straightforward application of disparate impact doctrine to the linguistic facts regarding Black English should permit Title VII—as it is currently written and interpreted—to protect speakers of Black English from employment discrimination. What people find radical about the solution offered above is not the legal argument, but rather the linguistic facts upon which the legal argument is based. This is ironic, given how uncontroversial these linguistic facts are within the linguistic community. As Professor Rosina Lippi-Green notes, it is “[t]he least disputed issues around language structure and function, the ones linguists argue about least, . . . which are most often challenged by non-linguists, and with the greatest vehemence and emotion.”<sup>289</sup> The recent public debate over the “Ebonics” resolution in Oakland<sup>290</sup> demonstrated just how emotional language issues

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288. See Karlan & Rutherglen, *supra* note 287, at 38–39.

289. LIPPI-GREEN, *supra* note 2, at 9.

290. See *supra* notes 5, 11, 16–24, and accompanying text (discussing the Oakland debate).

can be: The Oakland School Board's proposal to officially recognize Black English as a valid dialect did not just strike most people as misguided; it made many people very angry.<sup>291</sup>

But why is it so difficult for people to accept the linguistic facts about Black English? In part, our resistance—and I do mean to include myself here—results from habit; we are used to thinking about Standard English and nonstandard dialects in a certain way—the way that proponents of Standard Language Ideology in the schools, media, and entertainment industry would like us to think—and it takes a certain amount of mental energy to overcome this habit. In other words, the linguistic facts are hard to accept because they differ so markedly from what we have been told our entire lives. It is as if a group of scientists suddenly attempted to convince us that the sun does indeed revolve around the earth—we would need to review the evidence carefully before we could be convinced.

But habit can only provide a partial answer, because it does not explain why the facts regarding Black English give rise to so much anger. It may be that we would be just as resistant to new facts regarding the sun's orbit, but exposure to such facts would be unlikely to lead to the kind of fury evidenced in the Oakland "Ebonics" debate. The anger can only be explained if we examine our investment in Standard Language Ideology—if we ask what we have to lose by accepting the facts about Black English.<sup>292</sup> For speakers of Standard English—both black and white—the belief that Standard English somehow merits being the standard also means that they themselves have merit. Speaking Standard English becomes a virtue; being a speaker of Standard English means that one has earned whatever material and social advantages one may have. To speakers of Black English, Standard Language Ideology holds out a promise: that they too could have these material and social advantages if they would "only" learn to speak "proper" English. The common sense view of Black English as bad grammar offers all of us a convenient explanation—even what one could call a comforting explanation—for inequalities that would otherwise be too painful and too challenging. This is a classic example of hegemony: "[T]he means by which a system

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291. The debate over the Oakland "Ebonics" proposal was only the most recent and well-publicized debate over the status of Black English. For other examples of angry reactions to the claim that Black English is a valid dialect, see LIPPI-GREEN, *supra* note 2, at 193–97 (describing reactions of call-in viewers and audience members during a Black English discussion on a 1987 Oprah Winfrey show).

292. See generally LIPPI-GREEN, *supra* note 2 (discussing language ideology).

of attitudes and beliefs, permeating both popular consciousness and the ideology of elites, reinforces existing social arrangements and convinces the dominated classes that the existing order is inevitable."<sup>293</sup>

A personal and rather painful memory demonstrates just how pervasive our resistance to linguistic facts can be: After six years spent studying cognitive science and linguistics (and writing obscure papers on topics such as "Agreement Morphology in Squamish"), I took a job teaching science in a public middle school in New York City. Most of my students were black, and not surprisingly, they spoke Black English. As a white woman who grew up near Seattle, I speak a West Coast variety of Standard English. This dialect difference presented no comprehension problems; my students understood my speech and I understood theirs. Like all teenagers—not just those who speak Black English—they did have a tendency to use slang words. This was also not a problem. In fact, it provided an easy opportunity for my students to teach me something: I quickly learned what it meant when they noted that my shoes were "played-out"; I was happy if they thought an experiment that we had done was "fly"; and I must admit to feeling some pride when they exclaimed, in reaction to my quick verbal response to a student who was being difficult, "Ms. Gaulding learnin' t' diss!" I like to think back on these moments. The moment I do not like to think back on is the time when I made fun of a student for using the Black English negative concord construction ("If 'you didn't have no time to do your homework,' doesn't that mean you did have some time?").<sup>294</sup> I said this despite the fact that I was intimately familiar with the "linguistic facts of life"<sup>295</sup>—despite the fact that I knew better. What was I thinking? I suppose the best answer is that I wasn't thinking at all. Rather, I was acting (thoughtlessly but effectively) as a conduit for the common sense views about Black English, which so dramatically, and tragically limit that student's opportunities in life.

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293. Crenshaw, *supra* note 1, at 1351 (citing ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. Smith trans. 1971)); see also LIPPI-GREEN, *supra* note 2, at 66–67 (explaining the relationship between Standard Language Ideology and Gramsci's concept of hegemony).

294. See *supra* notes 156–62 and accompanying text (explaining the negative concord construction in Black English).

295. See LIPPI-GREEN, *supra* note 2, at 7–40 (summarizing the "linguistic facts of life").



In the face of these difficulties, what should we do? By posing this question, this Article places itself within the most optimistic strand of the Critical Race Theory tradition.<sup>296</sup> It is a modernist narrative (what Mari Matsuda might call “quaintly modernist”),<sup>297</sup> and as such, actually far more conventional than radical.<sup>298</sup> It demonstrates “a commitment to a vision of liberation from racism through right reason” and a “confiden[ce] that crafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation: that, indeed, the truth shall set [us] free.”<sup>299</sup>

As a specific answer to the question “what should we do?,” this Article proposes that we invoke Title VII to protect speakers of Black English from employment discrimination. But the proposed litigation strategy should actually represent only one aspect of a broader effort to restructure the relationship between Standard English and Black English. Currently the two dialects and their respective speakers occupy unequal positions in our culture. According to common sense, Standard English is the norm, while Black English is a marked “other”;<sup>300</sup> Standard English is simply English, while Black English is a dialect (if that); Standard English is unaccented and ethnically neutral, while Black English is accented and ethnically marked.<sup>301</sup> In rejecting the common sense view of Black English, we must also reject the common sense view of Standard English: we need to give Standard English a new identity as a dialect, to be able to hear the Standard English

296. This Article has been deeply influenced by Professor Mari Matsuda’s 1991 article on accent discrimination which was also a foundational article for the Critical Race Theory tradition. See Matsuda, *supra* note 2; see also CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Williams Crenshaw et al. eds., 1995). For an especially lucid discussion of the relationship between Critical Race Theory’s optimistic, modernist side and its more skeptical, postmodernist side, see Harris, *supra* note 182. The arguments made in this Article also fit well within the “cultural domination” approach to equality questions described by Martha Chamallas. See Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994).

297. Matsuda, *supra* note 2, at 1330.

298. See Harris, *supra* note 182, at 752 (“[O]ne characteristic of conventional legal scholarship is its insistent ‘normativity’: the little voice that constantly asks legal scholars, ‘So, what should we do?’”).

299. *Id.* at 743.

300. See Crenshaw, *supra* note 1, at 1372 (discussing the role of blacks as “the other”); Matsuda, *supra* note 2, at 1361 (discussing the role of Standard English as the norm).

301. The speech pathologists who specialize in “accent reduction” would never direct their services to Standard English speakers, since under the common sense view, Standard English speakers have no accent. See LIPPI-GREEN, *supra* note 2, at 144–46; Atkins, *supra* note 15.

accent and see Standard English ethnicity.<sup>302</sup> Of course, these two efforts are intertwined: as Title VII protection allows more Black English speakers to obtain jobs with greater prominence, it will become easier to see that both dialects can contribute to a valuable diversity in the workplace.

At both levels the focus should be on responsibility rather than blame.<sup>303</sup> The litigation strategy proposed by this Article reflects this focus by arguing that discrimination against Black English falls under the disparate impact framework rather than the disparate treatment framework. Under the disparate impact framework, employers must take responsibility for their inappropriate reactions to Black English, but they need not be blamed or punished.<sup>304</sup> The distinction applies to individuals as well: none of us is to blame for the current problems facing Black English speakers, but we all have a responsibility to help solve these problems.<sup>305</sup>

Some observers fear that respecting Black English can only lead to further segregation and subordination of blacks. One columnist, for example, argues that proponents of Black English are making "an attempt to sabotage the efforts of the black community to succeed in society by encouraging a language that

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302. Recognizing the ethnicity associated with Standard English could be one way to increase whites' race consciousness and to decrease the "Transparency Phenomenon." See Flagg, *supra* note 1, at 957 (discussing the "Transparency Phenomenon" in the context of Equal Protection law); see also Flagg, *supra* note 102 (applying a similar analysis in proposing a Title VII remedy for white decisionmaking). Readers might wonder how Standard English could be "ethnic," given that some nonwhites also speak this dialect. I would argue that diversity among Standard English speakers does not diminish its ethnic quality; it merely reflects the radical plurality possible in a nation "in which an Okinawan vendor serves Kosher pastrami and stir-fried vegetables wrapped in a tortilla to young white punk rockers at 3:00 a.m. in the morning." Matsuda, *supra* note 2, at 1403.

303. For further discussion of the advantages of responsibility over blame, see Flagg, *supra* note 1, at 985-91 (arguing that the concept of blame is not useful in the context of Equal Protection law); Krieger, *supra* note 204, at 1243-44 (explaining why punitive damages should not be awarded for cognitive-bias-based disparate treatment).

304. The remedies available to disparate impact plaintiffs are more limited than those available to disparate treatment plaintiffs, since under the Civil Rights Act of 1991, only victims of "intentional discrimination" (defined as "not disparate impact discrimination") may be awarded compensatory or punitive damages. See 42 U.S.C. § 1981a(a)(1) (Supp. V 1993).

305. Linguists may have a special responsibility to help educate the public about language facts. See Rickford, *Unequal Partnership*, *supra* note 285. Professor Rickford argues that linguists, while profiting greatly from studies of Black English, have done little to help solve the problems facing Black English speakers; he proposes that linguists need to adopt a general principle of "service in return." *Id.*

impedes assimilation.”<sup>306</sup> Responding to the decision of the Oakland, California School Board to recognize Black English as a valid language,<sup>307</sup> another commentator argued: “The Oakland plan is nothing more than inverted racism.”<sup>308</sup> This fear should be lessened to the extent that the linguistic arguments in support of Black English are made clear. The fear could quickly turn to hope if Title VII’s promise of equality begins to be realized.

In proposing that we invoke Title VII law to prevent discrimination against Black English speakers, this Article rejects the claim that we need to “be realistic,” i.e., to just focus on teaching blacks Standard English so that they can succeed.<sup>309</sup> Being “realistic” has superficial appeal because it seems easier than implementing a radical legal solution that goes against common sense. After all, “[p]opular notions about language are so thoroughly entrenched that they’re not going to be overcome overnight. We’re still confronting the same thinking we encountered 20 years ago. I guess that doesn’t say much for the rate of social change.”<sup>310</sup>

Even Steven Pinker argues that, although terms like “bad grammar,” “fractured syntax,” and “incorrect usage” are scientifically inaccurate ways to describe Black English, “[i]t is just common sense that people should be given every encouragement and opportunity to learn the dialect that has become the standard one in their society and to employ it in many formal settings.”<sup>311</sup>

The question is, what does it mean to give people “every encouragement and opportunity?” First, it is unlikely that applying Title VII law to protect Black English speakers would

306. Abraham, *supra* note 19; see also Aponte, *supra* note 20, at 11 (making the same argument).

307. See *supra* notes 5, 11, and 88 (discussing controversy surrounding Oakland decision).

308. Shaw, *supra* note 5.

309. See, e.g., “Ebonics” *Be Gone*, S.F. EXAMINER, Dec. 20, 1996, at A22 (rejecting the Oakland decision because “[i]n the real world of colleges and commerce and communication, it’s not OK to speak Ebonics as a primary language”).

310. ORR, *supra* note 17, at 12 (quoting Walt Wolfram, a linguist who studies Black English).

311. PINKER, *supra* note 2, at 400; see also Sol Adler, *Bidialectism? Mandatory or Elective?*, ASHA (AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION), Jan. 1987, at 41; *Social Dialects Position Paper*, ASHA (AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION), Sept. 1983 reprinted in ASHA, Jan. 1987, at 45; Betsy L. Winsboro & Irvin D. Solomon, *Standard English vs. “The American Dream,”* EDUC. DIG., Dec. 1990, at 51–52; Lee, *supra* note 14 at A1, D22; Page, *supra* note 20; Thomas, *supra* note 20; Cynthia Walker, *Lessons Target Language as Barrier for Blacks Education*, L.A. TIMES, Feb. 19, 1995, at 11.

mean that these speakers would no longer be adequately "encouraged" to learn Standard English. On a practical level, not everyone has the resources or stamina to pursue a Title VII suit. Even if Title VII law could completely eliminate discrimination by employers, the ability to speak Standard English would remain an advantage in other contexts—for example, in social, political, and academic realms.

More importantly, "just being realistic" (and encouraging Black English speakers to learn Standard English by allowing employers to discriminate against them) is simply not right: why should blacks bear the burden of Americans' uninformed beliefs about language? Imagine that blacks could become white in appearance with the same amount of effort it would take for them to learn Standard English.<sup>312</sup> This would provide a "realistic" solution to problems of discrimination—ignoring the irrationality of the prejudice and simply eliminating the effects as quickly as possible. But few would demand that we adopt this solution. Why should it be our approach when it comes to language?

The second part of the question posed above deserves more attention: what would it mean to give Black English speakers "every opportunity" to learn Standard English? At the very least, it would require teachers: (1) to understand the nature of Black English as a valid form of human language and (2) to respect the linguistic skills that Black English speaking children bring to school. Numerous studies have shown that this scientifically based approach produces far better results than the common sense approach of repeatedly correcting children's "error-filled" speech.<sup>313</sup> Taking such an approach is not merely "politically correct." Given the linguistic facts, the approach represents true common sense: learning a second dialect is naturally easier if it is seen as a process of building on a first dialect, whose properties children are encouraged to examine, rather than an endless, demoralizing process of "correcting mistakes."

Given that effective means do exist to help children acquire Standard English, the radical solution proposed by this Article could be seen as a stopgap solution: perhaps Black English speakers should only receive Title VII protection to the extent

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312. Cf. Jerome M. Culp, *The Michael Jackson Pill: Equality, Race, and Culture*, 92 MICH. L. REV. 2613 (1994) (imagining various reactions to a pill that could turn people white).

313. See *supra* note 285 and accompanying text.

that there still exist adult speakers who did not receive an adequate opportunity to learn Standard English as children. Once a certain quorum of effective school programs was in place, plaintiffs could be required to prove that they in particular were denied the necessary opportunity to learn Standard English as a second dialect.

Before adopting such a "minimally radical" solution, however, we ought to consider carefully what the ultimate goal of discrimination law is. If the goal is merely to ensure that members of historically subordinated groups face no particular disadvantage in the workplace, then the minimally radical solution would be exactly the right one to institute. If, on the other hand, discrimination law reflects a positive regard for diversity, then the minimally radical solution would be completely misguided, since it would lead to an unnecessary, artificial, and arbitrary uniformity in public speech.

On the other hand, the radical solution might be seen as not radical enough—one could argue that it is hypocritical to extend Title VII protection to Black English, but not to other nonstandard dialects, such as the one spoken by white Southerners. After all, the prejudice against these dialects is just as irrational as the prejudice against Black English.

But closer analysis shows that the accusation of hypocrisy is misplaced. For one, Southerners are simply not as disadvantaged by discrimination against their dialect, because they do at least have the option of pursuing jobs in regions where that dialect is the norm rather than the exception. Because blacks experience far greater economic subordination and isolation than Southerners, the option of remaining within such a "speech ghetto" is much more limiting for them. Furthermore, American discrimination law is simply not all-encompassing. It does not forbid all forms of prejudice and injustice, but rather only those forms related to specific factors such as race, gender, and disability. Poverty and powerlessness are factors closely linked to the use of a nonstandard dialect (since the rich and powerful can define which dialect is "standard"). But poverty is not considered a suspect classification<sup>314</sup> and Title VII does not forbid employers from discriminating, directly or indirectly, against the poor and powerless. This may be unfair, but it is the law. It is one thing to fail to alter this law to create new rights for the poor

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314. See *Harris v. McRae*, 448 U.S. 297 (1980); *James v. Valtierra*, 402 U.S. 137 (1971).

and powerless in society and quite another to fail to enforce existing law, where science and legal analysis strongly suggest it should apply.

### CONCLUSION

Black English is a problem, and quite a serious one, but not for the reason that most people think. Although common sense suggests that Black English is just bad grammar, the linguistic evidence shows otherwise. To ignore this linguistic evidence, to find it "interesting as science," while refusing to give it "social, political, or . . . ethical" meaning (as one commentator has recommended),<sup>315</sup> would be a grave error that would significantly impede our ability to eliminate the long term effects of racism:

[T]here can be no question that the institution of slavery will continue to leave tremendous gaps between blacks and whites as long as the majority of blacks cannot compete with their white counterparts in the American job market. The linguistic dimension forms just a small segment of this picture, but it is one dimension where social [and cognitive] science can provide accurate insights.<sup>316</sup>

Linguistics provides the insight that Black English is a language every bit as valid, grammatical, and expressive as Standard English, a language that can be just as intelligible to Standard English speakers as British English, and just as fascinating and appealing in its subtle differences. It shows us that the real problem lies not with the prevalence of Black English but with employers'—and others'—reaction to it. By incorporating this insight and protecting Black English speakers from employment discrimination, Title VII could help fulfill some of the highest aspirations of our civil rights law. Indeed, the invocation of Title VII could be critical, because our attempts to create a more inclusive society can

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315. Jay Tolson, *Minding the Language Shop*, U.S.A. TODAY, Feb.25, 1994 at 5D (reviewing Steven Pinker's book *The Language Instinct*, *supra* note 2).

316. BAUGH, *supra* note 70, at 58. As with much other research on Black English, Baugh's work draws on both social science (sociolinguistics) and cognitive science (cognitive linguistics). See *supra* note 79.

only succeed if the law enables us to recognize and combat the most pernicious type of discrimination—the type that calls itself “common sense.”