Listening to Deaf Culture: A Reconceptualization of Difference Analysis Under Title VII

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 balances employees' civil rights and employers' business needs. It prohibits discrimination in hiring, firing, compensation, or "terms, conditions, or privileges of

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2. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (explaining that Title VII reflects employer, employee, and consumer interests in efficient and trustworthy workmanship).
employment" on the basis of race, color, religion, sex, or national origin. Likewise, it prohibits "limitation, segregation, or classification [of] employees or applicants... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of the individual's race, color, religion, sex, or national origin. At the same time, it permits employers to engage in legitimate business practices, denoted either "a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of that particular business or enterprise," or a "business necessity." These two defenses.


6. 42 U.S.C. § 2000e-2(e). This affirmative defense to allegations of disparate treatment discrimination is known as the "BFOQ" (bona fide occupational qualification) defense. By its terms, the defense does not apply to discrimination on the basis of race or color. Id. By judicial interpretation, the defense is considered narrow. See Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977). Because disparate treatment allegations concern intentional discrimination, invocation of the BFOQ defense tacitly acknowledges (at least, for the purposes of argument) that the employer has discriminated. See Norwood v. Dale Maintenance Sys., Inc., 590 F. Supp. 1410, 1415 n.3 (N.D. Ill. 1984).

7. The courts invented this defense to disparate impact discrimination, and Congress wrote it into the statute with the Civil Rights Act of 1991, which amended Title VII to clarify its terms and legislatively reverse a line of Supreme Court cases that had narrowed the protections of Title VII. See 42 U.S.C. § 2000e-2(k) (Supp. V 1994) (business necessity defense); Landgraf v. USI Film Products, 114 S. Ct. 1483, 1489-90 (1994) (describing purposes of Civil Rights Act of 1991). The defense is broader than the BFOQ exception, and permits an employer to continue using a facially neutral policy that disproportionately disadvantages a protected group if the employer can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." See 42 U.S.C. § 2000e-2(k)(1)(A)(i). Two factors temper the defense. First, "demonstrate" means that the employer must carry the burden of proof on the issue. See id. § 2000e-(m) (Supp. V 1994). Second, an employer that carries this burden may still fail if "the complaining party" can show that the employer failed to adopt a less discriminatory alternative that would accomplish the employer's purposes. See id. §§ (k)(1)(A)(ii), (k)(1)(C).

8. There is also a defense based on use of a bona fide seniority or merit system. See 42 U.S.C. §§ 2000e-2(h) (1988) (bona fide seniority and merit systems may be used to apply different standards of compensation, or different terms, conditions, or privileges of employment). In addition, employers can "give and act upon the results of any professionally developed ability tests, provided" that it is not "designed, intended or used to discriminate." Id.
balance employers' interests against Title VII's anti-discrimination mandate by ensuring that Title VII enforcement will "not . . . interfere unnecessarily with legitimate business operations and decisions."  

Employers may not discriminate, but Title VII "preserv[es] . . . an employer's remaining freedom of choice."  

If the courts cannot consistently strike Title VII's balance, then they cannot consistently realize the statute's purpose of ending employment discrimination. In particular, Title VII's effectiveness is undermined, and the harms of discrimination go unvindicated, whenever courts fail to clearly define the scope of Title VII's protected categories or defenses. Unfortunately, Title VII's balance has gone awry when courts have confronted cases in three areas, which can be gathered together under the rubric of "difference analysis."  

The three areas of difference analysis embrace cases addressing employment policies directed at stereotyped, biological, and cultural differences. In these cases, themes of norm-centered equality and difference as privilege have diverted the courts from analysis consistent with Title VII's purposes and balance. Norm-centered conceptions of equality lead the courts to accept employer policies directed at difference as rational business judgments, rather than to consider the possibility that such policies are discriminatory under Title VII. By measuring employers' policies against an equality requirement that "like employees receive like treatment," the courts do not recognize inequalities that stem from different treatment meted out to different employees. To the contrary, the courts' norm-centered perspective prompts them to regard difference as unreasonable privilege-seeking. In that light, courts treat

9. Mardell, 31 F.3d at 1240 (discussing Title VII's design to leave to employers their legitimate management prerogatives).
11. Title VII is a remedial statute. Its passage was compelled by "the seriousness and solemnity of our national policy denouncing discrimination." Mardell, 31 F.3d at 1235.
13. The term "difference analysis"—or terms like it—have been applied to cases involving sex-based biological differences, such as pregnancy and childbirth. See, e.g., Deborah L. Rhode, Definitions of Difference, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 197-212 (Deborah L. Rhode ed., 1990) (discussing legal analysis of gender differences); DEBORAH L. RHODE, JUSTICE AND GENDER 96, 106 (1989) (referring to "difference-oriented frameworks"); see generally Sylvia Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984) (emphasizing biological difference as the focal point of a proposed approach to equal protection analysis in gender cases). This article applies the term to a broader range of cases, but includes the biological difference cases within its scope.
employee differences as infringements on employers' interests, even when employers' policies infringe upon employees' interests in protection from discrimination.

Commentators have noticed and criticized the courts' difficulties, but have not generated a workable corrective to difference analysis and its distorting themes. No commentator has recognized that the varied forms of difference analysis may all be of one piece, let alone that common difference analysis problems may point to one solution. Instead, the bulk of scholarly attention to difference analysis has come from feminist theorists focused on the biological difference problems of pregnancy and childbearing. 14

These theorists have generated two leading schools of thought regarding the courts' approaches to biological difference. One school of thought advocates an "equal treatment" model that conceptualizes equality as a requirement that similarly situated persons should be treated alike. 15 The second school of thought criticizes the first for granting women equality only when they are similarly situated to men. Therefore, this school of thought advocates a "special treatment" model that conceptualizes equality as achievement of "equal results." In turn, this equality model has been criticized for risking relegation of women to separate spheres such as those created by "protective legislation" that hampered women's employment opportunities. 16 The special treatment position is also vulnerable to criticism that claims for special treatment are philosophically inconsistent with the meaning of equality. 17

This debate has raged on for years, but has largely failed to influence the courts' approach to difference analysis. 18 True, the equal treatment theorists helped to shape early judicial and legislative efforts

14. See, e.g., FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993) [hereinafter FOUNDATIONS]. Only seven of the 38 essays in this collection make no reference to pregnancy, reproduction, or childbearing. Only one of the 12 essays specifically addressing equality theory omits any reference to pregnancy, reproduction, or childbearing.


17. See Catherine A. MacKinnon, Difference and Dominance, in FOUNDATIONS, supra note 14, at 276-77 (describing special treatment argument as "something of a doctrinal embarrassment").

to produce gender equality; however, the limitations of the approach have surfaced frequently enough to inspire its refinement and rearticulation many times over. As for special treatment, the courts have shown little interest in the approach; indeed, the current political and jurisprudential climate strongly disfavors it.

This stalemate has produced a new generation of equality models. Some of these new approaches consist of variations on, or modifications of, one of the two schools of thought. Others represent new departures. Whatever the approach, it seems fair to say that most participants in the equality debate recognize—at least implicitly—that the debate has “an insoluble quality.”

Lucinda Finley has suggested that the debate has been largely ineffectual because equality analysis cannot “come to terms in any acceptable, unproblematic manner with the reality of human variety.” I agree. I would go even further, and suggest that focus on biological difference has blinded us to the recurring analytic patterns that mar all areas of difference analysis. More specifically, I suggest that an examination of the whole of difference analysis reveals a pattern of recurrent themes that can only be addressed by consideration of the practical effects of difference upon Title VII’s promise of equality of


21. See, e.g., Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Paul C. Roberts, *Everybody Equal But White Males*, ROCKY MTN. NEWS (Denver), March 25, 1995, at 50A (editorial) (“[a]n array of quota policies . . . lavish employment and promotion privileges on women and other ‘protected minorities’ . . . [and] white male careers [in federal government are] on hold while those privileged by skin color and genitalia take precedence”). But see California Fed. Sav. and Loan Ass’n v. Guerra, 479 U.S. 272, 294 (1987) (finding that Pregnancy Discrimination Act does not prohibit preferential treatment consistent with Title VII’s goals); see generally id. at 294 n.4 (Stevens, J., concurring) (stating that the Court has not yet decided what is impermissible preferential treatment under Title VII).


23. See supra note 20.

24. See supra note 22.

25. Finley, supra note 18, at 194.

26. Finley, supra note 18, at 195.
opportunity balanced with legitimate employer interests. Thus, Part II of this article seeks to identify the patterns of difference analysis, and Part III will discuss the limitations of the ongoing equality debate's response to those patterns.

In place of these flawed approaches to difference, Part IV will explore the lessons of Deaf culture for difference analysis. Deaf culture stems primarily from the Deaf experience with American Sign Language ("ASL"), which has its own grammar, syntax, and folkloric and bardic traditions. This language enables its users to communicate as fully, with as much richness, as any non-deaf person's primary spoken language. Yet, norm-centered attitudes, and a concomitant sense that accommodation to difference grants an unfair privilege, prompted hearing educators of the deaf to attempt to eradicate ASL and replace it entirely with "normal" mimicry of speech and hearing. Thus, the history of Deaf culture is a history of the results of the two themes that have pervaded Title VII difference analysis. The results—which have ill-served many deaf people in their efforts to fully function and communicate—comprise the lessons of Deaf culture.

Part V of this article will use these lessons to reconceptualize difference analysis. In turn, this reconceptualization generates principles that replace the themes of norm-centered equality and difference as privilege with a functional approach that restores Title VII's conception of opportunity-based equality, and appropriately balances employer and employee interests.

II. DIFFERENCE ANALYSIS IN DISARRAY: THE COURTS' APPROACH

Difference analysis cases arise when an employer has made an employment decision based upon a characteristic that differs from the employer's desired norm. The workers who possess the "different" characteristic comprise a subgroup within one of Title VII's protected categories; yet, Title VII's traditional forms of disparate impact and

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27. A convention of Deaf culture scholarship is to denote "deafness" or "deaf" as a physical condition with a lower case "d," and "deafness" or "deaf" in the cultural sense with an upper case "D." See CAROL PADDO & TOM HUMPHRIES, DEAF IN AMERICA: VOICES FROM A CULTURE 2, 39 (1988); JEROME D. SCHEIN, AT HOME AMONG STRANGERS 6-7 (1989); Andrew Solomon, Deaf Is Beautiful, THE NEW YORK TIMES MAGAZINE, Aug. 28, 1994, at 40.

28. See generally PADDEN & HUMPHRIES, supra note 27.

29. See infra Part IV.

30. See infra notes 378-93 and accompanying text.

31. See supra note 13.
disparate treatment analysis do not address their situation. Disparate impact analysis generally fails in these cases because the employers' policies affect only a portion of a protected class, which is too small to evidence disparate impact.\(^\text{32}\) As for disparate treatment, the courts are stymied by the fact that the policies at issue are not explicitly directed at protected categories, but only at traits associated with these categories.\(^\text{33}\) For example, many early difference cases involved policies that affected only female or male employees, which the courts dubbed "sex-plus" policies.\(^\text{34}\) The name referred to the fact that the policies appeared not to be directed at sex, but at sex "plus" some other characteristic.\(^\text{35}\)

Difference analysis had its genesis in these sex-plus cases, in which the employer's policies targeted traits *stereotypically associated with* gender.\(^\text{36}\) As Title VII jurisprudence expanded, so did the scope of application of "sex-plus" concepts. For example, the courts have addressed whether certain hairstyle prohibitions constitute race discrimination.\(^\text{37}\) Similarly, men have challenged no-beard rules on the grounds of religious and race discrimination.\(^\text{38}\) Outside the grooming area,
employees whose primary language is other than English have challenged
English-only workplace rules, on the grounds that such rules constitute
national origin discrimination. Some cases (such as those involving
child care, hair length, dress codes, and surnames) center on traits stereotypically associated with protected categories; other cases (such as those involving PFB, pregnancy, and childbirth) center on traits biologically associated with protected categories; still other cases (such as those involving corn row hairstyles, religious challenges to grooming rules, and English-only rules) center on traits culturally associated with the protected category.

This expansion of “sex-plus” concepts beyond gender bounds necessitates use of the broader “difference analysis” term to denote and conceptually relate all such cases. The common thread in all these cases is a conception of equality ill-suited to the realities of difference. Repair of the resulting disarray must begin with an attempt to accurately trace the nature and scope of the flaws of difference analysis, beginning with its origins in “sex-plus” litigation, and proceeding to its evolution in biological and cultural difference cases.

A. The Flawed Origins of Difference Analysis: “Sex-plus” and Stereotyped Difference

In retrospect, some early sex-plus cases seem comical, based as they are on controversies centered on now-dated stereotypes. It is hard to recall why long hair once seemed to matter so much, similarly, the

39. See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), reh’g en banc denied, 13 F.3d 296 (9th Cir. 1993); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981).
40. See supra note 32.
41. This suggestion is not novel. See Peter B. Bayer, Mutable Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. DAVIS L. REV. 769 (1987) (suggesting the term “mutability analysis” for grooming and language cases, and critiquing extant analysis as unduly restrictive).
42. The apparent triviality of hair length rules for male employees has favored employers, despite the obvious irrelevance of hair length to actual performance. Id. at 769. As Professor Bayer reports, “not one prevailing court of appeals decision has held that grooming codes restricting the hair length of male employees are sexually discriminatory.” Id. at 837. Professor Bayer argues that the courts have ignored the significance of hair length. Id. at 868. I agree that male hair length and style may have political significance; however, Professor Bayer’s analysis seems vulnerable because he adopts the very analysis he criticizes. The only difference is that Professor Bayer defines the

http://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss2/1
idea of forcing women to wear uniforms for fear they would dress inappropriately now seems laughable. That we can now see the stereotypes for what they are reveals the very conundrum posed by sex-plus jurisprudence: in these cases, courts confront differentiated treatment based on stereotyped assumptions, but their adjudication of these cases frequently turns upon those same stereotypes.

The conundrum’s significance becomes clearer when the stakes are higher, as in other early sex-plus cases involving employers’ unfavorable treatment of women with pre-school age children, or married women. In these early cases, plaintiffs lost when judges’ own sex-based stereotypes led them to conclude that such policies did not discriminate on the basis of sex.

1. Three Steps Forward: Phillips, Diaz, and Sprogis

In Phillips v. Martin Marietta Corp., the trial court granted defendant’s summary judgment motion because it deemed Martin Marietta’s employment of men with pre-school age children irrelevant to a claim that its refusal to hire women with pre-school age children was sex discrimination. As the court saw it, the employer’s treatment of men was irrelevant to the case because “[t]he responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies.” From this assumption, the court concluded that there was no evidence that “defendant discriminated against the plaintiff because the plaintiff is a woman.” This conclusion accorded with Martin Marietta’s implicit argument that discrimination against only a portion of a protected class is not discrimination against the class, so long as the

category of fundamental rights more broadly than does the Fifth Circuit.

43. See Carroll v. Talman Fed. Sav. & Loan Ass’n of Chicago, 604 F.2d 1028, 1033 & n.16 (7th Cir. 1979) (finding Title VII was violated by employer who allowed men to wear “customary business attire” but required women to wear uniforms, euphemistically described as “career ensembles”).


45. See, e.g., Sprogis, 444 F.2d at 1194 (finding no-marriage rule for women stewardesses violated Title VII); Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781 (E.D. La. 1967) (finding no-marriage rule for women did not violate Title VII), appeal dismissed, No. 25,698 (5th Cir. 1968).

46. Rhode, supra note 13, at 197-212.

47. 69 L.R.R.M. (BNA) 2129 (M.D. Fla. 1968).

48. Id. at 2129.

49. Id.
portion suffers because of a "neutral" criterion.  

On appeal, the Fifth Circuit agreed with the district court, albeit on slightly different grounds. As the Fifth Circuit saw it, the issue was whether the employer's application of its no pre-school age children policy was "discrimination based on 'sex'" within the meaning of Title VII. In the Fifth Circuit's view, the answer was no: "[t]he discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children." In so reasoning, the court read Title VII narrowly, to reach only discrimination on classifications "named within the Act itself."  

Conceding that the policy "is arguably an apparent discrimination founded upon sex," the court nonetheless dismissed that possibility. First, the court strongly intimated that it would accept the policy as a BFOQ even if it found the policy discriminatory. Second, the court simply did not find the policy violated Title VII because it could not believe that Congress intended "sex" to be construed broadly enough to prohibit distinctions based upon "normal" sex roles and child-rearing practices. To the contrary, the court felt that "[t]he common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute."  

On petition for rehearing en banc, the Fifth Circuit simply denied the petition with a terse per curiam statement. Three judges dissented. They found it obvious that the employer's policy was sex-based because "[i]t is the fact of the person being a mother, i.e., a woman—not the age of the children, which denies employment opportunity to a woman which is open to a man." The dissenters, coining the "sex-plus" phrase to

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50. Thus, Martin Marietta argued a kind of "bottom line" defense 13 years before the Supreme Court rejected that defense. See Connecticut v. Teal, 457 U.S. 440 (1982). Set against early difference cases such as Phillips, Teal can be read as a rejection of a disparate impact variation on "sex plus" logic. Id. at 455-56.  
52. Id. at 2.  
53. Id. at 4.  
54. Id.  
55. Id.  
56. See id. (referring to "the differences between the normal relationships of working fathers and working mothers to their pre-school age children") (emphasis added).  
57. Id.  
58. Id.  
60. Id. at 1259.
refer to the majority’s view that no actionable discrimination stems from a policy based on “another criterion of employment . . . added to one of the classifications listed in the Act,”61 bluntly stated the problem with the analysis: “[i]f ‘sex-plus’ stands, the Act is dead. . . . Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers.”62

Ultimately, the Supreme Court addressed the Phillips case with a cryptic per curiam opinion, which reversed the Fifth Circuit’s decision.63 The Court could have clarified Title VII and said that employment policies based on sex-based stereotypes violate the statute. It did not do so. The Court simply said—without elaboration—that Title VII “requires that persons of like qualifications be given employment opportunities irrespective of their sex.”64 Given that the whole controversy centered on the question of what is and is not “irrespective of . . . sex,” this approach was less than helpful.

Worse yet, the Court noted in dicta that “[t]he existence of . . . conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction” as a bona fide occupational qualification under the Act.65 Thus, even the Supreme Court “[fell] into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination.”66 Distracted by such stereotyped assumptions, all that the Supreme Court did in Phillips was shift the arena of dispute from the threshold question of discrimination to the BFOQ defense.

On the BFOQ question, the Fifth Circuit had produced precedent that blunted employers’ ability to exploit the Supreme Court’s dicta in Phillips. In Diaz v. Pan American World Airways, Inc.,67 the Fifth

61. Id. at 1260.
62. Id.
64. Id.
65. Id. Years later, the Court read this dicta as a holding, by stating: “[t]he question in [Phillips] was whether the discrimination in question could be justified under § 703(e) as a BFOQ.” UAW v. Johnson Controls Inc., 499 U.S. 1196, 1203 (1991). This otherwise puzzling dicta makes sense if read as a statement that Phillips ultimately boiled down to a BFOQ question. In fact, the Supreme Court remanded Phillips on that question, but its opinion is the last reported decision in the case.
66. Phillips, 400 U.S. at 545 (Marshall, J., concurring). The Court’s stumble may be explained by then-Chief Justice Burger’s personal views. By some accounts, Burger—like his colleagues in the lower Phillips courts—believed that women with young children were not as good employees as men. See Stephen Armstrong & Bob Woodward, The Brethren 123 (1979).
67. 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971).
Circuit found the defendant employer violated Title VII when it refused to hire men for flight attendant positions. 68 Because Pan Am conceded that it hired only women for these positions, the parties stipulated that the issue was whether "being a female" was a BFOQ for work as a flight attendant. 69 The trial court had accepted this argument, 70 which was based on evidence that Pan Am deemed women better than men at "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations." 71 In addition, the trial court found that "Pan Am's passengers overwhelmingly preferred to be served by female stewardesses." 72 The Fifth Circuit reversed, and agreed with the EEOC's argument that the BFOQ exception should be interpreted narrowly, so as not to swallow the rule of Title VII. 73

Using this narrow BFOQ analysis, the Fifth Circuit found that Pan Am's defense involved merely tangential aspects of its business, while "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." 74 As for customer preferences, the Fifth Circuit found that they could not be the basis of a BFOQ defense because "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." 75

The combined effect of Phillips and Diaz was demonstrated in Sprogis v. United Air Lines, Inc. 76 In that case, female flight attendants challenged United's application of a no-marriage rule to its female attendants but not to its male attendants. 77 The airline defended its policy on two grounds. First, it followed Martin Marietta's lead, and argued that the policy was not discriminatory because it was based on a neutral, "sex-plus" factor. 78 Second, it followed Pan Am's lead, and

68. Id. at 389.
69. Id. at 386.
71. Diaz, 442 F.2d at 387 (quoting the trial court's findings).
72. Id.
73. Id.
74. Id. at 388 (emphasis in original).
75. Id. at 389.
76. 444 F.2d 1194 (7th Cir. 1979), cert. denied, 404 U.S. 991 (1971).
77. Id. at 1196.
78. See id. at 1197-98.
argued that the policy was a BFOQ. Citing Phillips in its analysis of the first argument, and Diaz in its analysis of the second argument, the Seventh Circuit rejected both theories.

In response to the “sex-plus” argument, the Seventh Circuit followed the EEOC’s view that “so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.” Thus, the Seventh Circuit read Title VII to prohibit more than “explicit discriminations based ‘solely’ on sex.” To the contrary, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” Nor did the Seventh Circuit view this spectrum narrowly; rather, it pointedly noted that neither biological nor stereotypical differences could justify a discriminatory policy.

The determination that United’s policy was sex-based discrimination meant that United could only prevail if it established that an unmarried status was a BFOQ for female flight attendants. United failed to do so. The only reason United could offer for requiring its stewardesses to be single was that “it received complaints from husbands about their wives’ working schedules and the irregularity of their working hours.” Not surprisingly, the Seventh Circuit found that spouses’ complaints were unrelated to their wives’ job qualifications, especially when concerns about a few employees’ domestic arrangements were used to bar employment of all married women. The court, therefore, found marital status unrelated to job performance, and,

79. See id. at 1198-1201.
80. See id. at 1197-1201.
81. Id. at 1198 (quoting EEOC regulations at 29 C.F.R. § 1604.3(a) (1994)).
82. Id.
83. Id.
84. Id. (citing Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 759-60 (M.D. Ala. 1969), and the Supreme Court’s Phillips opinion, 400 U.S. at 591.
85. Id. at 1198-99.
86. Id. at 1199. Apparently, United thought that married women could only work on the terms their husbands permitted them. Of course, that idea is a stereotype that was once enshrined in the legal fiction that “the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union.” LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 184 (1985) (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 129 (2d ed. 1832)). Interestingly, United dressed the old stereotype in modern clothes, by putting on expert testimony of psychiatrists and marriage counselors to the effect that “marriage tends to bring about changes in job attitudes which seriously impair . . . effectiveness as stewardesses. They tend to become preoccupied with their marital responsibilities, less dedicated, less sensitive to the needs of passengers and more resentful towards their jobs.” Sprogis, 444 F.2d at 1207 n.23 (Stevens, J., dissenting).
87. Sprogis, 444 F.2d at 1199.
citing Diaz, that passenger preferences for single stewardesses did not constitute a BFOQ. 88


Sprogis has been much-cited, 89 but it was not the last word on sex-plus analysis. A male job applicant’s desire to wear long hair presented another opportunity for the courts to determine whether inclusion of sex as a factor in an employment policy rendered the policy discriminatory under Title VII. 90 Trivial as hair length may be, the case has profoundly affected sex-plus and difference analysis.

In July 1970, Alan Willingham applied for a copy layout artist position with Macon Telegraph Publishing Company. 91 Macon Telegraph rejected Willingham’s application because it “object[ed] to the length of his hair.” 92 Specifically, Macon Telegraph felt that exclusion of “men (but not women) with long hair” was a necessary concession to the tastes of its advertisers and subscribers, who were “particularly sour on youthful long-haired males.” 93 Such an argument sounds like a BFOQ defense patterned after the airlines’ customer preference arguments in Sprogis and Weeks. Nonetheless, the trial court saw the issue as whether the policy was sex discrimination, at all. 94

On this issue, the district court found for the employer with a decision steeped in stereotypical thinking. 95 The court reasoned that Willingham’s reading of Title VII would mean that “men . . . could not be prevented by the employer from wearing dresses to work if the employer permitted women to wear dresses. . . . [I]t would not be at all illogical to include lipstick, eyeshadow, earrings, and other items of

88. Id.
89. A search of the LEXIS database for Shepard’s Federal Citations through September 1995 reveals 254 federal and state court citations to Sprogis.
90. Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1086 (5th Cir. 1975) (en bane) [hereinafter Willingham II].
91. Id. at 1086-87.
92. Id. at 1086. These objections were founded upon the Macon community’s recent experience with a nearby music festival, which attracted some 500,000 “[b]earded and long-haired youths and scantily dressed young women . . . . [whose] [u]se of drugs and marijuana was open. Complete nudity by both sexes although not common was frequently observed.” Id. at 1087 (citing Willingham v. Macon Tel., Co., 482 F.2d 535, 539 n.3 (5th Cir. 1973)) [hereinafter Willingham I].
93. Willingham I, 482 F.2d at 539 & n.3 (Simpson, J., dissenting).
95. Id. at 1022.
typical female attire . . . and bedeckment." Such reasoning suited the
well-ingrained expectations of 1972, but ultimately proved weak. In later
years, courts have struck down at least some employer restrictions upon
female dress, as well as requirements that female employees use
cosmetics. Similarly, a male employee who wears an earring, or a
female employee "who shaves her head as clean as a billiard ball" may
not yet the commonplace, but neither do they seem impossibly
absurd in this age of Andre Agassi and Sinead O'Connor. In sum, the
reasoning fails to hold consistently, and works only when tested against
a "parade of horribles" flaunting extant norms. When the norms change,
so does the result.

The Fifth Circuit briefly seemed to recognize as much. In 1973, it
reversed the district court by following Sprogis and broadly construc-
ing Title VII to prohibit "all differences in the treatment of men and
women resulting from sex stereotypes." Two years later, the Fifth
Circuit reheard the case en banc, and did an about face: it now
decided that the statute's scanty legislative history indicated that
Congress could not have meant "for its proscription of sexual discrimina-
tion to have significant and sweeping implications." Not only did
the Fifth Circuit abandon its earlier acceptance of Willingham's
argument, but it now endorsed the approach it had earlier rejected. The
court's en banc affirmation of the district court opinion was authored by

96. Id. at 1020.
98. Cf. Tamini v. Howard Johnson Co., 807 F.2d 1550 (11th Cir. 1987) (finding Title VII violated by make-up rule implemented as a pretext to discharge a pregnant employee who would not wear makeup because of her religious beliefs).
101. 482 F.2d 535 (5th Cir. 1973). For simplicity and clarity's sake, this initial Fifth Circuit opinion will be denoted as Willingham I, even though it is not customarily referred to as such—or even referred to, at all.
102. Id. at 537-38 (citing Sprogis, 444 F.2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971)).
104. Id. at 1090. It is true that the legislative history of the statute's inclusion of sex is "notable primarily for its brevity." General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976). What is puzzling is that the Fifth Circuit used this opaque history to conclude that Congress did not intend "significant and sweeping" consequences. The history is either illuminating or not, and its brevity no more connotes an intent for narrow change than an intent for broad change.
Judge Simpson, who dissented from Willingham I.\textsuperscript{105}

\textbf{a. Willingham II's Flawed Reasoning}

Alan Willingham had characterized the employer's grooming standards as discriminatory by arguing that the policy "involve[d] the classification of employees on the basis of sex plus one other ostensibly neutral characteristic."\textsuperscript{106} In 1973, the Fifth Circuit regarded such a classification as discrimination. Now, the Fifth Circuit saw the argument as "an equal protection gloss upon the statute, i.e., similarly situated individuals of either sex cannot be discriminated against \textit{vis \`a vis} members of their own sex unless the same distinction is made with respect to those of the opposite sex."\textsuperscript{107} In other words, the court seems to have understood Willingham to be arguing that the defendant favored short-haired over long-haired men, rather than that the employer enforced gender stereotypes by granting women more hairstyle latitude than it did men.\textsuperscript{108}

The Fifth Circuit's analysis of this issue acknowledged Phillips and Sprogis, as it had to.\textsuperscript{109} Moreover, it acknowledged that several district courts had followed Sprogis to find sex-differentiated grooming codes violated Title VII.\textsuperscript{110} The court then proceeded to ignore the lower court grooming cases—as an appellate court may do—and to read Phillips and Sprogis in the narrowest way possible. This narrow reading was easily accomplished with Phillips, which so cryptically had said so little. Yet, Sprogis had stated that "[t]he effect of the statute is not to be

\begin{footnotes}
\item[105] Judges Tuttle and Wisdom, who comprised the Willingham I majority, dissented from the Willingham II en banc opinion. \textit{Willingham II}, 507 F.2d at 1093.
\item[106] \textit{Id.} at 1089 (emphasis in original).
\item[107] \textit{Id.} (emphasis added).
\item[108] The Fifth Circuit's issue formulation in Willingham II sounds suspiciously like Martin Marietta's defense in Phillips. Just as the Fifth Circuit saw the grooming policy as a distinction favoring short-haired over long-haired men, Martin Marietta had argued that it was merely favoring women without small children over women with small children. This issue formulation also echoed the defendant's Willingham I theory:

\textbf{The company contends that its grooming code does not discriminate on the basis of sex because both sexes are treated equally: all applicants and employees are required to groom their hair according to the prevailing community standard. It is argued that the discrimination, if any, is between long and short haired males and not between males and females.}

\textit{482 F.2d at 537.} In Willingham II, the court rejected this argument. \textit{See} 507 F.2d at 1084.
\item[109] \textit{Willingham II}, 507 F.2d at 1089.
\end{footnotes}
diluted because discrimination adversely affects only a portion of the protected class.” At the same time, *Diaz* had foreclosed a BFOQ justification for discrimination based on customer preferences or other non-essential grounds. Thus boxed in, the court decided that some stereotype-driven policies may violate Title VII, but other stereotype-driven policies, including Macon Telegraph’s, do not.

Specifically, the court held that Title VII forbids discrimination “on the basis of immutable characteristics, such as race and national origin.” As for mutable characteristics, the court drew the line between discrimination and non-discrimination at “distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the manner in which an employer exercises his judgment as to the way to operate a business.” Finding hair length neither immutable nor a matter of “fundamental right,” the court concluded that Macon Telegraph’s policy did not violate Title VII.

This reasoning effectively rendered Title VII a narrow truism. The “immutability” and “fundamental rights” rubrics merely provided broad terms to cover all of Title VII’s explicit categories, along with the precedent the court could not ignore. Thus, “immutable characteristics” covers the Title VII categories of race, color, national origin, and sex. Similarly, “fundamental rights” covers the Title VII category of religion and accounts for the *Sprogis* and *Phillips* decisions. As for *Diaz*, the Fifth Circuit avoided it by stopping inquiry at the threshold question of discrimination. This analytic shell game allowed employers to defend policies that would never pass muster under Title VII’s BFOQ defense.

b. *Willingham II*’s Flawed Test

Succeeding courts have applied *Willingham II*’s mutability/fundamental rights test to all manner of cases. For example, most courts have upheld hair length rules, but at least one court regarded hair length as “an ingredient of an individual’s personal liberty.” Similarly, courts usually uphold gender-differentiated dress codes;

111. 444 F.2d at 1198.
112. 442 F.2d at 387-89.
113. *See Willingham II*, 507 F.2d at 1089-91.
114. *Id.* at 1091.
115. *Id.*
116. *Id.*
however, some courts have found Title VII violations when employers force female employees to wear revealing uniforms, which the courts perceived as infringements on the female employees’ privacy rights.\textsuperscript{118} Still another court found a Title VII violation when an employer forced female employees to wear arguably unattractive, but unrevealing, uniforms.\textsuperscript{119} Cases imposing weight standards upon flight attendants depended upon a showing that weight is not easily controlled, and, hence, immutable; some plaintiffs assembled such evidence, and some did not.\textsuperscript{120} In sum, the \textit{Willingham II} test produces inconsistent results.

Ultimately, the test turns upon the vagaries of the stereotyped preconceptions, or lack of them, in the minds of the different judges who decide each case. For the most part, this dependence on stereotypes has favored employers. Citing \textit{Willingham II},\textsuperscript{121} the courts have upheld stereotype-based policies restricting male grooming,\textsuperscript{122} male and female

\begin{itemize}
  \item \textsuperscript{119}Carroll v. Talman Fed. Sav. & Loan Ass’n, 604 F.2d 1028 (7th Cir. 1979) (reversing district court’s decision that uniform requirement imposed on female employees was merely an employer preference rather than a Title VII violation). The Seventh Circuit cited \textit{Sprogis} and stereotyping concepts to find that the uniform policy violated Title VII because it tended to mark female employees as subordinates, in contrast to the non-uniformed male employees. \textit{Id.} at 1030-33.
  \item \textsuperscript{120}This court could not break out of the forms of traditional equality analysis, as it observed that “Title VII does not require that uniforms be abolished but that defendant’s similarly situated employees be treated in an equal manner.” \textit{Id.} at 1031. Accordingly, the Seventh Circuit’s seeming divergence from \textit{Willingham II} actually turned on its willingness to see the employer’s policy as discrimination against women “vis-à-vis” men. If it had agreed with the defendant’s stereotyped argument that “women cannot be expected to exercise good judgment in choosing business apparel, whereas men can,” \textit{id.} at 1033 n.17, it presumably would have upheld the policy because it would have regarded women and men as differently situated. \textit{See, e.g., id.} at 1034 (Pell, J., dissenting) (emphasizing “essential uniformity of male garb and the lack of that uniformity among women”).
  \item \textsuperscript{121}See Association of Flight Attendants v. Ozark Air Lines, 470 F. Supp. 1132 (N.D. Ill. 1979).
dress, female height and weight, marriage, menstruation-related absences, effeminacy, and female “uppitiness.”

B. Biological Difference Cases

Post-Willingham II jurisprudence reflects the power of stereotypes, and the failure of legal analysis to counter the stereotypes. Biological difference has equally troubled the courts, producing a nearly infamous line of cases rescued from their illogic only by Congressional amendment of Title VII. In recent years, the underlying logic of the legislative rescue effort has likewise become questionable, despite its improvement on the courts’ initial pass at sex-based biological difference.

1. Round One: The Courts Apply Sex-plus Concepts To Pregnancy

In the mid-1970’s, the Supreme Court decided three problematic biological difference cases. The first of the cases, Geduldig v. Aiello, was not a Title VII case. The second and third cases, General Elec. Co.
v. Gilbert\textsuperscript{131} and Nashville Gas Co. v. Satty,\textsuperscript{132} were decided under Title VII.

In Geduldig, the Court considered whether an employer—the State of California—violated the Fourteenth Amendment’s equal protection clause by excluding pregnancy and childbirth from its employees’ disability insurance program.\textsuperscript{133} The Court decided that California’s insurance program did not discriminate against women because “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”\textsuperscript{134} In other words, the program did not affect women vis-a-vis men; rather, it distinguished between “pregnant women and non-pregnant persons.”\textsuperscript{135} Thus, the employer could exercise its business judgment to maintain the fiscal integrity of its plan by excluding pregnancy and childbirth from the plan’s covered disabilities.\textsuperscript{136}

Although Geduldig was not a Title VII case, it laid the groundwork for the Title VII cases that followed. In Gilbert, female employees challenged their employer’s disability plan as sex discrimination because it excluded payments for pregnancy disabilities.\textsuperscript{137} Using Geduldig’s logic, the Court found that the employer’s policy did not violate Title VII.\textsuperscript{138} Thus, the Court found the policy was not discriminatory.\textsuperscript{139} Nor could the plaintiffs demonstrate any adverse effect of the policy upon women as a group because they could not prove that the benefit package was worth more to the employer’s male employees than to its female employees.\textsuperscript{140}

In Satty, the Court once again applied its premise that a pregnancy-based distinction is not a sex-based distinction.\textsuperscript{141} Thus, the Court ruled that the employer’s requirement that its pregnant employees take...
an unpaid leave of absence did not violate Title VII. In contrast, the Court found the employer’s elimination of previously accumulated seniority for women returning from pregnancy leaves violated Title VII. This ostensibly neutral policy, targeted at sex-plus maternity leaves, was discriminatory because it “imposed on women a substantial burden that men need not suffer.” In the Court’s view, this burdening differentiated the no-seniority policy from the unpaid maternity leave policy; unlike the former policy, the latter one did not differently burden men and women, but only “refused to extend to women a benefit that men cannot and do not receive.”

After Satty, the courts that addressed employment policies directed at gender-based biological difference had to decide whether Gilbert or Satty governed the case. This decision turned on determining whether a policy burdened only one sex (and, therefore, was discrimination under Satty), or simply refused to accord a benefit to the only sex that could realize that benefit (and, therefore, was non-discrimination under Gilbert). This distinction between benefits and burdens was not easily applied. As the Gilbert dissenters pointed out, what the majority saw as reasonable withholding of a one-sided benefit could equally be viewed as imposition of a discriminatory burden.

2. Round Two: The PDA Invalidates Sex-plus Analysis of Pregnancy

The courts were seemingly prepared to labor on with the Gilbert and Satty framework, amid growing criticism of their approach. Congress spared them this endeavor. In 1978, Congress amended Title VII with the Pregnancy Discrimination Act, known as the “PDA.” In doing, Congress explicitly rejected the Gilbert approach. In Gilbert’s place, the PDA gave Title VII a new definition section, which states that discrimination based on “pregnancy, childbirth, or related

142. See id. at 143-46.
143. Id. at 139.
144. Id. at 142.
145. Id.
146. See Gilbert, 429 U.S. at 147-48 (Brennan, J., dissenting).
147. See supra note 135.

But see id. at 686 (Rehnquist, J., dissenting). By implication, the Congress’ rejection of Gilbert’s test suggests that it also rejected Satty’s analysis.
medical conditions" is sex-based discrimination that violates Title VII.

In relation to the difference analysis difficulties that had arisen under Title VII, this new language did two things. First, it effectively shifted pregnancy, childbirth, and "related medical conditions" from categorization as neutral "plus" factors to categorization as discriminatory "sex" factors. That is, an employer could no longer argue that a policy directed at pregnancy or childbirth was a neutral policy that, under "sex-plus" analysis, fell within the realm of permissible business judgments. Under the PDA, "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." Second, the PDA made the gender uniqueness of pregnancy and childbirth non-determinative. That is, the new section stated that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." Now, courts could use the broader analytic category of ability or inability to work, rather than choosing between benefits and burdens.

With the loss of a sex-plus argument strategy, employers could not easily characterize their policies directed at biological sex differences as neutral and nondiscriminatory. Similarly, they could not characterize their policies as refusals to accord women a gender-specific benefit. Instead, they had to turn to BFOQ analysis. That defense is "written narrowly, and . . . read . . . narrowly." Accordingly, reliance on the BFOQ defense gives employers far less leeway than does sex-plus analysis.

Difference analysis under the PDA is illustrated by the courts' treatment of fetal protection policies that excluded fertile women, but not men, from toxin-exposed jobs. At first, the courts upheld such policies under the PDA, but did so with wildly confused logic. For example, the Eleventh Circuit had stated that "there is a 'presumption that if the employer's policy by its terms applies only to women, then the policy is facially discriminatory.'" The Eleventh Circuit

152. Id. at 671 n.1.
therefore “tend[ed] to agree [with plaintiffs] that this [was] . . . facial discrimination,” but applied disparate impact theory “to ensure complete fairness” to the defendant employer. Once it got to disparate impact, the court decided that the employer’s policy was “neutral in the sense that it effectively and equally protect[ed] the offspring of all employees.” Similarly, the Fourth Circuit “recognized that the facial neutrality of a fetal protection policy ‘might be subject to logical dispute,’” but nonetheless felt that such a “‘dispute would involve mere semantic quibbling having no relevance to the underlying principle that gave rise to this theory.’” Hence, the Fourth Circuit also used disparate impact analysis, thereby implying that the policy was neutral.

What is significant about such logical contortions is that the PDA made them necessary. Without the PDA, the courts could simply have used sex-plus analysis to decide that fetal protection policies were not directed at sex, but at a neutral characteristic. Then, the courts could have proceeded to apply the Willingham II test. At that point, the courts could have decided either that fertility and childbearing implicated fundamental rights, or that fetal protection policies represented the employer’s judgment on how best to run its business.

The PDA precluded this approach, so courts exchanged “sex-plus” analysis for the questionable practice of treating a facially discriminatory policy as a neutral one. On one level, this practice simply used disparate impact concepts as a stand-in for sex-plus concepts. On another level, the courts were struggling with the apparent realities of difference. As the Seventh Circuit recognized, the problem boiled down to “the basic

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156. Hayes, 726 F.2d at 1548.
157. Id.
158. UAW v. Johnson Controls, Inc., 886 F.2d 871, 884 (7th Cir. 1989) (quoting Wright v. Olin Corp., 697 F.2d 1172, 1186 (4th Cir. 1982)).
159. See Willingham II, 507 F.2d at 1091. Most likely, the courts would have invalidated at least those policies involving toxins transmittable to the fetus by either parent. As the Supreme Court observed, policies prompted by non-gender-specific toxins but directed only at women were “conceptually similar” to Martin Marietta’s exclusion of women with pre-school age children, but not men. UAW, 499 U.S. at 197. The courts might also have found that fertility implicates a “fundamental right,” or poses a Satty burden on women. In addition, the courts might have considered fertility an “immutable” characteristic, even though women are fertile for only a portion—albeit a lengthy one—of their lives, and can use medical means to change their fertile condition to one of infertility, or vice versa.
160. One problem with the courts’ treatment of fetal protection policies was their assumption that male employees’ exposure to toxins would not harm their offspring. Much evidence suggests that this is not the case. See, e.g., Brief for Appellant UAW, UAW v. Johnson Controls, 499 U.S. 187 (1991) (No. 89-1215). Thus, the fetal protection cases involved both biological and stereotyped differences.
physical fact of human reproduction, that only women are capable of bearing children." Rather than confront the problem, the courts—and the EEOC—rationalized their approach by deciding that fetal protection "cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves." 

Perhaps recalling its Gilbert/Satty fiasco, the Supreme Court refused to adopt this approach. In *UAW v. Johnson Controls*, the Court reversed the Seventh Circuit's decision upholding a battery manufacturer's fetal protection policy. The Court flatly observed: "[t]he bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. . . . [Johnson Controls'] fetal-protection policy explicitly discriminates against women on the basis of their sex." In approximately three printed pages, the Supreme Court swiftly found disparate treatment where the lower courts had textually agonized over a disparate impact based finding of no discrimination. The Court did so by finding fertile women and men alike in their relationship to the question of reproductive risk; this premise allowed the Court to treat the policy as sex-based discrimination rather than a "sex-plus" business practice.

Having resolved the discrimination question, the Court proceeded to the other side of the Title VII balance and considered whether Johnson Controls' policy could be justified as a BFOQ. The answer was no. Using an analysis that stressed the narrowness of the BFOQ defense, the Court had "no difficulty concluding that Johnson Controls cannot establish a BFOQ."

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161. *UAW*, 886 F.2d at 886. 
162. *Id.* at 885 (quoting EEOC Policy Statement on Reproductive and Fetal Hazards Under Title VII, Oct. 3, 1988). The EEOC, like the courts, admitted that fetal protection policies were facially discriminatory, and then proceeded to endorse analysis using the business necessity defense, which was developed in disparate impact cases involving facially neutral policies. *Id.* at 885-86. Notably, the business necessity defense offers employers more leeway than does the BFOQ defense. See *supra* note 7 and accompanying text. 
164. *Id.* at 211. 
165. *Id.* at 202. 
166. *Id.* at 196-200; see also *Hayes*, 726 F.2d at 1552-54 (two pages to dispose of issue); *Wright*, 697 F.2d at 1182-92 (ten pages to dispose of issue). 
168. *Id.* at 200-01. 
169. *Id.* at 206. 
170. *Id.*
3. Round Three: The Courts Return To Sex-plus Analysis

The PDA clarified difference analysis sufficiently to allow the Supreme Court to find women-only fetal protection policies discriminatory; however, other aspects of biological difference remained troublesome. For example, another piece of legislation was required to address the fact that some employers’ maternity leaves are of insufficient duration to meet some women’s needs. Similarly, the courts have only just begun to address challenges to employment policies that deny accommodations of pregnancy, and, therefore, require pregnant female employees to conform to male norms.

The courts’ approach to such cases tends to disfavor the female plaintiffs. Following the PDA’s terms, courts decline to find discrimination when the employer has treated all of its employees—pregnant or not—in exactly the same way. As Judge Posner colorfully put it: “[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees.”

This treatment of pregnancy demonstrates that a literal reading of the PDA may harbor pitfalls similar to those that arose with a literal, “sex-plus” reading of Title VII. Tellingly, Judge Posner cites Satty to

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171. UAW’s analysis was based on the PDA. See 499 U.S. at 198-99.
173. See, e.g., Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308 (11th Cir. 1994) (no violation of PDA when employer discharged pregnant nurse who refused to treat AIDS patients); Troupe v. May Dep’t Stores, 20 F.3d 734 (7th Cir. 1994) (no discrimination when employer terminated employee for excessive tardiness related to morning sickness); Elie v. K-Mart Corp., 64 Fair Empl. Prac. Cas. (BNA) 957 (E.D. La. 1994) (no discrimination when employer terminated employee for refusal of reassignment prompted by the employer’s denial of pregnant employee’s request to remain at her position with assistance in lifting heavy items); Barnes v. Hewlett-Packard Co., 846 F. Supp. 442 (D. Md. 1994) (defendant won summary judgment on plaintiff’s claim that she was demoted and constructively discharged for seeking an extended maternity leave to care for her newborn’s medical problems); Wallace v. Pyro Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990), aff’d without op., 951 F.2d 351 (6th Cir. 1991) (no discrimination when employer terminated female employee who desired extra maternity leave to wean her infant from breastfeeding).
174. See, e.g., Carney v. Martin Luther Home, Inc., 824 F.2d 643, 649 (8th Cir. 1987) (reversing district court’s conclusion that employer had not discriminated when it put pregnant employee on unpaid leave rather than provide assistance with lifting or pushing because plaintiff’s “situation was not exactly identical” to that of other employees with medical restrictions).
175. Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).
support his contention that the PDA would be violated by an employer who "overlooks the comparable absences of non-pregnant employ-
es."176 The proposition is true enough, but the Satty citation should
suggest us pause: it suggests a return to a pre-PDA search for benefits and
burdens, with all of its baffling inconsistencies.

For example, Judge Posner believes that the PDA does not mean
that employers must "take . . . steps to make it . . . as easy . . . [for
pregnant women to work] as it is for their spouses to continue working
during pregnancy."177 This statement seems to say that working
women with families must suffer burdens that working men with families
will never suffer. Under Satty, that "differential burden" situation
constitutes discrimination. Yet, Judge Posner upheld an employment
policy that imposes such differential burdens, because the PDA tells
employers to "ignore an employee's pregnancy,"178 which means that
pregnant women are held to a non-pregnant "norm."

Similarly, Wallace v. Pyro Mining Co.179 relied heavily on Gilbert
to reject the plaintiff's claim that her employer discriminated against her
when it discharged her from employment after she requested a six week
leave of absence to wean her six week old infant.180 In the court's
view, the plaintiff sought an accommodation of "child care concerns of
breast-feeding female workers by providing additional breast-feeding
leave not available to male workers."181

C. Cultural Difference Cases

Title VII cultural difference cases fall primarily into two categories.
One category concerns employee grooming and dress practices related to
their ethnic and religious182 backgrounds. The other category concerns

176. Id. at 738 (citations omitted).
177. Id. (citations omitted).
178. Id.
179. 789 F. Supp. 867 (W.D. Ky. 1990) (holding that breastfeeding is not covered by the PDA).
180. Id. at 869.
relief for a plaintiff discharged for absences allegedly related to back pain and menstrual cramps).
182. Strictly speaking, religious grooming cases are not necessarily cultural; however, most such
reported cases include a cultural component or flavor, either because the religion involved is
indigenous to a particular ethnic group, or because its grooming or dress strictures are designed to
set wearers apart from other religious or ethnic groups. Such religious grooming cases are analyzed
under Title VII's reasonable accommodations scheme, which applies only to religion. See 42
on-the-job language restrictions. The latter category of cases represents one of the least-discussed, but most troubling, applications of difference analysis.

1. Grooming and Dress Cases

Cultural grooming cases are sparse, perhaps because the few suits that have been brought have not succeeded. The courts generally approach such cases using variations on sex-plus analysis. As a result, "grooming codes are governed by decisional law that clearly lacks conceptual coherence."

Courts that have considered cultural grooming cases usually apply Willingham II's test to determine that the employer's policy is not discriminatory. Rogers v. American Airlines, Inc. is the leading example of this approach. Renee Rogers was an African American airport operations agent for American Airlines. American prohibited some of its employees—including those in plaintiff's job—from wearing "all-braided hairstyle[s]."

Ms. Rogers challenged the policy on the grounds of sexual and racial discrimination. The racial challenge asserted that "the 'corn row' style has a special significance for black women." The court accepted Ms. Rogers' contentions regarding the cultural significance of corn rows, but nonetheless found there was no discrimination. First, using sex-plus concepts, the court noted that the employer's policy applied "equally to members of all races, and plaintiff [did] not allege that an all-braided hair style is worn exclusively or even predominantly

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183. See supra notes 38-39 and accompanying text.
186. Rogers, 527 F. Supp. at 231.
187. Id.
188. Id. On the sex discrimination claim, she lost because the airline's policy was not sex specific, and "[m]any men have hair longer than many women. Some men have hair long enough to wear in braids if they choose to do so." Id. Moreover, even if the policy had not applied to both sexes, it would have survived under Willingham II because hair styles are neither immutable nor a fundamental right. Id.
189. Id.
190. Id.
191. Id. at 232.
by black people." Second, plaintiff had apparently begun wearing her braided hairstyle soon after it was "popularized" by a white actress in a movie. Third, returning to Willingham II's mutability test, the court observed that "a...
ethnic, straightened hair style as "professional," and braids as unacceptable. Nor are cultural grooming issues restricted to women. African American males may encounter policies that restrict their choice of hairstyle. At least one Native American firefighter has asserted his culture-based wish to wear long hair, despite his employer's safety-based hair length rule.

The paucity of reported cases on the subject of cultural grooming therefore belies the strength of feeling on both sides of the issue. In recent years, employers' grooming strictures have begun to give way to this force of feeling. In the late 1980's, the Marriot and Hyatt hotel chains faced considerable negative publicity when they attempted to enforce no-braid rules. Both employers backed down; Marriot did so voluntarily, the Hyatt because of an EEOC ruling. In the summer of 1995, Wendy's fast food chain avoided a public relations disaster by reversing the no-braids judgment of one of its managers who would have fired two young African American women working to save money for college.

To the extent that Rogers and Willingham II now are being interpreted to forbid repression of cultural difference, that shift suggests that they were based on social tastes rather than the relatively static categories of mutability and fundamental rights. Hairstyle can hardly be mutable one day, and immutable the next. Nor can it be trivial one day, and a fundamental right the next. Thus, it appears that Willingham II and Rogers did not turn upon either concept. Instead, they turned upon contemporary social tastes, filtered through the judges addressing the cases. This dependency upon social norms means that Rogers and the Willingham II test fail to respond consistently to what is really at

201. See Jill Hodges, Indian Firefighter Sees Long Hair As Heritage; Boss Sees It As Hazard, STAR TRIB., Mar. 26, 1992, at 1A (referring to prohibition of a black firefighter's four-parted hairstyle).
202. See id. This firefighter seems unlikely to prevail, given Fitzpatrick's decision that firefighters with PFB could not establish that a no-beard rule implemented to ensure respirator seals violated Title VII. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993).
204. See Latimer, supra note 203, at B3; see also Pyatt, supra note 203, at F1; Schachter, supra note 203, at 4-1.
206. See generally Bartlett, supra note 100, at 2541.
Language inextricably relates to culture. English-only rhetoric concedes as much when it calls bilingualism a blow to American culture’s primacy. As so-called “culture wars” continue to brew, language has become a flashpoint in the larger debate over immigration policy and American culture. Several states have passed English-only laws, which range from exhortatory declarations that English is the state’s “official language” to requirements that public employees use only English in the workplace. In the private sector, recent court


208. Recently, this rhetoric has grown particularly forceful. See Paul West, Anti-Immigrant Rhetoric Heats Up Within the GOP, THE BALTIMORE SUN, Sept. 3, 1995, at 1A.

209. See Julian Beltrame, English-only Movement On Rise: Flood Of Immigrants Prompts Bill In U.S. Congress, THE GAZETTE (MONTREAL), Sept. 17, 1995, at B5. This controversy is closely related to growing unease in some quarters at current rates of immigration. See Stephanie L. Kralik, Civil Rights--The Scope of Title VII Protection For Employees Challenging English-Only Rules—Garcia v. Spun Steak Co., 67 TEMP. L. REv. 393, 393 & nn.4-5 (1994). Economic strains have produced fears that immigrants will “take jobs away from” citizens, or otherwise drain economic resources; this unease is often deepened by the fact that the newest wave of immigrants is largely non-European. See id. at 393 & nn.2-3; see also Beltrame, supra, at B5; Ralph Z. Hallow, Buchanan Seeks To Halt Immigration For 5 Years, THE WASH. TIMES, May 9, 1995, at A1. Many of these new immigrants do not speak English. See Aaron Epstein, 'English Only' Can Be Fighting Words, PHILADELPHIA INQUIRER, June 5, 1994, at C4 (from 1980-1990, the Spanish-speaking U.S. population increased 56%, and the Chinese-speaking population “more than doubled”). In fact, assimilation pressures have always run strong in this country, particularly during periods of heavy immigration or ethnic tension. See generally BILL PIATT, ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE UNITED STATES (1990); Juan F. Perea, Demography And Distrust: An Essay On American Languages, Cultural Pluralism, And Official English, 77 MINN. L. REv. 269 (1992); cf. Meyer v. Nebraska, 262 U.S. 390 (1923); Diane Jennings, Linguistic Debate Sets Tongues Afire; But Experts Say Spanish To Stay Secondary In U.S., THE DALLAS MORNING NEWS, Nov. 22, 1993, at 1A, 6A (describing strong English-only sentiments—focused primarily on German speakers—during and after World War I).

210. See Henry Weinstein, U.S. Appeals Court Strikes Down Arizona's English-Only Law, PHILADELPHIA INQUIRER, Dec. 8, 1994, at A14. The Ninth Circuit invalidated Arizona's law, which mandated the use of English by state employees, on First Amendment grounds. Id. At the time of the Ninth Circuit's ruling, eighteen states had English-only laws. Id. However, many such laws are either symbolic, or have not yet been enforced. See Epstein, supra note 209, at C4 (citing nineteen states with English-only laws). The Supreme Court will soon review the constitutionality of such laws. See Yniguez v. Arizonans, 69 F.3d 920 (9th Cir. 1994), cert. granted, 64 U.S.L.W. 3639 (U.S. Mar. 25, 1996) (No. 95-974).
rulings apparently leave employers free to implement English-only workplace rules.⁴¹ Such rules appear to be gaining popularity amongst employers,⁴² even though fears that English is being compromised or eroded are probably unrealistic.⁴³

Indeed, “today’s immigrants are learning English as fast or faster than previous generations.”⁴⁴ At least among Latino immigrants, “more than [ninety-one] percent . . . agree that U.S. residents should learn English.”⁴⁵ This consensus amongst immigrants reflects a pragmatic recognition of the benefits of English in the job market, particularly its effects on wages.⁴⁶ At the same time, immigrants must be concerned with “day-to-day” survival while they learn English.⁴⁷ They also desire respect for their cultural heritage, and fear loss of that

⁴¹. See Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993). Strictly speaking, Spun Steak is not a clear green light for English-only rules. In that case, the Ninth Circuit ruled that it would not defer to EEOC guidelines characterizing English-only rules as “per se” discrimination, see 998 F.2d at 1489-90, and found no grounds for the bilingual employees’ claim that the English-only policy had a disparate impact on them. Id. at 1484-88. Yet, the court left open the possibility of a disparate impact claim for a monolingual employee, id. at 1488, as well as the possibility of a discrimination claim based on a harassment theory “in some circumstances.” Id. at 1489.

⁴². See PIATT, supra note 209, at 168 (“following the adoption of the California English-only constitutional provision in 1986, a great many employers began enforcing English-only rules in the workplace”); Kralik, supra note 209, at 394 & nn.6-7; see also Dan Clawson, Note, Garcia v. Spun Steak Co.: The Ninth Circuit Requires That Title VII Plaintiffs Prove The Adverse Effect Of A Challenged English-Only Workplace Rule, 17 U. PUGET SOUND L. REV. 473, 473 & nn.1-2 (1994). As of June 1994, approximately 120 complaints regarding English-only rules were pending with the EEOC. At that time, the EEOC handled many such complaints by obtaining the employer’s agreement to rescind the rules; following Spun Steak, there is less—or no— incentive for an employer to rescind an English-only policy. Complaints have arisen in such diverse settings as factories, hospitals, stores, and the non-profit sector. See High Court Pressured to Rule On English-Only Workplaces (National Public Radio Broadcast, Mar. 11, 1994).

⁴³. Jennings, supra note 209, at 6A. “[E]xperts say there is no threat that English will be eclipsed by Spanish or any other tongue. In fact, studies show that immigrants from all nations continue to learn English and that the language remains a common thread that binds America together.” Jennings, supra note 209, at 6A. For example, 78% of the 3.4 million Spanish-speaking Texans “also speak English fluently.” Jennings, supra note 209, at 6A.

⁴⁴. Jennings, supra note 209, at 6A. By some expert estimates, “it takes three to five years to master a language, and the original language usually is lost after three generations. . . . Today language loss is beginning to occur in the second generation.” Jennings, supra note 209, at 6A. At the same time, there is much evidence that primary language serves as the most functional mode of thought and communication, even after other languages are acquired. See Perea, supra note 209, at 279 (citing studies indicating the functional primacy of primary language).

⁴⁵. Jennings, supra note 209, at 6A.

⁴⁶. Jennings, supra note 209, at 6A.

heritage in the face of pressures to assimilate.\textsuperscript{218}

These multiple realities have sometimes collided with employers' attitudes towards language.\textsuperscript{219} The collision came to a full head in Garcia \textit{v. Gloor},\textsuperscript{220} the leading early case on workplace language policies.\textsuperscript{221} As with Willingham, the Fifth Circuit took two passes at the case; this time, the court found for the employer on both occasions.\textsuperscript{222} Thus, the court found that Mr. Garcia's employer did not violate Title VII when it discharged him for speaking Spanish at the workplace.\textsuperscript{223}

Ironically, Gloor originally hired Garcia because he was bilingual.\textsuperscript{224} Gloor's business area was seventy-five percent Hispanic, and many of its customers wanted to deal with Spanish-speaking salespeople.\textsuperscript{225} Given these demographics, thirty-one of Gloor's thirty-nine

\begin{footnotes}
\item[218] See Jennings, supra note 209, at 6A; see also Irving Howe, \textit{World Of Our Fathers} 226-30, 271-78 (Touchstone Books 1976) (describing Jewish immigrant experience at turn of the century).

\item[219] Historically, employers have pragmatically approached language differences in the workplace. Some employers have exploited non-English speaking immigrants. See Farhan Haq, \textit{USA—Labor: Sweatshops A Growth Industry}, \textit{INTER PRESS SERV.}, Sept. 18, 1995 (describing New York sweatshops). Some employers permit linguistic diversity because they find it does not hamper workplace efficiency, and may even help promote it. See High Court Pressured To Rule On English-Only Workplaces (National Public Radio Broadcast, Mar. 11, 1994).

\item[220] 609 F.2d 156 (5th Cir. 1980), withdrawn and substituted by, 618 F.2d 264 (5th Cir. 1980), cert. denied., 449 U.S. 1113 (1981).

\item[221] At least two district courts had considered the issue before the Fifth Circuit's Gloor decision. See Saucedo v. Brothers Well Serv., 464 F. Supp. 919, 922 (S.D. Tex. 1979) (finding discrimination when employer discharged a Mexican American employee for speaking two words of Spanish while retaining a non-Hispanic employee who had assaulted the plaintiff); Mejia v. New York Sheraton Hotel, 459 F. Supp. 375, 377 (S.D.N.Y. 1978) (finding no discrimination when employer refused a promotion based on plaintiff's poor English skills because her language deficiencies rendered her unqualified for the job).

\item[222] The first decision was issued in January 1980, authored by Judge Hatchett, and reported at 609 F.2d 156 (5th Cir. 1980). Judge Rubin authored the second, May 1980 decision, which withdrew and replaced the first. See 618 F.2d 264 (5th Cir. 1980). It is not clear what prompted the Fifth Circuit's change in reasoning, as the second opinion was neither an en banc decision nor a rehearing. \textit{Id.} The second decision uses the first opinion's factual recitation and preliminary legal remarks without any discernible alterations; however, its text departs from the court's original effort once it turns to a discussion of the issues argued by the parties. \textit{Compare} 609 F.2d at 158-60 with 618 F.2d at 266-68. At that point, the second decision reads largely like the first, but omits passages tending to be especially dismissive of Garcia's claims, and substitutes passages that do not entirely foreclose the idea that "[l]anguage may be used as a covert basis for national origin discrimination." 618 F.2d at 268. The second decision also omits the original decision's discussion of BFOQ and business necessity defenses. \textit{Compare} 609 F.2d at 163-64 with 618 F.2d at 271.

\item[223] \textit{Gloor}, 618 F.2d at 266.

\item[224] \textit{Id.} at 269.

\item[225] \textit{Id.} at 267.
\end{footnotes}
employees were Hispanic, “and a Hispanic sat on the Board of Directors.” Yet, Gloor’s English-only rule “prohibit[ed] employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers.” It did not apply to monolingual employees, who all worked outdoors in the lumber yard, nor did it apply during breaks.

The employer offered several business reasons for its rule. First, the store’s English-speaking customers “objected to communications between employees that they could not understand.” Second, trade literature was in English, “so it was important for employees to be fluent in English apart from conversations with English-speaking customers.” Third, the rule would improve employees’ proficiency in English. Fourth, the rule would enable supervisors, all of whom did not speak Spanish, to “better oversee the work of subordinates.” The trial court found these four “valid business reasons” motivated Garcia’s discharge. This conclusion meant that the policy was directed at a neutral factor, and not at national origin; otherwise, Gloor’s proffered reasons for its rule could not have been “valid” absent a BFOQ or business necessity analysis.

The lower court’s factual reasoning is questionable. It found the employer’s policy free of discriminatory intent because it was supported by business purposes. Yet, each of those purposes is suspect. To begin with, customer preferences for English-speaking personnel likely reflected the wishes of only twenty-five percent of the population surrounding the store. As for the trade literature, the ability to read English is irrelevant to a rule governing conversation; moreover, all of the Spanish-speaking employees who might work with such literature

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226. Id.
227. Id. at 266.
228. Id.
229. Id. at 267.
230. Id.
231. Id.
232. Id.
233. Id. at 266-67.
234. The employer’s argument, as in Willingham, sounds like a BFOQ defense; however, the court concluded that the rule was not even discriminatory.
235. Gloor, 618 F.2d at 267.
236. Of course, the store’s percentages of English and non-English speaking customers may have varied from the surrounding population’s percentages. Yet, most of the store’s customer’s must have been Spanish-speaking, given the composition of its sales staff (seven of the eight spoke Spanish), and the fact that Gloor found Garcia’s bilingualism attractive when he was hired. Gloor, 618 F.2d at 267.
were bilingual. Their bilingualism arguably obviated any forced “English improvement”; in any event, the same reasoning did not prompt Gloor to force on its non-Spanish speaking supervisors the primary language of most of Gloor’s customers and non-supervisory employees.

Be that as it may, the trial court’s assessment of the credibility of the employer’s reasons for its policy were factual conclusions; under the clearly erroneous standard, such credibility findings are unlikely to be reversed. What the Fifth Circuit could have reversed, but did not, was the lower court’s legal conclusion that a policy directed at language was not a policy directed at national origin. Instead, the Fifth Circuit declared that “[n]either the statute nor common understanding equates national origin with the language that one chooses to speak.” With this conclusion, the court restrictively defined Title VII’s reference to “national origin,” much as it had done with “sex” in its earlier sex-plus cases.

In fact, the court followed Willingham II to reach its result. It viewed the defendant’s language restriction as an arbitrary rule, which Title VII permitted so long as it did not discriminate. As for determining what was discrimination, the court used the Willingham II test, which identified Title VII violations as “discriminations... either beyond the victim’s power to alter,... or that impose a burden on an employee on one of the prohibited bases.” Under this test, the Fifth

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237. See id. at 266 (all monolingual employees worked in the lumber yard).
238. The facts suggest a workplace with an ethnic hierarchy. The lowest level employees, who worked in the outdoor lumberyard, spoke only Spanish. The salespeople were almost all bilingual. All supervisory personnel spoke only English. See id. at 266-67. While the composition of the lower end of the hierarchy is not entirely surprising—non-English speakers frequently are weak competitors in the job market—it is surprising that the bilingual abilities so desirable for the salespeople were not equally desirable in supervisory personnel. One wonders how Spanish-speaking customers were supposed to have spoken with management if they had a complaint.
239. See id. at 268. The court softened this conclusion with dicta that conceded: “[l]anguage may be used as a covert basis for national origin discrimination...” Id. This dicta does not broaden the statute’s reference to national origin to include language; however, its concession that an employer might use language as a means of national origin discrimination tacitly acknowledges a close link between language and national origin. Similarly, the court noted that “[t]he refusal to hire applicants who cannot speak English might be discriminatory if the jobs they seek can be performed without knowledge of the language.” Id. at 269. In any event, the Fifth Circuit found neither situation present in the Gloor facts.
240. Id. at 269.
241. Id. at 267.
242. Id. at 269. The latter “impose a burden” phrase seems to amalgamate Willingham II’s “fundamental rights” prong with Satty’s language of “burdens,” even though Congress had by then discredited Satty with its enactment of the PDA. See also id. at 269 n.5.
Circuit found—without explicitly stating why it did so—that language is neither immutable nor a fundamental right.243

The court stated five times, in as many pages, its conviction that language cannot be equated with national origin.244 Perhaps the court’s unease stemmed from its use of Willingham II’s immutability test, for it could not escape the problem that language is not mutable (at least, not immediately so) for a monolingual employee.245 In its discomfort, the court seemed to have recognized the inconsistency of an analysis that could simultaneously find the same English-only rule a Title VII violation and an acceptable business judgment, depending on whether employees—of the same national origin—were mono- or bilingual.246

Soon after Gloor, the EEOC issued guidelines that defined national origin to include language.247 This reading of Title VII’s terms was consciously broad,248 and deemed wholesale English-only rules presumptive violations of Title VII.249 In the EEOC’s view, such rules comprised “a burdensome term and condition of employment.”250 This burden accrued because

[p]rohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual’s employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.251

Recognizing that English can also be a legitimate business requirement, the EEOC acknowledged that policies that applied “only . . . at certain
times” could be justified as a “business necessity.”

The EEOC guidelines made Gloor’s analysis untenable. In light of the guidelines, courts that considered English-only policies had to generate a new analysis of linguistic difference. Much of this renewed consideration of the issue occurred in the Ninth Circuit. Like the Fifth Circuit’s treatment of Willingham and sex-plus issues, the Ninth Circuit’s treatment of English-only rules wavered for several years. This evolution culminated with Garcia v. Spun Steak Co., in which the court rejected the approach embodied in the EEOC guidelines.

The Ninth Circuit’s earlier treatments of the issue were more flexible. In Jurado v. Eleven-Fifty Corp., the court recognized the EEOC’s guidelines. In Gutierrez v. Municipal Court of Southeast

252. See 29 C.F.R. § 1606.7(b) (1993).

253. See, e.g., Fragante v. City and County of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989) (finding a policy can be directed at accent only when accent “interferes materially with job performance”); Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988), reh’g en banc denied, 861 F.2d 1187, vacated as moot, 490 U.S. 1016 (1989) (following EEOC guidelines to find likelihood of success on the merits of a claim that English-only rule was disparate impact discrimination); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987) (citing both Gloor and the EEOC guideline to find employer’s “limited, reasonable and business-related” English-only rule did not discriminate against bilingual radio announcer); Carino v. University of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984) (finding employment decision based on employee’s accent, which did not interfere with ability to perform job, was not based on a legitimate justification); McNeil v. Aguilis, 831 F. Supp. 1079 (S.D.N.Y. 1993) (citing EEOC guideline in denial of employer’s summary judgment motion on claim that permitting co-workers to speak Tagalog violated non-Tagalog speaking plaintiff’s rights under Title VII); Cota v. Tucson Police Dep’t, 783 F. Supp. 458 (D. Ariz. 1992) (employer’s policy of requiring uncompensated use of bilingual skills did not violate Title VII); cf. Smothers v. Benitez, 806 F. Supp. 299, 306 (D.P.R. 1992) (equal protection analysis acknowledging association of language with national origin, and noting that language “has immutable aspects”); Pemberthy v. Beyer, 800 F. Supp. 144 (D.N.J. 1992) (analyzing habeas corpus claim based on jury’s ethnic composition, and citing Gutierrez while noting close association between language and ethnicity).

254. 998 F.2d 1480 (9th Cir. 1993), reh’g en banc denied, 13 F.3d 296 (1993).


256. 813 F.2d at 1411. Jurado’s acknowledgment of the EEOC guidelines was somewhat grudging, as it followed a citation to Gloor. See id. In addition, the court disagreed with the bilingual plaintiff’s claim that his employer violated Title VII when it discharged him for breaking the employer’s English-only rules by using Spanish phrases in his radio broadcast. Id. Nonetheless, the court impliedly recognized that there was at least some discriminatory flavor to Jurado’s claim when it stated that the employer’s rule was “business related”; if the court had read and applied Gloor strictly, it could have found an arbitrary English-only rule non-discriminatory under Title VII. See Gloor, 618 F.2d at 269. Moreover, the court’s specific reference to the rule’s limited and business-related nature tracked the EEOC’s rationale for permitting employers to implement limited English-only rules in some circumstances. See 29 C.F.R. § 1606.7(b) (1993). Finally, the Jurado case was complicated by its broadcasting context, one of the few areas in which the courts have permitted customer preferences to operate as a BFOQ, in light of the ratings-driven
Judicial Dist. County of Los Angeles, the Ninth Circuit virtually endorsed the guidelines, and even seemed willing to exceed them. The plaintiff in Gutierrez, a bilingual Hispanic-American deputy court clerk for a Los Angeles Municipal Court, challenged her employer’s rule prohibiting “employees to speak any language other than English, except when acting as translators.” Among other things, the plaintiff argued that the policy violated Title VII’s prohibition against national origin discrimination, and sought a preliminary injunction against her employer’s enforcement of the rule.

The defendant’s arguments parroted Gloor. In particular, the defendant argued mutability by suggesting that language for a bilingual employee is merely a matter of preference. As a business necessity defense, the Municipal Court argued that its rule was necessary for its supervisors to oversee employees. Unlike the Fifth Circuit, the Ninth Circuit rejected both arguments. It found “the prohibition on intra-employee communications in Spanish...sweeping in nature [with]...a direct effect on the general atmosphere and environment of the workplace. Under these circumstances, ease of compliance has little or no relevance.” As for supervisory concerns, the Ninth Circuit felt that the “best way to ensure that supervisors...are performing this part of their assigned tasks would be to employ Spanish-speaking supervisors.” The linguistic realities of a workplace with Spanish speaking employees and clients likewise rendered the defendants’ “Tower of Babel” argument unpersuasive.

Finally, the court rejected the argument that the rule was necessary to preserve workplace harmony. The employer asserted that its non-Spanish speaking employees and supervisors feared that Spanish speaking

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257. 838 F.2d 1031 (9th Cir. 1988), reh’g en banc denied, 861 F.2d 1187, vacated as moot, 490 U.S. 1016 (1989).
258. Id. at 1039-40.
259. Id. at 1036. At first, the rule applied throughout the workday, but after nine months it was modified to permit non-English conversations during breaks and lunch. Id.
260. Id.
261. See 618 F.2d 264 (5th Cir. 1980).
262. Gutierrez, 838 F.2d at 1040.
263. Id. at 1043.
264. Id. at 1040-41.
265. Id. at 1042.
266. Id.
267. Id.
employees could hide the substance of their conversations,\textsuperscript{268} as supervisors' affidavits suggested, "the speaking of Spanish unnerved[d]" English speaking employees.\textsuperscript{269} The court deemed such fears unfounded.\textsuperscript{270} More importantly, the court noted that whatever calming effect could be achieved by an English-only rule did not justify its discriminatory effect because "[e]xisting racial fears or prejudices and their effects cannot justify a racial classification."\textsuperscript{271}

Ultimately, the fears of English speaking co-workers co-opted the Ninth Circuit’s analysis of English-only rules.\textsuperscript{272} In Garcia v. Spun Steak Co.,\textsuperscript{273} the Ninth Circuit upheld an English-only policy applied to Spanish-speaking line workers at a meat processing plant.\textsuperscript{274} Twenty-four of the thirty-three workers spoke Spanish; all but two of these Spanish-speaking employees were bilingual, with "varying degrees of proficiency in English."\textsuperscript{275} The employer implemented its English-only policy in response to "complaints that some workers were using their bilingual capabilities to harass and insult other workers in a language they could not understand."\textsuperscript{276} The employer's reasons for

\textsuperscript{268.} Id.
\textsuperscript{269.} Id. at 1042 & n.15. At least one of the employees who complained about her colleagues' use of Spanish was an African American woman. See Gutierrez, 861 F.2d at 1191 (Kozinski, J., dissenting from denial of rehearing en banc). While there was a good deal of evidence regarding the existence of such fears and sensitivities, see id., no one seems to have suggested that non-discriminatory approaches such as mediation, diversity training, or Spanish language training for non-Hispanic employees would have assuaged them.

\textsuperscript{270.} Gutierrez, 838 F.2d at 1043 (finding that despite the allegations "there is simply no probative evidence of the Spanish language being used to conceal the substance of conversations").


\textsuperscript{272.} This shift was presaged by Dimaranan v. Pomona Valley Hosp. Medical Ctr., 775 F. Supp. 338 (C.D. Cal. 1991). In that case, the court upheld defendant's no-Tagalog policy, finding it did not constitute intentional national origin discrimination against the Filipina plaintiff. Id. at 343-44. The court deemed the rule a management decision that the bilingual plaintiff could easily observe.

\textsuperscript{273.} 998 F.2d 1480 (9th Cir. 1993), reh'g denied en banc, 13 F.3d 296 (1993).

\textsuperscript{274.} Id. at 1490.

\textsuperscript{275.} Id. at 1483.

\textsuperscript{276.} Id. Two English-speaking workers complained. One was African American, and the other was Chinese American. Id. However, Ms. Garcia traced the policy to a Spanish speaking worker's complaint about a male co-worker's harassment. See High Court Pressured To Rule On English-Only Workplaces (National Public Radio Broadcast, Mar. 11, 1994).
its policy were that the rule

would promote racial harmony in the workplace, ... would enhance worker safety because some employees who did not understand Spanish claimed that the use of Spanish distracted them while they were operating machinery, and would enhance product quality because the U.S.D.A. inspector in the plant spoke only English and thus could not understand if a product-related concern was raised in Spanish.277

On these facts, the district court denied summary judgment for the employer.278 It found the policy was discriminatory and unjustified by business necessity.279 The Ninth Circuit reversed.280

The Spanish-speaking plaintiffs, following the EEOC guidelines, argued that the policy "denie[d] them the ability to express their cultural heritage on the job; ... denie[d] them a privilege of employment that is enjoyed by monolingual speakers of English; and ... create[d] an atmosphere of inferiority, isolation, and intimidation."281 The Ninth Circuit saw this argument as a contention that the employer burdened its Spanish speaking employees with "harsher working conditions than the general employee population."282 Under the EEOC guidelines, this claim should have been viable; however, the Ninth Circuit declined to follow the EEOC's approach, and chose instead to follow Gloor.283

Like the Fifth Circuit in Gloor, the court perceived the plaintiffs' complaint as a request for special privileges.284 According to the Ninth Circuit, "Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges."285 The fact that English speaking workers could speak their primary language on the job did not change this analysis. In the court's eyes, the bilingual plaintiffs were like their co-workers in their capacity to communicate in English and converse on the job; thus, the employer's policy treated all like employees alike.286 Using this approach, the court was willing to find a disparate impact claim for a non-English speaking employee if the rule

277. *Spun Steak Co.*, 998 F.2d at 1483.
278. *Id.* at 1484.
279. *Id.* Thus, the district court analyzed the case in accordance with the EEOC guidelines for English-only rules.
280. *Id.* at 1490.
281. *Id.* at 1486-87.
282. *Id.* at 1485.
283. *Id.* at 1489.
284. *Id.*
285. *Id.* at 1487 (citing Gloor, 618 F.2d at 269).
286. *Id.*
adversely affected her, but found her colleagues' claims a matter of convenience rather than discrimination.\(^{287}\)

The Ninth Circuit did not entirely reject the possibility that Spanish speaking employees might have a Title VII claim based upon an English-only policy;\(^{288}\) however, its analysis precluded reading Title VII's reference to national origin to include a prohibition against language restrictions. With this narrow view of Title VII, the court had entirely abandoned its Gutierrez approach,\(^{289}\) just as the Fifth Circuit abandoned its Willingham approach when it decided Willingham II.\(^{290}\)

Thus, the dissenters from denial of rehearing en banc in Gutierrez ultimately prevailed in Spun Steak.\(^{292}\) The Gutierrez dissenters argued that the court's opinion gave "employees the nearly absolute right to speak a language other than English."\(^{293}\) The dissenters therefore feared that the opinion would "exacerbate ethnic tensions and force employers to establish separate supervisory tracks for employees who choose to speak another language during working hours."\(^{294}\) The Gutierrez majority had addressed such concerns, but the dissenters deemed the majority's suggestion that supervisors speak Spanish a "'let them eat cake' attitude."\(^{295}\) These themes of privilege and conflict carried the day in Spun Steak, trumping any claim that the English-only rule was discriminatory under Title VII.

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\(^{287}\) Id. at 1488. The court intimated that such an adverse effect was absent, partly because the employee "stated in her deposition that she was not bothered by the rule because she preferred not to make small talk on the job, but rather preferred to work in peace." Id. With this testimony, the one worker who fit the court's conception of equality haplessly rendered herself "like" her English speaking co-workers by disclaiming any desire to speak throughout an entire workday, day after day. In so doing, she underscored her bilingual colleagues' appearance of privilege-seeking: unlike this model employee who "preferred to work in peace," the plaintiffs wanted to engage in "small talk." Id.

\(^{288}\) Id. at 1489.

\(^{289}\) The court justified its failure to follow Gutierrez by virtue of the fact that it had been vacated as moot after the plaintiff employee left her job. Id. at 1487 n.1; see also Spun Steak, 13 F.3d at 301 (Reinhardt, J., dissenting from denial of rehearing en banc). The validity of these grounds for rejection of the precedent was arguable. Id.

\(^{290}\) 482 F.2d 535 (5th Cir. 1973)

\(^{291}\) 507 F.2d 1084 (5th Cir. 1975).

\(^{292}\) Judge O'Scannlain, who authored the court's Spun Steak opinion, had dissented from denial of rehearing en banc in Gutierrez. 861 F.2d 1187, 1188 (9th Cir. 1988).

\(^{293}\) Id.

\(^{294}\) Id.

\(^{295}\) Id. at 1194.
III. DIFFERENCE ANALYSIS AND THEEquality Debate

The courts' repeated use of sex-plus concepts has generated two themes that run throughout difference analysis: the theme of norm-centered equality, and the theme of difference as privilege. The current equality debate cannot satisfactorily respond to these themes because each of the two schools of thought concedes at least one of them.

A. The Themes Of Difference Analysis

1. The Theme of Norm-Centered Equality

With the phrase "norm-centered," I refer to measurement of discrimination claims against an employer's treatment of dominant groups. That is, the courts think of discrimination as differentiated treatment accorded to "like" persons. Hence, their first analytic step in a difference case is to determine whether the complaining employee is "like" other employees, or is differently situated. If the court finds the latter, the employer's policy of differentiated treatment will be deemed a permissible business judgment, so long as the "difference" is something other than race, sex, national origin, or religion, as such.

This analysis potentially excludes all difference-based claims from Title VII's protective scope. The plaintiffs in such cases do not fit the "like persons" paradigm; therefore, they appear to have no viable claim that any differentiated treatment constitutes discrimination. As Professor Cass Sunstein has put it, this approach adds up to a requirement that "blacks must be treated the same as whites to the extent that


297. This vision of the meaning of discrimination is probably traceable to constitutional rhetoric, which speaks of "similarly situated" persons. See RHODE, JUSTICE AND GENDER, supra note 13, at 94 (describing courts confronted with "sex-plus" cases as "steeped in the logic of 'similarly situated' doctrine").

298. See generally RHODE, JUSTICE AND GENDER, supra note 13, at 94.

299. See Phillips v. Martin Marietta, 416 F.2d 1257, 1260 n.10 (1969) (Brown, J., dissenting) ("[o]f course, the 'plus' could not be one of the other statutory categories"); see also RHODE, JUSTICE AND GENDER, supra note 13, at 81-82.

300. See Dolkart, supra note 296, at 169 (criticizing equal treatment model's failure to account for "the real differences of women and minorities").
they are the same as whites; women must be treated the same as men to
the extent that they are the same as men.\textsuperscript{301}

From the start, difference analysis was grounded in this norm-
centered vision of equality. This was true even when plaintiffs prevailed.
For example, every decision in the \textit{Phillips} litigation turned on the same
vision of equality; what was determinative was the particular court’s
perception of Mrs. Phillips as differently, or similarly, situated from
Martin Marietta’s male employees with young children.\textsuperscript{302} The
Supreme Court saw women and men as equally situated with respect to
work and pre-school age children, so it analyzed Martin Marietta’s
policy as a case of different treatment of like persons.\textsuperscript{303} At the same
time, the Court was willing to treat the policy as a BFOQ if women were
not like men with respect to their family obligations.\textsuperscript{304} Similarly, the
lower \textit{Phillips} courts asked whether the employer treated like persons
differently. They reached a decision different from the Supreme Court’s
only because they did not see women and men as “like” when it came
to balancing work with small children.\textsuperscript{305}

In Alan Willingham’s case, the “like qualifications/like treatment”
formulation of equality and discrimination no longer applied once the
Fifth Circuit decided that women and men were not “like” when it came
to social norms for hair length.\textsuperscript{306} Thus, the \textit{Willingham II}
court prefaced its finding of non-discrimination with the observation that the
employer’s policy only affected long-haired men “vis a vis members of
their own sex.”\textsuperscript{307} Assuming that men ordinarily—and by prefer-
ence—wear short hair, the court could only conclude that the policy was
a rational business judgment targeted only at some portion of “different”
men, rather than at men as a group.\textsuperscript{308}

Similar problems infected the courts’ initial treatment of biological
difference in the disability benefits context. In those cases, the courts

\begin{footnotesize}
\begin{enumerate}
\item Sunstein, \textit{supra} note 22, at 2423. Professor Sunstein goes on to state that the law deems
blacks and whites, and women and men, “almost always . . . the same,” except for three areas of
difference: reproduction, legally constructed differences not in dispute, or differences “closely
associated with past discrimination.” Sunstein, \textit{supra} note 22, at 2423.
\item See \textit{Phillips}, 411 F.2d at 4.
\item \textit{Phillips}, 416 F.2d at 1259-60.
\item Id.
\item See, e.g., \textit{Phillips}, 411 F.2d at 4 (stressing “differences between the normal relationships
of working fathers and working mothers to their pre-school age children”); \textit{Phillips}, 69 L.R.R.M.
at 2129 (“[t]he responsibilities of men and women with small children are not the same”).
\item \textit{Willingham II}, 507 F.2d at 1090-91.
\item See id. at 1089.
\item Id.
\end{enumerate}
\end{footnotesize}
focused on the reality that men and women have different disabilities, some of which are sex specific. Given this reality and the norm-centered nature of the courts’ equality model, the courts saw employment policies directed at pregnancy and childbearing as policies directed only towards pregnant women, who were differently situated from the non-pregnant male norm. With this approach, the courts were unwilling to find discrimination unless women could show that a policy was unjustified because it assumed difference when women in fact conformed to male norms. If the policy merely accorded different treatment to differently situated persons, it was an acceptable business judgment based on workplace needs.

The PDA did not really solve this problem; instead, it traded Geduldig’s and Gilbert’s fiction of “non-pregnant persons” for the fiction that pregnant women are “like” men. Specifically, the PDA prohibits differential treatment of pregnant employees so long as they do not differ from others “in their ability or inability to work.”[^309] It is true that pregnancy has nothing to do with a worker’s intrinsic capacities for a job. Yet, it is also true that pregnant women are not similarly situated to men; in reality, their bodies reflect for a brief time the most fundamental of sex differences. Despite this reality, the PDA conditions equal treatment upon “likeness” to men; that is, Title VII protects pregnant women only if they conform to a male norm.[^310]

In the third major category of difference cases, involving cultural difference, the distorting norms are those of the employer’s culture, or of the dominant culture served by the employer’s business. In grooming cases, the norm is a “professional appearance,” which generally is deemed to be one that conforms to white, non-ethnic standards.[^311] In language restriction cases, English speaking is the baseline from which claims are measured, and employers may reasonably restrict deviations from that norm.[^312] From this norm-centered perspective, courts may see non-English speakers as “a difficult and sensitive problem for those around them who do not speak the language,”[^313] even though the same could be said from the bilingual employees’ perspective. Similarly, courts may deem it unfair to ask English-speaking employees to speak

[^310]: See id.
[^311]: See supra notes 197-200 and accompanying text; see also Caldwell, supra note 184, at 372 n.15, 380.
[^312]: See Caldwell, supra note 184, at 380-81.
[^313]: See Gutierrez, 861 F.2d at 1193.
multiple languages, but perfectly natural to ask the same of ethnic employees. On a more abstract level, they may acknowledge the history of language-based discrimination, but blame it on immigrants' unwillingness to "preserve[e] native tongues and dialects for private and family occasions." This view entirely ignores the possibility that majority groups use language restrictions as a means of cultural and political repression.

2. The Theme Of Difference As Privilege

The theme of difference as privilege is a corollary to the theme of norm-centered equality. Under the norm-centered perspective, difference plaintiffs cannot establish that their differences merit protection under Title VII, nor that employment policies directed at difference constitute discrimination. From these premises, it follows that any request for relief from a difference-directed policy reflects a desire to deviate from the employer's norms. In turn, this desire is perceived as asking for special, privileged treatment.

Like the theme of norm-centered equality, this theme of privilege entered into difference analysis from the start. The Willingham trial court took the plaintiff's claim to mean that "employers would be powerless to prevent extremes in dress and behavior totally unacceptable according to prevailing standards and customs recognized by society." This claim struck the court as a demand for "a ridiculous, unwarranted encroachment on a fundamental right of employers."

314. See id. at 1194 (rejecting suggestion of using Spanish-speaking supervisors).
315. See id. at 1192-93.
317. "A difference 'discovered' is more aptly a statement of relationship, expressing one person's deviation from an unstated norm assumed by the other." Martha Minow, Justice Engendered, in FOUNDATIONS, supra note 14, at 303. Such deviation has complex psychological aspects for both the employee and those around him or her. See generally Erving Goffman, Stigma (1963). Goffman argues that stigma, which results from deviations from social norms, can preclude "full social acceptance." Id. at preface. The practical effect of Title VII difference analysis largely fits Goffman's theory, by disqualifying from the workplace persons who "deviate" from the dominant norm.
319. Id. at 1021.
Thus, the court ruled for the employer rather than "coerce" it "to conform their practices to the demands of those few who affect practices which are alien to prevailing societal norms."\(^{320}\)

In biological difference cases, the courts are somewhat less shrill. Nonetheless, the theme of privilege virtually drove the courts' pre-PDA analysis. Policies that failed to account for women's biological difference were acceptable refusals to accord women special privileges ("benefits," in Gilbert's parlance), rather than discriminatory, unequal treatment of women versus men ("burdens," in Satty's parlance).

In post-PDA cases, courts frequently return to the themes of the early stereotyping cases.\(^{321}\) These courts have regarded pregnancy accommodations as special treatment, exceeding what the norm requires.\(^{322}\) Thus, the Troupe decision suggested that the plaintiff sought to use Title VII as "a warrant for favoritism."\(^{323}\) Similarly, the Armstrong court repeatedly characterized plaintiff's claim as a bid for "preferential treatment."\(^{324}\) Another court perceived a claim seeking six months' maternity leave as an attempt "to dictate managerial decisions."\(^{325}\) In a still more emphatic vein, another court felt that an accommodation requirement for pregnancy would "require the employer to relinquish virtually all control over employees once they do become pregnant."\(^{326}\) Such statements suggest that the courts have returned to

\(^{320}\) See id.; see also Baker v. California Land Title Co., 349 F. Supp. 235, 238 (C.D. Cal. 1972) (denoting grooming plaintiff's claim a "whim of style").

\(^{321}\) See e.g., Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994).

\(^{322}\) See id.

\(^{323}\) Id. at 737.

\(^{324}\) Armstrong v. Flowers Hosp. Inc., 33 F.3d 1308, 1314, 1316-17 (11th Cir. 1994).

\(^{325}\) Barrash v. Bowen, 846 F.2d 927, 930 (4th Cir. 1988). The Barrash court went so far as to suggest that "plaintiff had defined her own rules to govern her employment relationship, and she conceded nothing to the employer's right." Id.

\(^{326}\) Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 693 (M.D. Fla. 1994). The extremity of this statement is startling. In most cases—such as Ms. Troupe's, or Ms. Elie's—the accommodation sought is relatively minimal. For example, Ms. Troupe had a very poor tardiness record; however, it was related to morning sickness, which typically ends after the first trimester of pregnancy. See Troupe, 20 F.3d at 734; MAYO CLINIC BOOK OF PREGNANCY & BABY'S FIRST YEAR 131 (Robert V. Johnson ed., 1994) [hereinafter MAYO]. Ms. Elie wanted to avoid heavy lifting beginning in her fifth month of pregnancy. See Elie v. K-Mart Corp., 69 Fair Empl. Prac. Cas. (BNA) 957, 958-59 (E.D. La. 1994); MAYO, supra, at 22 (repetitive heavy lifting can "increase the risk of preterm labor and low birth weight"). Thus, she would have required either "light duty," or assistance with "some" heavy lifting, for four months. As for Ms. Wallace, she wanted six weeks' leave because her six-week old infant refused a bottle; if her allegations were true, she sought the "privilege" of ensuring that her baby would not starve. But see Wallace v. Pyro Mining Co., No. 90-6299, 1991 U.S. App. LEXIS 30157, at *3 (6th Cir. 1991) (plaintiff failed to prove "medical necessity" of breastfeeding).
Gilbert's notion that the uniqueness of pregnancy means that it should not be acknowledged with "benefits" that men cannot enjoy.

The privilege theme is likewise apparent in language restriction cases. Gloor and its progeny explicitly describe plaintiffs' claims as a request for a privilege, even though “[a]n employer's failure to forbid employees to speak English does not grant them a privilege.”327 Thus, the Fifth Circuit characterized Garcia's claim as a contention that

others like to speak English on the job and do so without penalty. Speaking Spanish is very important to me and is inherent in my ancestral national origin. Therefore, I should be permitted to speak it and the denial to me of that preference so important to my self-identity is statutorily forbidden.328

The court found this contention absurd because “[n]o authority . . . gives a person a right to speak any particular language at work . . . . [I]f the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference.”329

3. The Effects Of The Twin Themes Of Difference Analysis

In the area of stereotyped difference, Willingham II tilted Title VII's balance strongly towards employer interests, effectively conflating a broadened BFOQ exception with a narrowed scope of Title VII protection. Thus, Willingham II affirmed the district court's findings, which Willingham I had branded "more pertinent to the bfoq defense than the question whether there was discrimination,"330 and concluded that "Macon Telegraph's dress and grooming policy does not unlawfully discriminate on the basis of sex, [so that] the applicability of the B.F.O.Q. exception [need] not be considered."331 In so doing, Willingham II transformed a BFOQ analysis into a non-discrimination analysis, tailored to the narrowest possible reading of the statute and then-governing precedent.

Narrowed readings of Title VII's protected categories, and a

327. Gloor, 618 F.2d at 269. Of course, this statement only makes sense from a norm-centered perspective.
328. Id. at 271.
329. Id. at 268-69.
330. Willingham I, 482 F.2d at 538.
331. Willingham II, 507 F.2d at 1088.
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skewed tilt to employer interests, have pervaded the other two areas of difference analysis. Using the themes of norm-centered equality and difference as privilege, the courts were unable or unwilling to link biological difference with “sex,” or cultural difference with “race” or “national origin.” As a result, difference is excluded from Title VII’s protective sweep. 332

In this manner, current difference analysis enforces what Lucinda Finley calls “the American ideal of homogeneous equality,” which actually extends only to those who fit the homogenized ideal. 333 This ideal has “legitimated . . . invidious discrimination,” because “everything that is dissimilar from [that] standard [is] the deviate ‘other.’” 334 As Professor Finley concludes: “[d]ifference is stigmatizing because the assimilationist ideal underlying our society’s conception of equality presumes sameness.” 335

B. The Equality Debate’s Response To Difference Analysis Themes

Rich as the equality debate has been, it has not truly responded to the themes of difference analysis. One school of thought in the debate buys into the theme of norm-centered equality. The other school of thought plays into the hands of the theme of difference as privilege. Moreover, neither school addresses all of the varieties of difference analysis, focusing nearly exclusively on biological differences between men and women.

1. Buying Into Norm-Centered Equality

Proponents of the “equal treatment” conception of equality advocate an approach that effectively “buys into” the theme of norm-centered equality, 336 as the early fetal protection and the now-growing body of post-PDA cases suggest. In these cases, the courts applied the equal

332. Pre-Title VII legal exclusion of “different” persons from the workplace perpetuated a business culture suited to the workers then at hand: white males. Title VII prompted the inclusion of non-whites and non-males in the workplace, but did nothing to prompt changes in the context to which these new workers were now admitted. See generally FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S CAPITAL (1995). This reality means that workers who differ from workplace norms cannot challenge employer policies directed at forcing conformance to those norms.

333. Finley, supra note 18, at 197.

334. Finley, supra note 18, at 197.

335. Finley, supra note 18, at 197; see also Caldwell, supra note 184, at 380.

336. See generally Troupe, 20 F.3d at 734.
treatment model and assumed that pregnant women are entitled to the same treatment as men so long as they are similarly situated to men.\footnote{337} This standard means that pregnant women are held to non-pregnant, male norms. Hence, differences related to fetal safety, morning sickness, lifting and standing restrictions, excess fatigue, and breastfeeding are all deemed fair grounds for disadvantageous treatment, or discharge from employment.\footnote{338}

Doubtless, at least some of these results are not what equal treatment theorists had in mind. To the contrary, these commentators have sought “laws and rules that make no assumptions about the sex of the family childrearer or wage earner, but simply address those functions directly.”\footnote{339} Such laws, in turn, would spur a restructured, gender neutral workplace.\footnote{340} In pursuit of this vision, equal treatment theorists have rejected sex specific accommodations of difference, so as to avoid labeling issues such as child care “women’s problems.”\footnote{341} This hope has not been borne out because the equal treatment model incorporates the like person/equal treatment form of analysis that underlies the theme of norm-centered equality. While equal treatment theorists attempt to avoid this trap by reference to an “androgynous,” rather than a male, norm,\footnote{342} the courts have not taken this cue. If anything, they have retrenched their male oriented, norm-centered analysis.

The equal treatment theorists have been unable to prevent this result because their equality model is only as sensitive as its user. Thus, a judge using an androgynous norm would deem women and men similarly situated with respect to reproduction and childrearing. At the same time, a judge using a male norm would deem women and men differently situated because women can and do become pregnant, breastfeed, and carry greater childrearing burdens\footnote{343} than do men.

The equal treatment model generates similar analytic twists and turns for all kinds of difference. A neutral judge would deem women and men similarly situated in their capacity to present a professional

\begin{itemize}
  \item \footnote{337} Id. at 738.
  \item \footnote{338} See Armstrong, 33 F.3d at 1314-17.
  \item \footnote{339} Williams, supra note 19, at 143.
  \item \footnote{340} Williams, supra note 19, at 143-44.
  \item \footnote{341} Williams, supra note 19, at 144.
  \item \footnote{342} Williams, supra note 19, at 151.
  \item \footnote{343} This is especially true given current demographic shifts towards single parent, female-headed households. See Linda J. Krieger and Patricia N. Cooney, The Miller-Wohl Controversy, in FOUNDATIONS, supra note 14, at 165 (equal treatment model works well for women who can conform to the male norm, but not for “women who deviate substantially from the male norm, specifically working class and single mothers”).
\end{itemize}
workplace appearance; a norm-centered judge would deem them differently situated with respect to suitable modes of dress and hairstyle. A neutral judge would deem English and non-English languages similar in their communicative capacities, while a norm-centered judge would differentiate English from other languages.

The equal treatment model is inherently subject to such shifts, which characterize the turns taken by the Fifth Circuit between *Willingham I* and *Willingham II*. The difference between the lower court and Supreme Court *Phillips* decisions is likewise traceable to such a shift. Contrasted with *Geduldig*, *Gilbert*, and *Satty*, the PDA represents the same kind of shift; moreover, the shifting process repeated itself yet again in early fetal protection, and later post-PDA, cases. The same can also be said for *Gloor*, *Gutierrez*, and *Spun Steak*.

Proposed modifications to the equal treatment approach to provide short term accommodations of pregnancy implicitly acknowledge this problem, but do not really solve it. To begin with, this approach leaves stereotyped and cultural difference cases untouched. That problem aside, the argument that men and women are similarly situated but for limited, “episodic” phases of pregnancy has much initial appeal, because it seems to answer cases, such as *Troupe*, that involve quite limited accommodations to pregnancy. Yet, outside such circumstances, it retains the PDA’s flaws: it asks women to minimize pregnancy and childbearing functions, so as to be as much like men as possible. To the extent that this model avoids such a “superwoman” syndrome, it—like the special treatment model—falls into the analytic traps set by the theme of difference as privilege.

2. Special Treatment And Privilege

Like the equal treatment advocates, special treatment theorists

344. See generally Bartlett, supra note 100.
346. See, e.g., Kay, supra note 20, at 28-30, 32-38.
348. Kay, supra note 20, at 34 (positing a “bright line between pregnancy and child care” because “the woman’s reproductive cycle ends with childbirth”). With this bright line approach, the result is the same for the plaintiff in *Wallace*. See Kay, supra note 20, at 35 n.174. In that case, plaintiff’s problem arose six weeks after childbirth, when her maternity leave was up but her baby refused bottles and could only be fed by nursing. *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 868 (W.D. Ky. 1990). In this situation—on the “like men” side of Professor Kay’s bright line—the plaintiff was in a position that no male would ever experience: if she worked, the baby would not eat; if the baby ate, she lost her job.
largely address only sex-based biological differences. Within that sector of difference analysis, special treatment advocates avoid the norm-centered theme, but fall prey to the privilege theme. Indeed, the special treatment model has been much-criticized on these very grounds.\textsuperscript{349}

Aside from the apparent theoretical inconsistency of an argument that equality requires differential treatment, the model’s practical effectiveness is limited by its failure to justify tangibly the costs of accommodation. Special treatment advocates—and even episodic analysis advocates—justify the costs of special treatment on abstract grounds; namely, they resort to appeals to the “social value” of workplace equality and the fundamental right status of procreative activity.\textsuperscript{350} I do not disagree for a moment with this assessment of social values, but the argument’s abstractness renders it precarious in light of emerging judicial deference to cost-based employer arguments.\textsuperscript{351}

In short, the courts appear unwilling to dismiss costs from their analysis of the employer interest side of Title VII’s balance, but the special treatment theorists sound as though Title VII need only concern itself with employee interests. On this point, the special treatment argument is mistaken. Title VII’s paramount goal is elimination of employment discrimination, but it also preserves employers’ traditional prerogatives.\textsuperscript{352} Courts are unlikely to discard this principle, which is grounded in the Act’s language and structure.\textsuperscript{353}

\section*{C. New Themes Of Difference: Equality of Opportunity And A Balance of Interests}

In a sense, the two sides of the equality debate talk past each other. “Choosing the equal treatment approach undermines the equal opportuni-
ty value, and choosing that value undermines the equal treatment ideal. ³³⁴ Even as each side replays one of the two difference analysis themes, both sides have tended to ignore the full dimensions of difference. Thus, the debate ignores the full problem and its solution, settling instead for infinite repetitions of, and variations on, their initial positions.

To break out of this cycle, the themes of norm-centered equality and difference as privilege must be replaced with themes that restore Title VII's commitment to equality of opportunity and balance between employer and employee interests. Such themes are exemplified by the law's treatment of workplace difference outside of Title VII.³⁵⁵ Under the ADA and § 504, claims for accommodations to difference are denoted discrimination claims, and not claims for privileged treatment.³⁵⁶ Thus, difference in the form of disability will be "reasonably accommodated" if the employee is "qualified" for the job and the accommodation will not pose an "undue hardship" on the employer.³⁵⁷

The disabilities that trigger such accommodations encompass more than the employee's current, actual physical state. A "record of impairment," or a showing that an employee is "regarded as having an impairment," will also trigger ADA and § 504 protections.³⁵⁸ These expansive definitions address "Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.'"³⁵⁹ Between their accommodation provisions and their definitions of

³⁵⁴. Finley, supra note 18, at 196.
³⁵⁵. See Sunstein, supra note 22, at 2428 (using disability analogies to critique difference analysis under Title VII).
³⁵⁷. See 42 U.S.C. §§ 12111(8), (9), (10) (Supp. V 1994) (defining "qualified individual with a disability," "reasonable accommodation," and "undue hardship" under the ADA); see also id. § 12112(b)(5)(a) (incorporating refusal of reasonable accommodation absent undue hardship into prohibition of employment discrimination).
³⁵⁹. Arline, 480 U.S. at 279 (citing legislative history of § 504); see also id. at 284 (society's myths and fears about disabilities are as handicapping as actual impairment).
disability and handicap, the ADA and section 504 address the problem of deciding whether policies directed at characteristics associated with a disability are discriminatory. For example, the Supreme Court rejected an employer’s claim that a policy directed at “the contagious effects” of tuberculosis “can be meaningfully distinguished from the disease’s physical effects on a claimant.” The Court rejected this argument because

contagiousness and ... physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.

The fact that difference analysis succeeds under the ADA and section 504 where it fails under Title VII has important consequences for the reconceptualization of difference analysis under the latter statute. Unlike Title VII jurisprudence, the ADA and section 504 reflect a difference-oriented conception of equality focused on opportunity, rather than a norm-centered conception of equality that sees difference as an unfair privilege. Ironically, this idea of difference-oriented equality of opportunity emerged in the Supreme Court’s first encounter with Title VII. In *Griggs v. Duke Power Co.*, the Court described Title VII’s underlying principles as something more than

equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has ... provided that the vessel in which the milk is proffered be one all seekers can use.

Title VII difference analysis has forgotten this principle, and puts

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360. *Id.* at 282. Contrast this statement with the Court’s decision in *Hazen*, which stated that avoidance of pension costs was an employment decision based on factors “analytically distinct” from age. *See* Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1707 (1993). *Hazen’s* approach is significant for Title VII jurisprudence because the ADEA’s substantive language is derived from Title VII. *See* Lorillard v. Pons, 434 U.S. 575, 577 (1978).


362. 401 U.S. 424, 431 (1971). The Court’s reference to the stork and fox alludes to one of Aesop’s fables. The story highlights the effect of difference: the fox serves the stork a drink in a shallow dish, which is useless to the stork; the stork retaliates by serving the fox with a tall, narrow jar, which is useless to the fox. *See* The Fox and the Stork, in *HESITANT WOLF AND SCRUPULOUS FOX: FABLES SELECTED FROM WORLD LITERATURE* 163 (Karen Kennerly ed., 1973).
employees in the position of the fox confronting the tall milk vessel: the employee can do the job, but is deprived of the opportunity by the employer's norm-centered rule.

IV. RECONCEPTUALIZING DIFFERENCE

The Deaf comprise the one group that is simultaneously disabled and culturally different. Not only do the deaf straddle the worlds of disability and cultural difference, but they also provide a human analog to the story of the fox and the stork. In the fable, the fox would be able to drink if only he could perform the act of drinking in the way that worked best for him. Unfortunately for the fox, the vessel was shaped to a long-billed stork "norm," shutting the fox out of opportunity based on his difference. Unable to hear or speak as the non-deaf do, the deaf occupy the position of the fox: they can communicate, but they are cut off from maximum effectiveness, and opportunity, when they are confined to modes of communication designed for hearing norms.

A. Lessons From Deaf Culture

The general public first became aware of the Deaf culture movement in 1988, during the Gallaudet University student protest. Since then, a spate of books and articles, and elements of popular culture, have kept the idea of Deaf culture in the general public's consciousness.

363. Gallaudet University is "the world's only Deaf university." Solomon, supra note 27, at 41. It was established as a federally chartered college for the deaf in 1864. See Harlan Lane, The Mask of Benevolence 165 (1992); Schein, supra note 27, at 137. The National Technical Institute for the Deaf [hereinafter NTID] was opened "as a second college for the deaf in 1968." Arden Neisser, The Other Side of Silence 52 (1983).

364. The week-long protest occurred in March 1988, when Gallaudet alumni and students angrily reacted to the University Board of Trustees' selection of a hearing president. From its inception, all of Gallaudet's presidents were hearing. See Lane, supra note 363, at 187. Following a week of student protest and intensive media coverage, the new hearing president resigned, and the Board selected a deaf man, I. King Jordan, as the University's next president. See Lane, supra note 363, at 189-91.


366. In 1987, deaf actress Marlee Matlin won the Best Actress Oscar for her performance in Children of a Lesser God; in 1994, Heather Whitestone, who is 95% deaf, won the "Miss America" pageant. See Ellen Grehan, Traitor: Why They've Turned On Miss America, Sunday Mail, Apr. 2, 1995, at 13. Whitestone's selection excited many deaf Americans; however, her reliance on oral communication methods is controversial in the Deaf community. See id.
The roots of Deaf culture go far deeper than these recent events. While Deaf culture stems from multiple sources, its predominant feature is its language.\(^{367}\) More specifically, the modern Deaf culture argument is most deeply rooted in the existence and nature of American Sign Language ("ASL").\(^{368}\) The lessons of Deaf culture for difference analysis lie largely in its linguistic roots, for ASL deviates from "normal" communication modes, yet maximizes the communicative effectiveness of its users.\(^{369}\)

1. The Linguistic Roots of Deaf Culture

ASL’s history has long been known,\(^ {370}\) but its nature as an independent language was only recently recognized. Until the 1960’s, ASL was widely regarded as an iconic mode of pidgin-English, with limited capacities for abstraction and expression.\(^ {371}\) Such misconceptions (still extant in some quarters) were proved false in 1960, when William Stokoe, a non-deaf Gallaudet University professor with a

\(^{367}\) Deaf culture is a complex entity, stemming from, among other things, use of American Sign Language, myriad deaf organizations, social clubs, deaf-published newspapers, and deaf residential schools. See generally PADDEN & HUMPHRIES, supra note 27.

\(^{368}\) American Sign Language has been described as "the natural language of the deaf." Dolnick, supra note 365, at 40. There are many other manual communication systems, including "cued speech" (limited number of handshapes and positions indicate consonants and sounds otherwise indistinguishable to lip readers), various manual English systems (representations of spoken English), fingerspelling (handshapes denote each letter of the alphabet), and "home signs" (idiosyncratic systems developed by individual deaf persons not exposed to other manual languages). See generally JEROME D. SCHEIN, SPEAKING THE LANGUAGE OF SIGN 5-6, 33, 64-100 (1984). Moreover, the deaf in other countries have their own sign languages, see SCHEIN, supra note 27, at 27, and ASL—like spoken American English—has different regional dialects. See Solomon, supra note 27, at 44-45. In America, ASL is unique among manual communication systems: it is a language with its own syntax and grammar, independent of English. See NEISSER, supra note 363, at 46-49.

\(^{369}\) See infra notes 370-93 and accompanying text.

\(^{370}\) ASL’s origins are partially traceable to a visual communication system formalized in eighteenth-century France by the Abbe de l’Epee, a teacher of the deaf. This system was brought to America by Laurent Clerc, a deaf man hired by Thomas Hopkins Gallaudet to teach at the Hartford School for the Deaf. There, the French sign language merged with existing American usages and evolved into modern-day ASL much as any other language evolves over time. See SCHEIN, supra note 27, at 54-59.

\(^{371}\) See LANE, supra note 363, at 45-46 (describing hearing attitudes towards sign language); NEISSER, supra note 363, at 48 (explaining how "ASL was thought to be a language without nouns and verbs . . . . It was thought to have no inflections (tenses) on the verb . . . ."); PADDEN & HUMPHRIES, supra note 27, at 7 (stating that ASL commonly misconceived as "either a collection of individual gestures or a code on the hands for spoken English"); SCHEIN, supra note 27, at 2 (describing how "[i]t was considered . . . . to be a substitute for spoken English—and a poor substitute at that . . . .").
linguistics background, studied ASL and concluded that it is a complete, unique language with its own syntax and grammar. 372

Stokoe’s “discovery” was controversial, even at Gallaudet. 373 On one level, Stokoe simply confirmed through scholarship what the deaf knew through experience: ASL “is a natural language.” 374 Deaf ASL users “think in it, have internal monologues in it, dream in it.” 375 ASL is so used because, like the words of any independent language, “[t]he signs of ASL refer directly to meaning rather than to a specific English word.” 376 Stokoe had merely identified and described ASL’s means of signification. 377 Yet, Stokoe’s work had significant political implications because it challenged the core premises of hearing attitudes towards the deaf, as well as the entire system of deaf education.

Until 1880, sign language was widely used in deaf education. 378 In that year, a conference of 164 hearing educators of the deaf convened in Milan, Italy. 379 At the conference, the delegates affirmed resolutions endorsing “the incontestable superiority of speech.” and, therefore, oral methods in deaf education. 380 The delegates did so without consulting the wishes of the deaf; to the contrary, deaf educators were excluded from the convention. 381

The impact of the Milan Congress and the oralism movement it spearheaded was profound.

In 1882 . . . only 7.5% of the 7,000 pupils in American schools for deaf children were taught orally (that is, without signs or fingerspelling). By 1900 that percentage had increased to 47.

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372. See PADDEN & HUMPHRIES, supra note 27, at 79-80 (describing Stokoe’s analysis and its impact); SACKS, supra note 365, at 76-77 (same); JOSEPH SHAFFRO, NO PITY 97-98 (1st paperback ed. 1994). For a detailed description of Stokoe’s system of analysis of ASL’s structure, see SCHEIN, supra note 27, at 10-21.

373. See NEISSER, supra note 363, at 46; PADDEN & HUMPHRIES, supra note 27, at 79-80.

374. NEISSER, supra note 363, at 47.

375. NEISSER, supra note 363, at 47.

376. NEISSER, supra note 363, at 47.

377. See supra note 372.

378. See LANE, supra note 363, at 113.

379. LANE, supra note 363, at 113-14.

380. LANE, supra note 363, at 114-15. Specifically, all but six delegates (five of whom comprised the American delegation) voted to adopt this motion: “[t]he Convention, considering the incontestable superiority of speech over signs, (1) for restoring deaf-mutes to social life, and (2) for giving them greater facility of language, declares that the method of articulation should have the preference over that of signs in the instruction and education of the deaf and dumb.” JOHN VICKERY VAN CLEVE & BARRY CROUCH, A PLACE OF THEIR OWN 110 (1989) (quoting Edward M. Gallaudet, The Milan Convention, in 26 AMERICAN ANNALS OF THE DEAF 4, 5-6 (Jan. 1981)).

381. See LANE, supra note 363, at 113.
1905 marked a watershed—for the first time in American history the majority of deaf students learned without [sign]. Speech, speechreading, and writing, rather than sign language and the manual alphabet, were the communication methods used to instruct the majority of deaf pupils in the United States. By 1919, at the peak of oralism’s influence, schools reported that nearly 80 percent of deaf students received their instruction and communicated with their teachers without any manual language.382

The Deaf community rejected the new stress on oralism,383 and oral/manual debates have roiled the world of deaf education ever since.384

Deaf activists “worked against attempts to eliminate manual communication from deaf schools.”385 Such activists “argued that speech reading involved merely substituting one form of visual communication that was reliable for another that was less so because ‘to the deaf, speech is but another mode of signs, and a very poor and indistinct one as compared with any of the other methods.”386 Within the Deaf community, protests against oralism were impassioned.387 The first National Association of the Deaf (“NAD”) President asked: “‘[w]hat heinous crime have the deaf been guilty of that their language should be proscribed?’”388 According to the Deaf press, “oralism [was] the method of ‘violence, oppression, obscurantism, charlatanism, which only makes idiots of the poor deaf-mute children.’”389

The proponents of oralism were equally impassioned.

Bell argued that sign language made deaf Americans different from their hearing peers; he insisted that it encouraged the growth of a deaf culture and that it perpetuated negative genetic traits. Hearing parents objected to sign language because they believed its use prevented their children from practicing speech and thus being ‘normal.’ Politicians

382. VAN CLEVE & CROUCH, supra note 380, at 122.
383. VAN CLEVE & CROUCH, supra note 380, at 132.
384. Not only have these debates been long lasting, but they are still ongoing. See James Woodward, Some Sociolinguistic Problems in the Implementation of Bilingual Education for Deaf Students, in HOW YOU GONNA GET TO HEAVEN IF YOU CAN'T TALK WITH JESUS 21-37 (James Woodward ed., 1982) [hereinafter HEAVEN]; see generally COHEN, supra note 365, at 120-25.
385. VAN CLEVE & CROUCH, supra note 380, at 132.
386. VAN CLEVE & CROUCH, supra note 380, at 134 (quoting deaf activist Olof Hanson’s letter to oralism proponent Alexander Graham Bell, unsuccessfully requesting Bell’s support for a statute adding manual alphabet training to the deaf education curriculum in Illinois).
387. See LANE, supra note 363, at 117.
388. LANE, supra note 363, at 117.
389. LANE, supra note 363, at 117.
thought that instruction by means of sign language made deaf education needlessly expensive. Hearing teachers and their professional associations argued that signs interfered with the socialization of deaf children.

In keeping with this philosophy, which reflects both norm-centered and privileging attitudes, oralist educators rigorously enforced their view that speech is superior to sign. Many deaf students experienced harsh punishment for using sign, including dunking, caning, and having their hands tied.

2. Pathologies and Norms

The heart of the oral/manual debate, as with current arguments over the existence and extent of Deaf culture, is whether deafness should be regarded as a pathology, or as a physical trait akin to race, ethnicity, or even mere hair color. In other words, the debate is between norm-centered and difference-oriented perspectives.

The traditional, non-deaf conception of deafness classifies it as pathology: a deviance from the hearing norm. This account of deafness is empirically true; deaf Americans are a numerical minority of 2.2 to 22 million persons, depending on the definition of “deafness.” ASL users comprise a still smaller minority. Aside from numbers,
the pathology view is also true in the sense that the world is designed for the hearing, so that daily functioning in the hearing world is more difficult for the deaf than for the hearing. In this sense, "deaf people are disabled. They will always be at a disadvantage. In order for that to change, society’s definition of 'normal' would have to change." Of course, this simple reality poses a conundrum: deafness is disabling in the sense that everyday life is more difficult with it than without it; yet, in many ways, the difficulty arises from the design of a hearing society, rather than from deafness, itself. As Leah Hager Cohen explains:

If we lived in a society that did not regard hearing people as the norm, these differences might not constitute deprivations. In fact, in a society that regarded deafness as the norm, it is likely that hearing people would be at a disadvantage. But hearing people dominate our society; it is hearing people’s gaze that determines reality. Within this reality deaf people are disabled.

a. The Oralism Debate: Difference Becomes Pathology

The traditional characterization of deafness as pathology is based on more than numbers and functioning. As the history of the Milan Congress and the oralist movement suggests, many hearing people regarded the deaf as their inferiors. This attitude was especially pronounced in relation to the non-speaking deaf. Thus, a hearing educator described deaf signers as "freaks—dummies... like a trained 'spaniel' who can 'for a brief time stand on his hind feet... but as soon as the restraint of his master's will is removed he capers about again on four feet." In contrast, "[o]rally trained deaf persons" who were either born without hearing or lost it before acquiring speech; 90% of this group uses sign.

NEISSER, supra note 363, at 8. But see James Woodward, Some Sociolinguistic Problems in the Implementation of Bilingual Education For Deaf Students, in HEAVEN, supra note 384, at 21, 29-30 (estimating 250,000 native ASL users, with ASL "rat[ing] considerably lower than third as a frequently used foreign language in the U.S.").

398. See generally James Woodward, Some Sociolinguistic Problems in the Implementation of Bilingual Education For Deaf Students, in HEAVEN, supra note 384, at 75-78.

399. COHEN, supra note 365, at 208.

400. COHEN, supra note 365, at 207.

401. See, e.g., John V. Van Cleve, Nebraska’s Oral Law of 1911 and the Deaf Community, 65 NEB. HIST. 195 (Summer 1984) (quoting a 1911 address to the Nebraska Teachers Association by Carol G. Pearse, superintendent of the Milwaukee, Wisconsin public schools and president of the National Education Association).

402. Id. at 205.
were “normal, no longer seriously handicapped, no longer ‘dummies,’ no longer objects of pity or contempt.”

Some even believed that those who could not speak could not pray. Thus, the President of the Milan Congress declared:

Oral speech is the sole power that can rekindle the light God breathed into man when, giving him a soul in a corporeal body, he gave him also a means of understanding, of conceiving, and of expressing himself. . . . While, on the one hand, mimic signs are not sufficient to express the fullness of thought, on the other they enhance and glorify fantasy and all the faculties of the sense of imagination. . . . The fantastic language of signs exalts the senses and foments the passions, whereas speech elevates the mind much more naturally, with calm, prudence and truth. . . . Speech alone, divine itself, is the right way to speak of divine matters.

Such attitudes reflected the eugenics movement of the late nineteenth and early twentieth centuries. Alexander Graham Bell, a leading proponent of oralism, also subscribed to eugenist ideas. Thus, Bell objected to sign because he believed that it encouraged clannishness among the deaf, leading to deaf intermarriage and the perpetuation of genetic deafness. To Bell, that scenario was unacceptable, because he “believed that deaf persons weakened the society in which they lived.” This attitude compelled him to support eugenics: “[s]ince deafness seemed incurable, Bell focused his efforts on discover-

403. Id. at 198.
404. LANE, supra note 363, at 114-15. This belief had a long history. The Catholic Church at one time barred the deaf from taking communion “because they could not confess aloud.” COHEN, supra note 365, at 118. In sixteenth century Spain, this barrier precluded inheritance of properties and titles; as a result, the history of deaf education begins with the Spanish nobles who wanted their deaf children to learn to speak. COHEN, supra note 365, at 11; see also Solomon, supra note 27, at 41. Nor was Catholicism alone in its attitudes towards the non-speaking deaf; “Orthodox Judaism did not accept Deaf coreligionists unless they could speak.” SCHEIN, supra note 27, at 54.
405. Bell was involved in the eugenics movement generally, as well as with a specific emphasis on the deaf. See LANE, supra note 363, at 213-16.
406. See VAN CLEVE & CROUCH, supra note 380, at 198. Bell’s science, like the rest of the pseudo-scientific eugenics movement, was simply wrong. Ninety percent of deaf persons have hearing parents, and 90% of deaf persons have hearing children. See SCHEIN, supra note 27, at 106; see also Solomon, supra note 27, at 42 (explaining that “at least 30[%] of deafness is genetic, more than 90[%] of deaf children are born to hearing parents”). As for the scope of the perceived threat, congenital deafness currently comprises approximately 0.1% of the population. See SACKS, supra note 365, at xi.
Nor was Bell alone in his efforts. Model eugenics laws, and some enacted sterilization laws, included deaf persons in the categories of social undesirables to be sterilized.409

Surrounded by such negative views of deafness, many hearing parents of deaf children understandably preferred—and still prefer—to see their children use speech rather than sign.410 Hearing parents often felt that the paramount goal for their children was the acquisition of speech, which would enable them to “pass” as “normal” persons.411 Thus, their decisions for their deaf children—confusing and difficult to start with—were shaped by the perceived necessity of speech for “normalcy” and assimilation within the hearing world.412

b. The Cochlear Implant Debate: *Seeking A Cure For Difference*

Cochlear implant technology is a modern flashpoint for the issues

408. VAN CLEVE & CROUCH, supra note 380, at 145.
409. See LANE, supra note 363, at 215-16; Stephen J. Gould, *Carrie Buck’s Daughter*, NATURAL HIST., July 1984, at 14. Under the Third Reich’s eugenics program, nearly 4,000 of the 375,000 persons who underwent forced sterilization did so on the basis of blindness or deafness. Id. While the most striking numbers come from Germany’s Nazi experience, the eugenicist philosophy was not uniquely Nazi. See STEFAN KUHL, THE NAZI CONNECTION (1994). To the contrary, German eugenicists were inspired by Justice Holmes’ decision in *Buck* and impressed by U.S. sterilization rates. Id. at 24, 38.

410. As Jerome Schein explains, hearing parents “know little or nothing about deafness and less about Deaf people. They cannot rely on their own experience for guidance. They lack empathy for their deaf child’s behavior. They feel cut off from the child; they have difficulty understanding the child and greater difficulty making the child understand them.” SCHEIN, supra note 27, at 107. Moreover, hearing parents feel their signing children become alienated from them, more at home in the residential schools’ visual milieu than with their speaking parents. See VAN CLEVE & CROUCH, supra note 380, at 198. In fact, many deaf residential school alumni report just such sensations of alienation from non-signing, speaking parents, and a feeling of being “at home” in the school setting. See generally PADDELL & HUMPHRIES, supra note 27; SCHEIN, supra note 27, at 1-2. Deaf culture therefore emphasizes school ties, and most Deaf refer to their educational histories when they introduce themselves. See LANE, supra note 363, at 17; Dolnick, supra note 365, at 52.

411. LANE, supra note 363, at 199; see also VAN CLEVE & CROUCH, supra note 380, at 106-07. Some deaf persons shared these sentiments. Alexander Graham Bell’s wife, Mabel Bell, preferred to “pass” as a hearing person. She [strove] in every way to have [her deafness] forgotten and to be so completely normal that [she] would pass as [hearing]. To have anything to do with other deaf people instantly brought this hard-concealed fact into evidence. So [she]... helped other things and people... anything, everything but the deaf. [She] would have no friends among them.

LANE, supra note 363, at 98 (quoting Mabel Bell).

412. See, e.g., LANE, supra note 363, at 154-62; THOMAS SPRADLEY & JAMES SPRADLEY, DEAF LIKE ME (1978) (hearing parents’ account of early years with their deaf daughter).
argued in the oralism debate. Using a procedure approved by the FDA in 1985, surgeons implant "a tiny chip... in the inner ear... connected to a magnet just under the skin, which attracts another magnet in a transmitter attached behind the ear." From the transmitter magnet, a "wire leads... to a 'speech processor' you can clip to your belt." This device "converts sound into electrical impulses and sends them to the implant, which conveys them to the brain, where they are processed as sound would be. The result is an approximation of hearing."

The effectiveness of the procedure depends upon the implantee; specifically, those who have late-onset, post-lingual deafness are the best candidates for the procedure. For other deaf persons, particularly those who are prelingually deaf, the implant's value is at best questionable, and, for some, non-existent. Thus, some estimate that "[f]ewer than [one] percent of the 22 million Americans with hearing impairments can benefit from the operation."

413. Solomon, supra note 27, at 65.
414. Solomon, supra note 27, at 65.
415. Solomon, supra note 27, at 65.
416. Solomon, supra note 27, at 65.
417. Solomon, supra note 27, at 65.
418. SHAPIRO, supra note 372, at 224 (finding "[f]ewer than [one] percent of the 22 million Americans with hearing impairments can benefit from the operation"); Solomon, supra note 27, at 65. Solomon reports that "[p]relingual deaf adults who have the implants often find them ineffective or just irritating." Solomon, supra note 27, at 65. Even a post-lingually deaf man told Solomon that the implant "made everyone sound like R2D2 with laryngitis." Solomon, supra note 27, at 65. But see Bonnie P. Tucker, Deafness—Disability or Subculture: The Emerging Conflict, 3 CORNELL J.L. & PUB. POL'Y 265, 267 (1994). Professor Tucker states that "[c]ochlear implants have enabled some profoundly deaf people to understand speech without having to rely on speech reading or interpreters," and she predicts that continued technological advances "will enable profoundly deaf people to understand speech in most circumstances." Id. at 267-68. The most controversial use of the technology is with prelingually deaf children. Implants in children who have not yet acquired language may be ineffective because those children have no means of interpreting any sound they perceive, and because the sound they receive through the implant is "too garbled" to be interpreted as language. See LANE, supra note 363, at 4. If such children receive implants and then are deprived of exposure to sign, they can end up entirely without language. See Solomon, supra note 27, at 4-5, 65. Compounding these risks is the fact that the surgery "destroys all residual hearing a child might have." Solomon, supra note 27, at 65. These problems are especially significant in light of the fact that "antibiotics have tamed many of the childhood diseases that once caused permanent loss of hearing, [so] more than 90[\%] of all deaf children in the United States today were born deaf or lost their hearing before they learned English." Dolnick, supra note 365, at 39. In other words, the majority of potential child implantees may be least suited to the technology. See THE COMMISSION ON EDUCATION OF THE DEAF, TOWARD EQUALITY: EDUCATION OF THE DEAF 125 (Feb. 1988) [hereinafter THE COMMISSION ON EDUCATION OF THE DEAF] (report to the President and Congress). But see Solomon, supra note 27, at 65 (stating that "implants are most effective when put in children at about age [two].").
From the Deaf point of view, the notion that implants are beneficial “is both inappropriate and offensive—as if doctors and newspapers joyously announced advances in genetic engineering that might someday make it possible to turn black skin white.” Deaf activists deem the implantation procedure brutally invasive, despite its actual relative safety. For themselves, “[eighty-six] percent of deaf adults said they would not want a cochlear implant even if it were free.” As for children, the Deaf view is that

‘[a]n implant is . . . the ultimate denial of deafness, the ultimate refusal to let deaf children be Deaf . . . . Parents who choose to have their children implanted, are in effect saying, “I don’t respect the Deaf community, and I certainly don’t want my child to be part of it. I want him/her to be part of the hearing world, not the Deaf world.”’

Whether one agrees with implantation’s proponents or detractors, it is clear that the debate turns upon competing accounts of “normalcy.” For the non-deaf parents who choose implantation for their children, and for the deaf who elect implantation, “normalcy” entails an approximation of hearing and speech. For the Deaf who reject implantation technology, “normalcy” entails immersion in Deaf culture and communication via manual language. In one view, deafness is a pathology; in the other view, deafness is depathologized, even “an identity to

419. Solomon, supra note 27, at 65.
420. See, e.g., LANE, supra note 363, at 3-4 (although non-deaf, Lane shares the Deaf culture perspective, and graphically describes implantation procedures in sensationalized, negative terms); Tucker, supra note 418, at 271 (quoting former National Association of the Deaf Executive Director’s view that implants are a form of “assault,” and “analogous to the Iraqi invasion of Kuwait or the beating of a blind man in order to induce him to see stars.”).
421. See Solomon, supra note 27, at 65.
422. Dolnick, supra note 365, at 43 (citing a survey reported by Harlan Lane).
423. Dolnick, supra note 365, at 43 (quoting Deaf Life editorial). In other words, the Deaf view cochlear implantation as an attack on Deaf culture’s existence. See SHAPIRO, supra note 372, at 224. In fact, “in England the sign language symbol used for cochlear implant is the same one as ‘to kill.’” SHAPIRO, supra note 372, at 224.
424. Cochlear implants do not really provide “normal” hearing, even when fully effective. As Andrew Solomon puts it, they “do something that looks like hearing. They give you a process that is (sometimes) rich in information and (usually) free of music. They make the hearing world easier, but they do not give you hearing.” Solomon, supra note 27, at 65.
425. See SHAPIRO, supra note 372, at 224; LANE, supra note 363, at 5-6.
be adopted with pride." 427

The Deaf reaction is psychologically understandable. According to the pathology model, the deaf are at best abnormal and pitiable; at worst, they are deviant and less than fully human. 428 In contrast, the Deaf culture model provides a much more positive sense of self. Thus, those deaf who think of Deafness as culture rejoice if their child is born deaf. 429 These feelings run so strong that a hearing reporter at the National Association of the Deaf convention felt it was "impossible, [at the convention], not to wish you were Deaf." 430

Apart from psychological appeal, the pathology model and the Deaf culture model suggest different means of responding to the practical effects of deafness. The question is: which model is most functional? Not surprisingly, Deaf activists argue that the Deaf culture approach is more functional. 431 Their reasons for rejecting the pathology/assimilation model are instructive for difference analysis.

3. Function or Assimilation: The Trade-Off

The oralism and cochlear implant debates center on whether the deaf function best in the hearing world by assimilating—becoming as nearly like hearing persons as possible—or by bringing Deaf culture into the hearing world. 432 From the hearing perspective, assimilation seems the preferable, perhaps even the only, option, because deafness seems unacceptable. 433 From this premise, it follows that speech and lip

427. SHAPIRO, supra note 372, at 224. Shapiro recounts a parallel debate over emerging technology that uses electrodes to stimulate paraplegics' leg muscles, producing "a jerky, torturous version of walking . . . [which] overstimulates muscles, leaving users exhausted even after short distances." SHAPIRO, supra note 372, at 225. While this technology seemingly offers "normalcy" in place of wheelchairs, some argue that it would be "[b]etter . . . to take the money spent on . . . [such] research and study ways to build better wheelchairs or to replace architectural barriers." SHAPIRO, supra note 372, at 225. In other words, wheelchair use is not necessarily undesirable in and of itself; rather, it is made undesirable by the difficulties created when it is regarded as abnormal, and its exigencies are excluded from the design of the everyday world. See generally JOHN HOCKENBERRY, MOVING VIOLATIONS (1995).

428. See LANE, supra note 363, at 3-31; see also supra notes 402-12 and accompanying text.

429. See Dolnick, supra note 365, at 38 (stating that "many deaf parents cheer on discovering that their baby is deaf.").

430. Solomon, supra note 27, at 45.

431. See, e.g., LANE supra note 363 at 3-31 (non-deaf author explaining the Deaf view of the pathology model); James Woodward, How You Gonna Get to Heaven If You Can't Talk With Jesus: The Educational Establishment vs. The Deaf Community, in HEAVEN, supra note 384, at 11, 13; James Woodward, On Depathologizing Deafness, in HEAVEN, supra note 384, at 75-78.

432. See James Woodward, supra note 384, at 15-17, 75-78.

433. See Dolnick, supra note 365, at 37.
reading comprise the best means of communication for the deaf, because they permit (theoretically) the deaf to pass as non-deaf, and thereby to assimilate into the hearing world. These same ideas motivated the Milan Congress, and formed the basis of the subsequent oral/manual debates.

While the ultimate effectiveness of cochlear implant technology is yet to be determined, the results of oralism's dominance are well documented, both empirically and anecdotally. These results do not point solely in one direction; however, the lion's share of the evidence suggests that the Milan Congress's approach was a practical mistake, whatever its philosophical merit.

The empirical evidence of educational achievement using oral methods is discouraging.

The average deaf sixteen-year-old reads at the level of a hearing eight-year-old. When deaf students eventually leave school, three in four are unable to read a newspaper. Only two deaf children in a hundred (compared with forty in a hundred among the general population) go on to college. Many deaf students write English as if it were a foreign language.

The empirical evidence of oralism's efficacy for daily functioning is likewise discouraging. With respect to speech, "[b]arely [ten] percent of oral students actually mastered intelligible speech." Even their teachers "[judge] the speech of two thirds of them to be hard to understand or unintelligible." One deaf superintendent of a school for the deaf estimates that "[t]he vast majority of deaf children will never develop intelligible speech for the general public." Speech acquisition is especially difficult for the prelingually deaf, who comprise

434. See generally LANE, supra note 363, at 139-72.
435. Given the rhetoric of the Milan Congress, one wonders if its participants would have voted to force cochlear implants upon the deaf, just as they forced oral methods upon the deaf community, and eugenicists forced sterilizations upon persons deemed undesirable. See supra notes 376-81, 407-09 and accompanying text. In this light, Deaf activists' polemics against implants have an historical basis, however extreme their conclusions may appear.
436. NEISSER, supra note 363, at 8.
437. See generally, LANE, supra note 363, at 119-20.
438. Dolnick, supra note 365, at 40.
439. NEISSER, supra note 363, at 8.
440. Dolnick, supra note 365, at 47-48 (describing results of an unspecified study).
441. Dolnick, supra note 365, at 47-48.
442. SCHEIN supra note 27, at 32.
approximately ninety-five percent of deaf American children. Lip reading's results are equally discouraging: "the average deaf person with a decade of practice [is] no better at lip-reading than a hearing person picked off the street." Lip reading poorly serves its deaf users because "the greatest aid to lip-reading is knowing how words sound." Absent such knowledge, "only [forty] percent of the sounds produced in the English language is visible on the lips." Hence, the rate of understanding for deaf children without residual hearing may be as low as five percent. In tests using simple sentences, deaf people recognize perhaps three or four words in every ten. Comprehension of the remainder depends upon "gathering meaning from context, from facial expression, and from guessing." Put together, emphasis on speech and lip reading generally hinders rather than helps language acquisition. By age five, deaf students in oral kindergarten programs learn "perhaps fifty words. At the same time, a child with normal hearing has a vocabulary of several thousand words." Numerous studies suggest that orally educated deaf never close this early gap; if anything, it widens. In contrast, deaf children exposed early to ASL—the ten percent "deaf of deaf"—fare much better. Just as non-deaf children of non-deaf parents begin language acquisition with nonsense babbling, so do deaf children of ASL-using deaf parents "babble" in sign. Their ASL acquisition then proceeds at a rate comparable to that of their hearing peers' acquisition of spoken language.

443. THE COMMISSION ON EDUCATION OF THE DEAF, supra note 418, at 15. Some speculate that oralism's heyday at the turn of the century may have stemmed from its relatively good prospects for success with that era's deaf population, which included many more postlingually deaf persons than does today's deaf population. See NEISSER, supra note 363, at 25. Even then, results did not reach the ideal of perfect speech. Neisser describes Mabel Bell's exhaustive work: she had "articulation lessons throughout childhood, . . . [was] sent to Germany to work with special tutors, and was Bell's private pupil for years." NEISSER, supra note 363, at 29. Bell was satisfied with the results, which enabled family and friends to understand his wife, but "her articulation was never considered good." NEISSER, supra note 363, at 29.


446. THE COMMISSION ON EDUCATION OF THE DEAF, supra note 418, at 15.

447. THE COMMISSION ON EDUCATION OF THE DEAF, supra note 418, at 15.


449. NEISSER, supra note 363, at 23.

450. NEISSER, supra note 363, at 8.


452. See Dolnick, supra note 365, at 40.

453. See Dolnick, supra note 365, at 40; see also NEISSER, supra note 363, at 8.
Anecdotal evidence demonstrates that an oral emphasis not only hinders language acquisition, but also hampers general education because the attempt to learn speech absorbs so much time. One deaf graduate of a leading oral school recalls "spending two weeks learning to say "guillotine" and that was what we learned about the French Revolution." Perhaps out of resentment, some Deaf describe their speech classes in bitter terms. "The emphasis was on English, and we were hit if we were caught talking with our hands. The speech teacher couldn't sign, and I used to hate having to touch her throat and neck, to learn the sounds to make, and smelling her breath." Even after all of this effort, "the majority of pre-lingually deaf students couldn't master speech or lip-reading . . . Consequently, they missed most of what was taught in the classroom, and, upon leaving school, entered a kind of underclass of the deaf."

Even those who have successfully mastered speech and lip reading do not necessarily find it efficacious. Instead, they use speech self-consciously. As for lip reading, they may find it exhausting. One skilled lip-reader explains: "even with peak conditions . . . good lighting, high energy level, and a person who articulates well, I'm still guessing at half of what I see on the lips." Given the empirical and anecdotal results of oralism, only two factors justify it. One factor is assimilation: manual communication marks its users as deaf, whereas oral communication enables the deaf to pass as non-deaf. This factor is a norm-centered proposition. The

454. See generally LANE, supra note 363, at 132-33 ("[m]any schools became, in effect, speech clinics"); Dolnick, supra note 365, at 48 ("deaf students were forced for hour upon hour to try to pronounce "English words they had never heard").

455. Solomon, supra note 27, at 41.

456. Dolnick, supra note 365, at 52 (quoting recollections of Patrick Graybill).

457. Michael D'Antonio, Sound & Fury, L.A. TIMES MAG., Nov. 21, 1993, at 44, 48; see also id. at 64 (reporting Deaf advocates' argument that "many students miss valuable school time struggling through speech therapy sessions).

458. See SCHEIN, supra note 27, at 33 (quoting one Deaf person as saying "speaking is like walking about in public naked").

459. See Dolnick, supra note 365, at 39.


461. Not all deaf are uncomfortable with oralism, and those who prefer it stress its value for assimilation with the hearing world. See, e.g., LEW GOLAN, READING BETWEEN THE LIPS (1995); HENRY KISOR, WHAT'S THAT PIG OUTDOORS (1990).

462. Of course, this advantage is more theoretical than real for most deaf persons. The reality is that most deaf speak differently from the non-deaf. Thus, Heather Whitestone has mastered speech, but radio "personality" Howard Stern imitates and ridicules her voice. Similarly, lip reading enables avoidance of sign, but it does not provide anything like full comprehension. See supra text accompanying notes 382-87.
other factor is integration: direct\(^{463}\) communication with the non-deaf who do not know any manual languages requires oral methods. This is both a norm-centered and a privileging proposition, which assumes that oral communication is the norm, and non-deaf use of manual communication would be special treatment of the deaf.

Functionality considerations throw both factors’ underpinnings into doubt. Assimilation offers nothing in the way of enhancing functionality; to the contrary, it impedes it.\(^ {464}\) Superficially, the integration factor enhances functionality, but this appearance is deceptive. Unlike ADA accommodations, oralism’s effects are not achieved through a change in the environment.\(^ {465}\) Instead, oralism’s effects are achieved solely through the efforts of the deaf person who uses speech and lip reading.\(^ {466}\) If they choose, the non-deaf participants in the exchange can assist the effort by speaking clearly, facing the deaf person, and keeping their faces uncovered.\(^ {467}\) The non-deaf participants may also choose to do nothing, and leave the work—and any comprehension problems—to the deaf participant. Indeed, the more assimilation and “passing” is the goal, the less is asked of the non-deaf, so as to minimize the deaf person’s difference. Thus, assimilation and efficacy are inversely related: the more assimilation is achieved, the greater the effort and potential loss of efficacy is required.

4. Assimilation’s Costs

The Deaf experience demonstrates that stamping out difference exacts a cost. This cost falls upon the non-deaf as well as the deaf. Oral communication methods are inefficient for all participants, both because they are time-consuming, and because they impede full communication.\(^ {468}\) Thus, hearing consumers count communication difficulties with

\(^{463}\) I use the term “direct” to distinguish deaf/non-deaf communication via interpreters.

\(^{464}\) See supra notes 438-60 and accompanying text.

\(^{465}\) See 29 C.F.R. app. § 1630 (1993) (EEOC guidelines for interpretation and application of the ADA) (describing accommodations as work environment or method changes that enable disabled individuals to enjoy equal employment opportunities).

\(^{466}\) As one president of an oral-based school said, “[i]t’s unlikely . . . that the rest of the world is going to learn sign language just to accommodate to the deaf. The deaf have to accommodate to the hearing.” NEISER, supra note 363, at 126.

\(^{467}\) See generally DOROTHY J. STEFFANIC, OFFICE OF PERSONNEL RESEARCH AND DEVELOPMENT, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, REASONABLE ACCOMMODATION FOR DEAF EMPLOYEES IN WHITE COLLAR JOBS 8-9 (Apr. 1982).

\(^{468}\) When Edward Dolnick interviewed Cheryl Heppner, a skilled lipreader who can speak, their “conversation ground to a halt every sentence or two.” Dolnick, supra note 365, at 39. Dolnick
deaf as a transaction cost, and will deal with the deaf “only if [they can] offer quality and price which [are] advantageous enough” to overshadow the costs of communication difficulties. 469 The total impact of the resulting discrimination and underemployment has been estimated to reduce deaf earnings “by almost [two-thirds].” 470

Oral methods also exact costs by reducing deaf persons’ productivity. Numerous studies suggest that deaf persons’ cognitive functioning is best in manual communication situations. 471 Although this notion of reduced cognitive functioning seems abstract, it can create dollars and cents losses. Such losses inure to employers as well as to employees, because a deaf employee forced to use oral methods generally will not be maximizing his or her effectiveness. This is not to say that the deaf are unproductive, or bad, employees; rather, the point is that a norm-centered policy of oral communication would preclude the deaf employee’s realization of his or her full potential.

These costs exact a heavy price for an approximation of normalcy. This bottom line is expressed strikingly in Lawrence Newsman’s allegorical depiction of a society that insists that blind persons read by using their “residual sight,” 472 rather than Braille:

> Which is more important, John kept asking himself: to assume an appearance of normalcy with ten percent vision that stumbles and staggers, OR to admit having a sight impairment, letting the world know it, and using braille to advance and ensure his place in that world. Which? Which? 473

“had great difficulty making out Heppner’s soft, high-pitched speech, and far more often than not [his] questions and comments were met only with her mouthed ‘Sorry.’ In frustration [they] resorted to typing on her computer.” Dolnick, supra note 365, at 39.


470. Id. at 102. Jacobs describes an economist’s 1972 study on the costs of deafness. Through a series of calculations, the economist concluded that “the average hearing worker could expect to earn $392,613 during his/her lifetime. Using the same figuring, he found that the average deaf employee could earn only $132,538 during his/her lifetime. Therefore, the cost of deafness is $260,075.” Id. (describing a study performed by Dr. John E. Weinrich). Of course, this picture of the economic costs of deafness is drawn from multiple causes, and not just the question of communication methods. Nonetheless, as Jacobs argues, communication methods pose the primary obstacle to deaf opportunity. Id. at 100.

471. See LANE, supra note 363, at 181-85 (asserting the advantages of bilingual ASL-English education); NEISSER, supra note 363, at 82-85, 92-93; SACKS, supra note 365, at 94-95, 112-13.

472. This phrase refers to oralists’ emphasis on use of “residual hearing,” augmented by hearing aids, lipreading, and speech, rather than the visual communication systems that obviate any need for hearing.

What of integration? Oral methods appear indispensable, despite their costs, because hearing people usually do not know sign. Therefore, Deaf insistence upon sign seemingly cuts short any prospect of communication. This calculation of sign's costs may be illusory. For one thing, sign language interpreters can be employed. More significantly, there is no inherent barrier to ASL literacy amongst the hearing. Indeed, this possibility is demonstrably real: an entire hearing and deaf community of sign language users once existed on Martha's Vineyard, where original settlement and subsequent marriage patterns produced a relatively high proportion of deaf residents.

On Martha's Vineyard, the deaf population's size made "a knowledge of the language ... a necessity." Most hearing Islanders learned sign language in childhood, and so became bilingual. "Hearing members of the community were so accustomed to using signs that the language found its way into discussions even when no deaf people were present." Perhaps because all Vineyarders used sign, manual communication imposed no stigma on its users. To the contrary, "deaf men and women [on the Island] ... were not handicapped, because no one perceived their deafness as a handicap." Moreover, deaf Vineyarders functioned on equal terms with their hearing counterparts. By economic measures, the deaf did as well as, or better, than their hearing counterparts.

B. Principles For Difference Analysis

If the ADA did not exist, and the deaf were a protected group under
Title VII, current difference analysis would force selection of assimilation over functionality. Employers who chose to do so could forbid the use of sign amongst their deaf employees, much as English-only rules survive scrutiny under Spun Steak's approach to cultural difference.\textsuperscript{481} Employers could even exclude deaf employees lacking hearing aids or cochlear implants, or terminate employees who refused to obtain these devices. After all, such policies would not be directed explicitly against the deaf; rather, they would be directed at deafness \textit{plus} lack of the desired norm. Under existing difference analysis, that approach would not violate Title VII.\textsuperscript{482}

Of course, employers who chose that route would hurt themselves. Even assuming that deaf workers were willing to forgo their "preference" for sign, these employees would be less functional than they would be if permitted to use sign. Even if the policy left the employer with deaf persons fully comfortable with oral methods, the employer would have reduced the size of its prospective labor pool, thereby driving up its wage costs.\textsuperscript{483} In this light, dispensing with norm-centered equality and permitting the use of sign would not privilege difference. To the contrary, it would simply be good business sense.

Seen in these terms, the Deaf culture model makes plain the deficiencies of difference analysis and the equality debate, with their themes of norm-centered equality and difference as privilege. At the same time, the Deaf culture model offers four principles for reconceptualizing difference analysis in a way that better realizes equality of opportunity, and better balances employer and employee interests. These four principles are: (1) mutability may be illusory; (2) forcing conformance to a norm upon holders of purportedly mutable characteristics may reduce their functionality; (3) far from working a one-sided "privilege," accommodation of difference will reduce assimilation’s costs for both employers and employees; and (4) difference only matters because of social artifice. The first two principles serve to reject the

\textsuperscript{481} Garcia v. Spun Steak, 13 F.3d 296 (9th Cir. 1993).

\textsuperscript{482} Cf. Tucker, supra note 418, at 272-74 (suggesting that the Deaf culture argument logically requires a Title VII approach that would withhold accommodation from those deaf who refuse cochlear implants).

\textsuperscript{483} Cf. Michael J. Zimmer et al., Cases and Materials on Employment Discrimination 30 (2d ed. 1988). "It is not clear how discrimination could long exist in a competitive model. An employer that discriminates . . . has artificially contracted its supply of available labor and therefore has tended to raise the price of labor it purchases." Id. Admittedly, this disincentive is more theoretical than real in an oversupplied labor market. In the deaf situation, chronic underemployment and unemployment might preclude any actual wage effect.
Willingham II test and its concomitant sex-plus analysis. The second two principles serve to replace current difference analysis with themes that realize equality of opportunity and an employee-employer balance.

1. Mutability May Be Illusory

Current difference analysis uses Willingham II’s concepts of mutability and fundamental rights to determine whether an employer’s policy violates Title VII. The sensitivity of this approach therefore depends—at least, in part—upon the accuracy of mutability determinations. The deaf experience suggests that such determinations may be inaccurate, especially when judges, like employers, evaluate difference in pathologizing, norm-centered terms. Moreover, the mutability test reinforces norm-centered thinking (and its illogic) by laying the blame, and the solutions, for difference at the feet of those who do not meet existing norms.

The results of such determinations are questionable. For example, cochlear implant technology permits the argument that deafness is mutable. Yet, this supposed mutability is hardly a simple change for the deaf; it requires an intrusive operation that can often fall short of real effectiveness. Similarly, judges deciding difference cases have assumed that hair straightening, weight reduction, infant weaning, and the use of a non-primary language is both easily achieved and desirable.

2. Forcing Conformance to a Norm May Reduce Functionality

Willingham II’s fundamental rights inquiry asks whether the employer’s policy requires employees to forgo a mere preference, so that a ruling for the employer treats the employee’s desire for difference as an unfair request for privileged treatment. The deaf experience teaches that this approach mistakenly assumes that “pathology” and “norms” are objectively defined categories, such that the dominant group modes of functioning are deemed best for everybody. As the oralists demonstrated, those who lack the experience of difference overestimate the value of norm-conforming, and underestimate the value of differentiated

484. See Tucker, supra note 418 (suggesting that a logical consequence of further cochlear implant advances would be a refusal of ADA accommodations for those Deaf who refuse implants); see also Jerome McCristal Culp, Jr., The Michael Jackson Pill: Equality, Race And Culture, 92 Mich. L. Rev. 2613 (1994) (hypothetical debate on whether equality problems can and should be solved by having African Americans take a pill that makes them white).

485. See Tucker, supra note 418, at 267-68.
functioning.

3. Assimilation's Costs Make Accommodation Desirable

In the employment context, the themes of norm-centered equality and difference as privilege exact costs upon all parties. The employer who refuses to "privilege" an employee's difference gains norm-conformance, but loses productivity. Assuming the employee is not entirely cut off from employment opportunity, the employee may suffer diminished evaluations, discipline, and discharge for the poor productivity, which may be blamed upon the employee rather than on the inadequate mode of functioning forced upon the employee.

4. Difference Matters Only Because of Social Artifice

The fourth Deaf culture principle suggests that norm-conformance is not worth the price employees and employers pay to obtain it. To the contrary, the value of the appearance is merely a self-perpetuating social construct. In the Deaf culture context, the advantage offered by oralism is that it permits— theoretically, at least— deaf integration with hearing society, by hiding deafness with an appearance of hearing. Not only is this advantage illusory for those deaf who cannot produce intelligible speech, but it also fails all deaf, because even the best lip readers cannot comprehend all that the non-deaf can hear.

This fourth Deaf culture principle echoes some equality theorists, who have recently argued that difference is "relational," and not intrinsic. In this view, "attributions of difference reflect choices by those in power about what characteristics should matter." The principle also parallels the well-established Title VII rule that customer preference generally cannot support a BFOQ defense, especially when that preference is a product of artifice rather than reality.

486. See generally supra notes 468-75 and accompanying text.
487. Martha Minow, Justice Engendered, in FOUNDATIONS, supra note 14, at 304; see generally Minow, supra note 22, at 128; cf. Goldman v. Weinberger, 475 U.S. 503, 513-21 (1986) (Brennan, J., dissenting) (finding military's refusal to permit serviceman to wear a yarmulke treats Christianity as a norm and irrationally differentiates yarmulkes from other religious articles).
488. See, e.g., Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993) (customer survey revealed merely lukewarm support for no beard policy); Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (rejecting employer's BFOQ defense of female-only flight attendant policy because the "necessity" of fulfilling customer expectations of an all-female attendant crew was created by the employer's own advertising campaign); cf. Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985) (grooming policies prompted by customer preferences are justifiable in a business

http://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss2/1
Deaf culture principles and Title VII recognize that appearance is valuable only because norm-centered social constructs make it so. As the Martha's Vineyard experience suggests, appearance ceases to matter once difference is depathologized. Instead of asking the deaf to attempt speech—much less obtain cochlear implants—hearing Vineyarders signed, and thought little of the fact that they did so. On Martha's Vineyard, sign was not a difference; rather, it was a part of daily life for both the non-deaf and deaf.489

V. APPLICATION OF NEW DIFFERENCE ANALYSIS THEMES: A PROPOSED APPROACH

The four Deaf culture principles compel rejection of the themes of norm-centered equality and difference as privilege. In their place, courts should read Title VII to achieve equality of opportunity, and appropriately balance employer and employee interests.490 If they do so, courts can approach difference cases in a manner that recognizes that policies directed at stereotyped, biological, or cultural differences may be discriminatory. They can also recognize that such policies may thwart the interests of all parties by reducing the functionality of affected employees. What follows is a practical Title VII test designed to meet these goals.

A plaintiff challenging an employer's norm-centered policy should establish the policy's effect on employee traits in one of the three difference areas. That is, the plaintiff's prima facie disparate treatment case491 should include a showing either that the policy in question explicitly discriminates against a statutory category, or discriminates against characteristics stereotypically, biologically, or culturally associated with a statutory category.

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489. Groce, supra note 475, at 56.
490. A judicial solution to the problem is preferable to a Congressional solution because the difficulties of difference analysis are more susceptible to case by case treatment than to an attempt to catalog covered differences in the statute itself. The PDA demonstrates the ultimate shortcomings of such an approach. See supra notes 154-81 and accompanying text.
491. I suggest disparate treatment analysis on the theory that policies directed at the three difference areas are directed at statutory categories; put another way, a disparate treatment approach recognizes that difference analysis poses a construction problem focused on the scope of Title VII's protected categories. Moreover, the approach I suggest requires a rather simple modification of the present scheme of proof of disparate treatment.
Once the plaintiff establishes this prima facie case, the burden of production should shift to the defendant, just as it does in current disparate treatment analysis. Under *Texas Dep’t of Community Affairs v. Burdine*[^492] and *St. Mary’s Honor Ctr. v. Hicks*,[^493] the employer may argue that its treatment of plaintiff was unrelated to its norm-centered policy.[^494] If the employer cannot meet this burden of production, then the case is necessarily one of mixed motives[^495] or discrimination.[^496]

In either case, the inquiry would proceed to a BFOQ analysis of the employer’s policy. As in current BFOQ analysis, the employer can justify a policy that is reasonably necessary to the normal operation of its particular business or enterprise.[^497] By the same token, an employer that cannot meet this BFOQ test will not be entitled to retain its policy. This should be the result even if the policy does not interfere with plaintiff’s functioning, for a discriminatory policy that cannot be justified as a BFOQ falls outside the bounds of Title VII’s balance of employer and employee interests.

In keeping with current BFOQ analysis, an employer who can meet the terms of this narrow defense has established that its policy is a legitimate business practice in the sense permitted by Title VII. Nonetheless, the BFOQ inquiry in a difference case should be modified to *additionally* inquire whether the employer’s policy hampers the employee’s functioning. This modification corrects the norm-centered distortions of current difference analysis, and parallels the Title VII principle that discrimination consists of practices that cut off employment opportunity.[^498]

Courts can undertake this modified inquiry by directly examining whether the policy at issue interferes with the plaintiff’s work perfor-

[^494]: Id. at 2747.
[^496]: If the defendant meets its burden, plaintiff would proceed to proof of pretext in the manner prescribed by the *Hicks* decision. In difference cases, that showing would presumably require a demonstration that the defendant’s articulation of a non-difference oriented reason for its actions is untrue.
mance, thus making it "more difficult to do the job." In the alternative, courts may inquire whether there is a "reasonable but less discriminatory alternative" to the employer's policy. This second prong would essentially graft together business necessity and reasonable accommodation concepts. For example, the employer in Elie would be required to have another floor worker assist plaintiff on the occasions during the remaining four months of her pregnancy that required heavy lifting.

This BFOQ modification benefits employers as well as employees, by incorporating into differences analysis a set of principles that respect difference in a way that serves all parties' interests in the best possible employee performance. Even with respect to non-functional differences—such as hair length—this approach makes sense. Usually, employers implement policies directed at non-functional differences for the sake of an image. Difference analysis has permitted employers to do this for two reasons. First, norm-centered distortions have persuaded judges that the practices are not discriminatory. Second, norm-centered distortions have persuaded judges and businesses that such policies make business sense. Both reasons heavily rely on the supposition that adherence to norms really matter. As the deaf experience teaches, that supposition is false.

VI. CONCLUSION

Title VII's paramount goals are equality of opportunity and an appropriate balance of employee rights with employers' legitimate interests. In Title VII cases involving policies directed at stereotyped, biological, and cultural differences, the themes of norm-centered equality and difference as privilege have thwarted these goals. The long-debated equal and special treatment equality models have not solved the problems created by these difference analysis themes. To the contrary, they ignore the full scope of difference analysis, and inadequately address its themes. The cultural experience of the Deaf yields principles that replace the

499. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring) (discriminatory conduct "unreasonably interferes" with work performance, altering work conditions so as to "make it more difficult to do the job").


501. If they had deemed the policies discriminatory, most would have fallen under the general rule that customer preferences cannot be used as a BFOQ. See Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981).

distorting themes of difference analysis with themes that reflect and further Title VII's goals of equality of opportunity and balanced employee and employer interests. Using Deaf culture principles, courts can apply disparate treatment analysis and a modified BFOQ test to realize Title VII's goals.