DOES MY SPANISH BOTHER YOU?: LANGUAGE BASED DISCRIMINATION AS A PRETEXT FOR NATIONAL ORIGIN DISCRIMINATION

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I. INTRODUCTION

Consider the following scenario.[1] Eduardo Juarez was born in Mexico and raised in the United States. His parents have reared him speaking English and Spanish. As a consequence, Mr. Juarez, who is now a U.S. citizen, speaks with a noticeable Spanish accent. Mr. Juarez applied for and was awarded a branch manager position by a social service agency of the state in which he resides. The position he filled had been vacant for a long time due to an alleged lack of qualified applicants. Mr. Juarez signed an employment contract and began working. Shortly thereafter, Mr. Juarez encouraged his supervisors to enforce and comply with a state statute[2] which required that a bilingual staff person be hired to assist non-English speaking clients. His requests were denied. He was further instructed in the presence of witnesses to "get off the Hispanic thing" and to "accept the fact that Hispanic services are not a priority in this state."

Despite this disappointment, all was going well for Mr. Juarez. However, before expiration of his employment probationary period, Mr. Juarez was fired and within two weeks was replaced with a black supervisor. The State gave no reason for his termination and it claimed that none is warranted. Mr. Juarez claims the reasons for his termination are that he is Mexican-American[3] and that he

1. Recently, an actual case similar to the hypothetical I present, developed at Oregon state. This paper does not represent or intend to portray any of the parties involved in that case. *See Herald And News*, July 1, 1988, at 2.

2. The scenario is based on a statute like OR. REV. STAT. § 411.062(1) (1987) which states:

> "When the caseload of a division branch office consists of 35 or more non-English speaking households which share the same language, the division shall provide at that branch office written materials in that language and access to a bilingual assistance worker or caseworker fluent in both that language and English."

3. "The term 'Mexican-American' refers to persons living in the United States who are themselves of Mexican origin or whose parents or more remote ancestors came

speaks with a Spanish accent. He also claims that he is legally seeking to promote the interests of a national origin group. He further claims that the reasons for his discharge violate his constitutional and civil rights.

Does Mr. Juarez have a cause of action under either the Civil Rights Act of 1964 (Civil Rights Act)[4] or under 42 U.S.C. § 1983?[5] If both, is one route preferable over the other?[6] In attempting to answer these questions, this work will briefly look at the historical background of the Civil Rights Act and § 1983. Second, it will consider the advantages of using one approach over the other. Third, it will discuss the required elements for a prima facie case under Title VII and § 1983 and whether our facts meet those requirements. Finally, it will conclude that the preference is to pursue a claim under § 1983 and that there are sufficient facts to constitute a cause of action in Mr. Juarez' case. This work suggests that language is frequently used as a pretext for discriminating upon the basis of national origin. Thus, judicially recognized protection against such discrimination is not only desirable but warranted.

II. HISTORICAL BACKGROUND OF CIVIL RIGHTS ACT AND § 1983

A. *The Civil Rights Act of 1964.*

Ten years after *Brown v. Bd. of Education* and after three years

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to the United States from Mexico or whose antecedents resided in those parts of the Southwestern United States which were once part of the Mexican Nation. Others are [Chicano], 'Spanish-American', 'Latin', and 'Latin-American'." *U.S. Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest*, (1970).

4. 42 U.S.C. § 2000e-2(a) (1982) (commonly referred to as Title VII of the Civil Rights Act of 1964) states in relevant part:

> It shall be an unlawful employment practice for an employer-
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . national origin.

5. 42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

6. At this point, one must also ascertain exactly what it is that Mr. Juarez is asserting. It may be that he is claiming a fourteenth amendment argument of unequal protection of the laws. On the other hand, he may claim that as a member of a protected class under Title VII (national origin), he has been discriminated against.

of civil rights protests against the continued maintenance of segregated facilities, Congress enacted the Civil Rights Act of 1964. The Act banned racial discrimination in areas including public accommodations, employment, voting, education and other federally funded activities. The prohibition against racial bias in employment is included in Title VII of the 1964 Act.

Prior to Title VII, most complaints were handled by administrative agencies that viewed themselves as mediators between the parties. "Agencies during this period simply failed to act as law enforcement agencies enforcing the legal rights of [minorities]. For these reasons, the public policy against discrimination, though established well before Title VII in a variety of state laws, executive orders, and court decisions, remained unenforced."[7]

The Civil Rights Act became the first major piece of federal legislation designed to prevent discriminatory employment practices. The protection against such discriminatory practices created enforceable federal substantive rights. Among these was the right to be employed free from discrimination based on national origin.[8]

The plain purpose of Congress in Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[9] It is clear that Congress originally viewed Title VII as a ban on overt discriminatory practices and not on disparate effect. In 1970 the Senate noted that:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Employment discrimination, as viewed today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority in lines of progression, perpetuation of the present effects of pre-Act discriminatory practices through various institutional devices, and testing and validation requirements.[10]

Today, Title VII covers overt discriminatory practices as well as practices that result in disparate effect.

Title VII also created the Equal Employment Opportunity Commission (EEOC) and conferred power upon it to investigate

7. Bell, RACE, RACISM AND AMERICAN LAW, 612-13 (2nd ed. 1980).
8. 42 U.S.C. § 2000e-2 (1982).
9. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).
10. S. Rep. No. 1137, 91st Cong., 2d Sess. 4 (1970), the Senate Committee on Labor and Public Welfare.

claims and promote voluntary conciliation.[11] Sixty days after resorting to state procedures, complainants may use Title VII regardless of a state proceeding's status.[12] Originally, it was thought that since employees had access to federal courts for Fourteenth Amendment protection, there was no need to apply Title VII to state and local governments.[13] In 1972 Congress amended the Act and provided that remedies available to private sector employees should extend to state and local government employees.[14] As a result, all "employees subject to the civil service laws of a state government, governmental agency or political subdivision"[15] are now protected.

B. *Section 1983*

Section 1983 was originally enacted because some states were unwilling or unable to protect the federal rights of all their citizens.[16] It was one of six sections enacted as the Ku Klux Act of 1871.[17] One commentator observes that upon signing the Act, some of the legislators may have believed they were enacting emergency legislation, intended to cope only with the immediate crisis of the Ku Klux Klan's reign of terror in the South.[18] If such was the case, "[t]hey could not have been more wrong."[19]

It is interesting to note that though the bill was intended to counteract the activities of the Ku Klux Klan,[20] section 1 did not

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11. 42 U.S.C. § 2000e-4 and § 2000e-5(b) (1982).

12. 42 U.S.C. § 2000e-5(c) (1982).

13. Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. INDUS. & COM. L. REV. 473, 493 (1966).

14. 42 U.S.C. § 2000e(a) (1982).

15. 42 U.S.C. § 2000e(f) (1982).

16. *See* Monroe v. Pape, 365 U.S. 167 (1961):

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. *Id.* at 180.

17. Act of Apr. 20, 1871, CH.22, 17 Stat. 13.

18. Mathias, *Weeding the Civil Rights Garden: Reform of 42 U.S.C. Section 1983*, 1983 DET. C.L. REV. 1343 (1983).

19. *Id.*

20. The bill was drafted in response to a now famous message from President Grant to Congress on March 23, 1871:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. . . .That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. Cong. Globe, 42d Cong., 1st Sess. 244 (1871).

reach the Klan at all. Sections 2 through 6 deal with Klan-type issues, whereas section 1 prohibited conduct "under color of law."[21] Thus, it is possible Congress did not view section 1 as part of the solution to the Klan problem.[22] This point is significant "[b]ecause it implies that many of Congress' reasons for enacting the 1871 Act, particularly the states' failure to provide equal protection, are irrelevant to section 1."[23]

In our present case one could argue that Congress intentionally worded section 1 so that it would be read and interpreted to be expansive and not limiting in nature. This means that all parties would be entitled to a remedy if a deprivation of their constitutional rights was caused by an official's abuse of his position.[24] Thus, Mr. Juarez would be entitled to a remedy if he satisfies the prima facie case, even though his action is not related to the activities of the Ku Klux Klan.

III. ANALYSIS AND COMPARISON OF POSSIBLE APPROACHES

A. *The Title VII Prima Facie Case*

Regardless of the form of discrimination alleged, the complainant in a Title VII action has the initial burden of proof.[25] "He must demonstrate that (1) an employer, (2) discriminated against a protected class,[26] (3) within a prohibited category[27] recognized under Title VII, and (4) there was a connection between the protected class and the prohibited category."[28] In establishing a prima facie case,[29] the plaintiff may show discrimination by either overt discriminatory practices or by discriminatory effect.[30] The burden of proof then shifts to the employer once the prima facie case is established. The employer must articulate some legitimate nondiscriminatory reason for the practice.

For purposes of this paper, a disparate treatment analysis is where the employer has treated a person less favorably than others

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21. Act of Apr. 20, 1871, CH.22, 17 Stat. 13.

22. *See, e.g., Monroe*, 365 U.S. 167, (indicating that "Congress. . . meant to give a remedy to parties deprived of constitutional rights. . . by an official's abuse of his position.") *Id.* at 172.

23. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 549 (1985) [hereinafter *Section 1983 Liability*].

24. *Monroe*, 365 U.S. 167.

25. *McDonnell Douglas Corp.*, 411 U.S. at 802.

26. National origin is one such protected class and within a prohibited category. *see supra*, note 4.

27. *See supra*, note 4.

28. Aniol, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MARSHALL L. REV. 667, 670 (1982).

29. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981) (prima facie case in Title VII context establishes mandatory but rebuttable presumption).

30. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

because of their protected class characteristics such as a Spanish accent. Although the focus of this analysis is on discriminatory intent, the employee is not required to prove intent directly. Rather, he must provide evidence which would lead to an inference of the employer's illegally motivated actions.[31] In this regard, courts have allowed comparative evidence based on treatment of similarly situated persons because "direct evidence of discrimination . . . is virtually impossible to produce."[32] Thus, the inference of illegally motivated actions would be enough for the prima facie case.

In *Griggs v. Duke Power Co.*,[33] the United States Supreme Court formulated the adverse impact test for discrimination. Practices which were neutral on their face could not be continued or maintained if they operated to "freeze" the status quo of prior discriminatory practices.[34] Proof of intent was not necessary. The *Griggs* case only required a showing that the practices impacted adversely upon a protected class. Thus, even in the absence of discriminatory intent, facially neutral practices which had an adverse impact on equal employment opportunity would not be tolerated.[35]

1. *Present Facts Under Title VII*

Assuming his desire is prove a Title VII claim, Mr. Juarez will likely have no problem establishing that he is within a protected class[36] and that the alleged act was committed by his employer.[37] Here, our facts show that Mr. Juarez was born in Mexico[38] and that he has a noticeable Spanish accent. His employer was an agency of the state in which he resided.[39] Thus, Mr. Juarez' circumstances

31. "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." International Brd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

32. Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 399 (D. Or. 1970), *aff'd*, 492 F.2d 292 (9th Cir. 1974).

33. 401 U.S. 424.

34. *Id.* at 430.

35. *Id.* at 432.

36. Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, (1973) ("We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment.") *Id.* at 197. (citing Hernandez v. Texas, 347 U.S. 475 (1954). *See also*, United States v. Texas Education Agency, 467 F.2d 848 (Cir.5 1972) (en banc); Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (Cir.5 1972) (en banc); Alvarado v. El Paso Independent School Dist., 445 F.2d 1011 (Cir.5 1971); Soria v. Oxnard School Dist., 328 F. Supp. 155 (CD Cal. 1971); Romero v. Weakley, 226 F.2d 399 (Cir.9 1955).

37. It is not uncommon for an employer to offer the hiring of one national origin group member to rebut or preclude an inference of discriminatory motive with respect to another. Employers usually undertake such acts realizing that intent is often difficult to prove or lacking altogether. *See generally*, Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

38. *See* 42 U.S.C. § 2000e-2, 3 (1982) (race and national origin are protected classes).

39. *See* 42 U.S.C. § 2000e (1982) (actions may be brought against an employer, employment agency or labor organization).

satisfy the first two elements. His main hurdle then, is to show that as a Mexican American, he was discharged[40] because of his national origin and that there was a causal nexus between the discharge and his national origin.

The correlation between being Hispanic (and in Mr. Juarez' case being one who advocates the interests of Hispanics) and being discharged is the most difficult element to prove. In order to establish this last requirement, Mr. Juarez may begin by presenting overall data showing under-employment of Hispanics in his state. This would entail compiling and presenting data not only of Spanish-surnamed persons employed by the State but more specifically, a designation of those who are bilingual in English and Spanish. Of course, if the State itself has raised basic questions about its own practices, the data showing disproportionate representation will carry more weight.[41]

Related to the question of how many Hispanics are employed, is how the State assures their bilinguality. It does little good for the Spanish-speaking client to face a State employee who cannot even speak conversational Spanish. If each agency branch is forced to accept an individual's word for his or her level of proficiency, in his or her second language, then the requirement of the statute[42] amounts to no requirement at all. There must be a standardization of the proficiency criteria throughout the state system.

An additional way for Mr. Juarez to bolster the "causal nexus" requirement is to show that a specific practice contributed to the discriminatory discharge. If, for example, Mr. Juarez had been required to sign a contract which no other branch manager had to sign or agree to in order to get hired, such a fact would buttress his case. This forces the State to rebut a specific claim and justify by a bona fide occupational qualification (BFOQ)[43] or business necessity defense the specified action.

In Mr. Juarez' case, it will be difficult for the State to show that the discharge was reasonably necessary to the normal operation of the agency. Inasmuch as our facts show, "all was going well for Mr. Juarez". There is no indication that his religion, gender, or national origin was impeding the operation of the agency. It was only his supervisor that advised him to "get off the Hispanic thing!"

This argument does not focus on the central issue, however. The comments of Mr. Juarez' supervisor are an overt act, but it is

40. *See* 42 U.S.C. § 2000e-2(a)(1) (1982).

41. *See, e.g.*, Dept. of Human Res. letter to [Oregon] Governor's Welfare Reform Task Force, June 16, 1988. "The staff of the [agency] branch including supervisors did not recognize the special needs of minority communities including the very serious problem created by our inability to provide Spanish language services." *Id.* at 1.

42. Or. Rev. Stat. § 411.062 (1987).

43. *See infra*, note 53 and accompanying text.

not the act in question. Here, that specific act is the discharge of Mr. Juarez. Granted, the State may and does treat people differently or disparately. That is not unlawful. It becomes unlawful when the form of discrimination is constitutionally or statutorily forbidden. Thus, the State could conceivably admit discrimination and then try to articulate some legitimate, nondiscriminatory reason for the employment practice,[44] but success is unlikely. It is generally agreed that the BFOQ exception is limited to the rebuttal of an overt discriminatory act while the business necessity argument covers covert discriminatory action.[45] The State's overt discriminatory discharge of Mr. Juarez in the present case cannot be said to be "bona fide" in any sense because it was based on his national origin only. It therefore, cannot be supported by the claim that it is an occupational qualification since there is no proof that one must be non-Hispanic to do the job. Consequently, the State is not likely to prevail on a BFOQ defense.

Mr. Juarez may choose to prove that the discharge had a disparate impact on him.[46] He may attempt to accomplish such showing by demonstrating employer prejudice based on distinctively foreign characteristics such as language accent.[47] Such claims, however, are normally pursued on behalf of an entire class and usually not for a single individual.

One could argue, as the State is likely to do in this case, that Mr. Juarez is really putting forth an equal protection argument based on the Constitution's fourteenth amendment.[48] This, of course, requires Mr. Juarez to show that the State had a discriminatory purpose in terminating his employment.[49] This difference in standards of proof between Title VII and Fourteenth Amendment claims has not gone unnoticed by the Court.[50] One commentator observed that "In providing a statutory burden of proof that was

44. Bd. of Trustees of Keene State College, 439 U.S. 24 (1978).

45. *See generally*, McGrew & Jonson, *How to Defend an Employment Discrimination Case*, 25 PRAC. LAW. Jan. 15, 1979, at 13.

46. Griggs, 401 U.S. 424, 432 (1971).

47. *See*, Note, Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1165 n.5 (1985):

> Even the employer whose animus is directed at ancestral origin per se might rely upon national origin-linked characteristics to give effect to his feelings. Given a clear statutory prohibition against discrimination on the basis of national origin, he is unlikely to question job applicants directly about their ancestry. . . . Instead, he might discern an applicant's nationality on the basis of proxies such as surname, accent, dress, or any number of other traits that identify a particular ancestral origin. Thus, an implicit "no Mexican-Americans allowed" rule might be administered through a selection process focusing on characteristic manifestations of Mexican origin, such as a Spanish accent.

48. U.S. CONST. Amend. XIV § 1 "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

49. Washington v. Davis, 426 U.S. 229, 239 (1976).

50. Oregon v. Mitchell 400 U.S. 112 (1970).

lighter than one imposed by the Constitution, Congress broadened the enforcement of equal employment opportunity."[51] However, for our purposes, since the Supreme Court itself has not reconciled the conflict, we will proceed with the proof required only in a Title VII claim.[52]

2. *Rebutting the Prima Facie Case*

Various means of rebuttal are available to an employer who faces a prima facie case against him. One of these addresses the disparate treatment theory. Under the federal statute, an employer may show that the alleged disparate treatment is the result of a bona fide occupational qualification (BFOQ), which is reasonably necessary to conduct his particular business.[53] Though this may result in a form of discrimination in some situations,[54] an employer must still articulate some legitimate, nondiscriminatory reason for the employment practice.[55] For example, an employer may use employment tests with an exclusionary effect on minorities where the tests bear a demonstrated relationship to successful performance of the jobs for which they were used. An employer may also reject an employee for the employee's participation in unlawful conduct against it.[56]

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51. Jacobs, *A Constitutional Route to Discriminatory Impact Statutory Liability for State and Local Government Employees: All Roads Lead to Rome*, 41 OHIO ST. L.J. 301, 328 (1980).

52. A majority of Supreme Court justices now support the proposition that the "normative content of a constitutional provision is the same for both Congress and the Court"; consequently, the impact standard under Title VII and the holding in Washington v. Davis . . . , conflict as to state and local government employers: "Only one of the two theories - Washington or [impact under Title VII] - can prevail, for the two are mutually exclusive." Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 573 n.148 (1977).

53. 42 U.S.C. § 2000e-2(e)(1) (1982) provides that:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

54. 29 C.F.R. § 1606.1 (1980) provides guidelines on national origin discrimination.

> "The Commission defines national origin discrimination broadly as including . . . the denial of equal employment opportunity because . . . an individual has the physical, cultural or linguistic characteristics of a national group. The Commission will examine with particular concern charges alleging that individuals . . . have been denied equal opportunity for reasons which are grounded in national origin considerations, such as . . . (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; . . . *Id.* The exception that national origin may be a BFOQ shall be strictly construed. *Id.* at § 1606.(4).

55. McDonnell Douglas Corp., 411 U.S. at 802; Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

56. McDonnell Douglas Corp., 411 U.S. at 803.

Another defense which has been formulated in the courts is the business necessity defense. It is comprised of two elements. First, there must be proof that the practice is job-related. Second, a determination must be made whether a discriminatory but job-related practice is necessary to the safe and efficient operation of that business.[57]

This defense differs from a BFOQ defense in that the business purpose must be compelling to override any racial impact. "It should go without saying that a practice is hardly "necessary" if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory."[58]

In the present case the State may assert that the discharge was in fact discriminatory but that removal of Mr. Juarez was necessary to the safe and efficient operation of the state agency. For example, the State may claim that Mr. Juarez engaged in inappropriate behavior with staff by promoting Hispanic interests. It could further claim that such behavior caused him to be ineffective in his position.

The State could also charge Mr. Juarez of being unable or unwilling to fully and faithfully perform duties of his position satisfactorily. Furthermore, the State may contend that Mr. Juarez failed to follow the chain of command in the agency. These examples of possible charges, however, are little more than mere conclusions.

In order for the State to succeed, it must provide concrete examples of conduct of Mr. Juarez affecting his job performance curable only by discharge. The above-cited examples must show that the alleged discriminatory discharge bore a "demonstrable relationship to successful performance of the jobs for which it was used."[59] Granted, the State may cite Mr. Juarez as being a "thorn in their side" or a "whistle-blower" with nothing substantial to blow about. Nonetheless, at least one court has said that inconvenience, additional expense, or a certain amount of disruption do not add up to business necessity.[60]

In order for a business necessity defense to stand, "[t]he challenged practice must effectively carry out the business purpose it is alleged to serve," and "[t]here must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it with a lesser differential racial impact."[61] Consequently, it is difficult to understand why the state would have to fire Mr. Juarez in order for the agency to run smoothly. Both sides, of course, may bring forth witnesses to testify

57. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).
58. *Id.* at 798 n.7.
59. Griggs, 401 U.S. 424, 431.
60. Robinson, 444 F.2d 791.
61. *Id.* at 798.

on their behalf. The likely result is that there will become apparent alternative ways of having handled Mr. Juarez' specific situation. The State's presumed failure to employ any methods to have resolved the matter may be to the State's detriment.[62] Still, the business necessity defense remains a better option than a BFOQ defense under the present facts thus far. It is a better option because the State does not really have a burden of proof in rebuttal, but rather a burden of producing evidence in justification of the discharge. The difference is that it is easier to produce evidence that, although not strong enough to rebut a prima facie case, will suffice to justify a discharge.

Mr. Juarez has an additional consideration at this stage of the trial. The State may also present evidence showing that even if the court concludes that an unlawful discriminatory discharge has occurred, affirmative and monetary relief are not appropriate.[63] This is because Mr. Juarez was a probationary employee and as such the State may terminate his employment at will. The State may also point out that Mr. Juarez may have been discharged, even absent discrimination. The answer to that suggestion is simply that in our given facts, there is no indication, but for the discharge, that Mr. Juarez would not remain on the job indefinitely.

3. *Proving Pretext*

The final shifting of the burden of proof, after the State's rebuttal, is upon Mr. Juarez. He then has the opportunity to prove that the employer's practice and the reason given for it are in fact a mere pretext for unlawful discrimination.[64] Since the discharge was not facially discriminatory, Mr. Juarez has two ways to prove pretext. He may show pretext by 1) directly persuading the court that a discriminatory reason motivated the State or 2) showing that the State's explanation is not a believable one.

There are various ways in which Mr. Juarez may proceed. First, he may show that white employees are not discharged for promoting the interests of white people as he was for promoting Hispanics' interests. For example, he may be able to cite instances where white branch managers were not fired for defending the rights of poor black people. Clearly, a less discriminatory alternative to discharge could have been utilized in Mr. Juarez' case. Here, the showing of a less discriminatory alternative "would be evidence that the [State] was using its [discharge] merely as a pretext for

62. Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

63. *See* Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976).

64. Texas Department of Community Affairs, 450 U.S. 248, 253. *See also*, McDonnell Douglas Corp., 411 U.S. 792, 805.

discrimination."[65]

Second, Mr. Juarez may claim that his tenure with the agency was "under a microscope" all the while he was employed by the state. He may further claim that differences in his language and other cultural characteristics were used as a "fulcrum for discrimination."[66] The distinction would be that other white employees were not treated as he was while they were on probation. One way to show difference in treatment is to prove that his employment contract was unique in a way that imposed distinct requirements upon him. Thus, the discharge was discriminatory against him because no other branch manager had to sign such a unique employment contract solely because of his Spanish-speaking background. Such a class clearly falls within the boundaries of Title VII.[67]

Third, the State ignored Mr. Juarez' legitimate requests to address and respect his clients' and his own civil rights. Our facts show that Mr. Juarez was encouraging his supervisors to enforce existing law. He was not proposing a new program for the State. This is consistent with the Supreme Court's opinion that "Title VII prohibits [the State] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."[68]

Lastly, Mr. Juarez may present evidence to show that the State's general policy and practice with respect to Hispanics is discriminatory.[69] This evidence may include past incidents where other Hispanic branch managers have been fired for promoting Hispanic concerns. If Mr. Juarez can show disparate treatment in any of these or other ways, between Hispanics and others similarly situated, there is a reasonable inference that national origin was a factor in the state's decision.[70] This would be enough to carry his burden of proof for the prima facie case.

B. *Prima Facie Case Under § 1983 Claim*

Under § 1983 an action may be maintained against 1) every person who, 2) acting under color of 3) any statute, ordinance, regulation, custom, or usage of any State, 4) subjects or causes to be subjected another person to the deprivation 5) of any rights, privi-

65. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

66. Garcia v. Gloor, 618 F.2d 264, 270, *reh'g denied en banc*, 625 F.2d 1016 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

67. Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 8 (E.D. Pa. 1975).

68. Furnco, 438 U.S. at 577-78.

69. *See generally*, McDonnell Douglas Corp., 411 U.S. 792.

70. *See, e.g.*, Hernandez v. Erlenbusch, 368 F.Supp. 752 (D. Or. 1973) (where tavern owner implemented English only rule against all customers, there was patent discrimination against Mexican-Americans who made up about one fourth of clientele).

leges or immunities secured by the Constitution and laws.[71] To address all these elements is beyond the scope of this work, suffice to say that the Supreme Court has labored long and hard over all of them. Unfortunately, much confusion remains throughout the jurisdictions. Because the focus of this paper is "national origin", concentration will be directed to the fifth element of "rights, privileges or immunities secured by the Constitution and laws". As in a Civil Rights Act claim, a plaintiff in a § 1983 action must prove a prima facie case in order to shift the burden upon the defendant to show a justifiable reason for his conduct. Since deterrence is one of the aims of § 1983,[72] the emphasis in the analysis of a prima facie case is therefore properly on the state of mind of the defendant.

Unfortunately, the statute does not state a requisite state of mind or culpability.[73] The only requirements are proof of deprivation of a constitutional or federal right under § 1983 and a showing that it was caused by a person acting under color of law.[74] In order for the State to have caused a deprivation of a right, the State must have sanctioned the act of discharge through its official policy, or if the discharge was pursuant to a governmental "custom", even if such custom was not part of the official policy.[75] This would include acts by an state employee even though the employee has committed an unauthorized act. If Mr. Juarez' superior can be shown to have executed or acted pursuant to official state policy, then the State can be said to have caused the deprivation.

The recent Supreme Court decisions in *Daniels v. Williams*[76] and *Davidson v. Cannon*[77] suggest that the Court is willing to narrow what constitutes a prima facie case in civil rights actions. However, "the Court has not defined the state of mind for most constitutional torts and the immunity doctrines remain overprotective of public officials in a cause of action aimed at official abuse."[78]

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71. 42 U.S.C. § 1983 (1982).

72. Owen v. City of Independence, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation . . . but to serve as a deterrent against future constitutional deprivations, as well.")

73. 42 U.S.C. § 1983 (1982).

74. *See generally*, Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533, 551 (1978).

75. Monell v. Dept. of Social Servs., 436 U.S. 658, 690-91 (1978).

76. 474 U.S. 327, 329-30 (1986) ("[W]e concluded that § 1983 . . . contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right . . . . ; [a]nd depending on the right, merely negligent conduct may not be enough to state a claim.")

77. 474 U.S. 344, 347-348 (1986) (the State's lack of due care by prison officials, while leading to serious injuries, simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent).

78. McCann, The Interrelationship of Immunity and the *Prima Facie* case in Section 1983 and Bivens Actions. 21 GONZ. L. REV. 117, 142 (1985-86).

1. *Present Facts Under § 1983*

After evaluating his chances for success under a Title VII claim such as discrimination based on national origin, Mr. Juarez may choose to additionally claim a deprivation of equal protection of the law. It is generally accepted that Congress did not intend Title VII to preempt any preexisting remedies that the State and government employees enjoy.[79] Thus, Mr. Juarez may proceed with a suit to redress discrimination that violates the Constitution or preexisting statutes even if Title VII also prohibits such discrimination.[80]

Despite the Court's enunciation of the "plain terms of § 1983",[81] there have been other judicial requirements added to the plaintiff's case. Indeed, "it is hard to imagine a plaintiff's lawyer who would initiate a section 1983 suit without also being prepared to prove that the defendant is subject to suit under the statute, that the plaintiff was in fact injured by the deprivation, and that the deprivation is the type to which section 1983 applies."[82]

The first requirement for Mr. Juarez under § 1983 is to show that his supervisor acted under color of law in depriving Mr. Juarez of his federal right. Mr. Juarez should argue that the federal right of equal protection of the law was denied him by his supervisor who was acting on behalf of the State. He may even want to suggest that his supervisor's conduct rose to the level of a conspiracy to discharge him. By showing that his supervisor was acting, unlawfully or not, with the knowledge and consent of high ranking state officials, Mr. Juarez will satisfy the state action requirement and the color of law requirement.[83] This "joint activity" rule was first announced in a criminal case[84] but has been applied in a § 1983 setting.[85]

It would be wise for Mr. Juarez not to seek protection from the

79. Storey v. Board of Regents of the Univ. of Wis. System, 600 F. Supp. 838, 840 (W.D. Wis. 1985).

80. *See, e.g.*, Trigg v. Fort Wayne Community Schools, 766 F.2d 299, 302 (7th Cir. 1985) (where the court allowed a § 1983 and Title VII claim for race and sex discrimination); *see also*, Day v. Wayne County Board of Auditors, 749 F.2d 1199, 1205 (6th Cir. 1984) (both types of actions are possible when the claim is based on a constitutional violation).

81. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

82. Mahoney, *The Prima Facie Section 1983 Case*, 14 THE URBAN LAWYER 131, 132 (1982).

83. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

84. United States v. Price, 383 U.S. 787 (1966). Joint activity is where:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of state law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. *Id.* at 794.

85. Adickes, 398 U.S. at 152.

purely private conduct of his supervisor because the statute clearly was not drafted to address that concern.[86] However, there is an alternative theory available to him. Mr. Juarez may assert that his supervisor discriminated under color of a custom of the community. If he can show that his discharge "was motivated by [a] state-enforced custom, [he] will have made out a claim under § 1983."[87] Thus the Court seems to be saying that an act motivated by a compelling state law or custom is performed under color of law.[88]

With respect to "color of law", § 1983 differs substantially from Title VII. This is because nowhere in Title VII is there a requirement for the defendant to have acted under color of law.[89]

Next, Mr. Juarez must address the equal protection claim. This claim is clearly within the bounds of § 1983 because it involves a constitutional right.[90] At this point, however, new questions present themselves: For example, can Mr. Juarez assert a federal statutory right under § 1983? Secondly, can the asserted right be a right created by Title VII?

The answer to the first question is yes. In *Maine v. Thiboutot*, the Supreme Court held that § 1983 protects statutory as well as constitutional rights.[91] This means that Mr. Juarez may properly plead under § 1983 that he was deprived of a federal statutory right.

The answer to the second question is a qualified yes. Mr. Juarez is likely to be allowed to plead discrimination based on national origin[92] if at the same time he claims the discrimination resulted from unequal treatment.[93] The unequal treatment claim would invoke protection under the Fourteenth Amendment.

Using this theory, Mr. Juarez faces the classic Fourteenth Amendment argument of unequal protection and the burden to prove that the State acted with discriminatory intent in discharging him.[94] He must show more than merely that the State was aware of the consequences in discharging him.[95] He must show that the State "selected or reaffirmed a particular course of action at least in

86. *See, e.g.*, Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

87. Adickes, 398 U.S. at 174.

88. Zagrans, *Section 1983 Liability*, 71 VA. L. REV. 499, 567 (1985).

89. Gomez, 446 U.S. at 640, (Only two allegations are required in a § 1983 action: 1) plaintiff must allege deprivation of a federal right and 2) that the person who has deprived him acted under color of state law).

90. Hagans v. Lavine, 415 U.S. 528, 535 (1974).

91. 448 U.S. 1, 9 (1980).

92. 42 U.S.C. § 2000e-2 (1982).

93. *See*, Hamilton v. Rodgers, 783 F.2d 1306 (1986); Lewis v. Univ. of Pittsburgh, 725 F.2d 910 (1983).

94. Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229, 239-245 (1976) (both of these equal protection clause cases required a demonstration of discriminatory purpose or intent).

95. Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group."[96] Here, Mr. Juarez may assert that he was discharged "because of" of his Hispanic background and beliefs, and not merely "in spite of" the fact that he was Hispanic. Thus, in proving intent and what the State "is 'up to' may be plain from the results its actions achieve, or the results they avoid."[97] If he is successful in proving intent, he will have satisfied one of the major elements of a § 1983 constitutional claim while simultaneously pursuing a Title VII claim.

Mr. Juarez may further point out any specific sequence of events leading up to his discharge to shed some light on the State's purposes. It will not be necessary to show a consistent pattern of discrimination against Hispanics in order to constitute a Fourteenth Amendment violation. Such evidentiary proof would be helpful but "[a] single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions."[98] Thus, Mr. Juarez may argue that the act of his discharge alone constitutes a discriminatory act with an unlawful purpose.

Even so, Mr. Juarez may decide that his national origin claim amounts to the same as a race-based discrimination claim and thus his discharge was per se unlawful. If so, he can suggest that the State's conduct should be subject to strict scrutiny because "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[99] In this way, Mr. Juarez may attempt to do away with the requirement of discriminatory intent.

However, he will likely find little support for a race-based argument if he focuses merely on national origin. Although some commentators have suggested that national origin be considered a quasi-suspect class,[100] national origin has not yet been found to be a suspect class.

A plaintiff could easily miscalculate the importance of the defendant's state of mind in a § 1983 action. This is because at least one case states that § 1983 "affords a civil remedy for deprivation of federally protected rights caused by persons acting under color of law without any express requirement of a particular state of

96. *Id.*

97. *Id.* n.24.

98. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14 (1977).

99. *Id.* at 279 *citing* Brown, 347 U.S. 483 (1954).

100. *See generally*, Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985); Aniol, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MARSHALL L. REV. 667 (1982).

mind.[101] Yet this statement is correct only because the language of the statute has no explicit culpability standard.

The issue of which right, secured by the Constitution and laws, is actionable for Mr. Juarez under the statute, may not be quite so difficult a hurdle to overcome. As stated earlier, he may claim under the Constitution and Title VII that he was discriminated against because of his national origin. Further, he may claim that by treating him unequally and violating Title VII, the State has deprived him of a right secured "by the Constitution and laws."[102]

2. *Rebutting the § 1983 Prima Facie Case*

Once Mr. Juarez has established his prima facie case, the State has numerous valid defenses against § 1983. The two main defenses, not addressing substantive issues, are immunities and procedural defenses.

As to individuals, immunities can be absolute or qualified. We will not examine absolute individual immunity beyond the mere mention of it. This is because absolute immunity is primarily enjoyed by judges, legislators and by other officials acting in a quasi-judicial or legislative capacity.[103] Such was not the case in Mr. Juarez' situation where his supervisor acted in a non-judicial or legislative capacity.

Mr Juarez' supervisor can be afforded a qualified individual immunity if he is shown to be a public official who acted in good faith. The State must show "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief."[104] The State would be wise to demonstrate a reasonable basis for the supervisor's belief that the discharge was constitutional. The State may suggest that Mr. Juarez' Hispanic concerns were taking up too much of the time that should have been devoted to management concerns. The State may then claim that the supervisor's intent was not to invidiously discriminate but rather to allow a smooth and efficient operation of the agency branch. However, consideration should be given to the fact that immunity for malicious acts undermines the public's expectations of honesty and reasonableness in government, and that a good faith defense may not be adequate to protect both the interests of the official and of the public.[105]

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101. Parrat v. Taylor, 451 U.S. 527, 535 (1981).

102. Maine, 448 U.S. at 4 (holding that the § 1983 remedy broadly encompasses violations of federal as well as constitutional law).

103. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978).

104. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

105. *But see*, J. Rushing, L. Bratcher, *Section 1983 Defenses*, 14 URBAN LAW 149, 156 (1982) (suggesting the opposite conclusion as to the adequacy of a good faith defense).

Another immunity that the State may claim is state immunity from suits under the Eleventh Amendment.[106] Fortunately for Mr. Juarez, there is a door to this seemingly solid brick wall. The door opens if the State's immunity has been limited. Mr. Juarez may rely on *Fitzpatrick v. Bitzer*,[107] for support that the State has waived its immunity. In that case the Court held that the 1972 amendments to Title VII constituted an express limitation on state immunity pursuant to section 5 of the Fourteenth Amendment.[108]

However, the State is likely to posit that Mr. Juarez is bringing a § 1983 action and for all practical purposes states are immune from § 1983 damage actions.[109] Thus, the State will claim there is no waiver of the Eleventh Amendment immunity. The State's argument is buttressed by the Court's statement in *Quern v. Jordan*.[110] There the Court noted that § 1983 does not contain language which focuses on state liability and which shows that Congress decided to abrogate the Eleventh Amendment immunity to the States.[111] Mr. Juarez' response to the state immunity claim is simple and straightforward. He may argue that the deprivation of his right to be free from national origin discrimination is a Title VII right which is allowed to be claimed simultaneously with his § 1983 claim.[112] Furthermore, he may argue that because he is asserting an equal protection constitutional claim, he should be able to maintain either a Title VII claim, a § 1983 claim, or both.[113]

The second main area of defenses for the State is in the procedural arena. Procedurally, the State is free to use the normal mechanical defenses which may be raised as an initial bar to Mr. Juarez' suit. For example, there may be a motion for judgment on the pleadings[114] a motion to dismiss,[115] or a motion for summary judgment.[116] As a result, the defenses do not address the merits of Mr. Juarez' case. The substantive defenses for our present case under a § 1983 claim will be similar to those made earlier under a Title VII argument.

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106. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

107. 427 U.S. 445 (1976).

108. *Id.*

109. *See generally*, Lake Country Estates v. Tahoe Regional Planning Agency 440 U.S. 391 (1979) (Eleventh Amendment immunity is *only* available to the state itself, and not to the state's political subdivisions).

110. 440 U.S. 332 (1979).

111. *Id.* at 345.

112. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

113. *Id.* at 48-49.

114. FED. R. CIV. P. 12(c).

115. FED. R. CIV. P. 41.

116. FED. R. CIV. P. 56.

3. *Proving the State's Defense as Pretext*

Assuming the State successfully rebuts the prima facie case, the burden implicitly returns to Mr. Juarez to show that the legitimate rationale asserted by the State was only a mere pretext for the discriminatory practice.[117] The burden may be met in several ways.

First, Mr. Juarez may show that no white branch manager was ever treated the way he was for promoting the interests of a national origin group. The obvious goal then, is to show that the supervisor singled out Mr. Juarez for different treatment basing that selection on an identifiable characteristic. Our facts show that Mr. Juarez had a noticeable Spanish accent. A fair inference, provable by testimonial evidence, would be that other branch managers did not have a noticeable Spanish accent. Thus, this inevitable perception of difference results in an evaluation and comparison made by the supervisor. The perception was manifest in the supervisor's comments to "get off the Hispanic thing" and to "accept the fact that Hispanic services are not a priority in this state." The result of the comparison, of course, is that white is best, so anything foreign or different must be inferior.[118]

As a consequence, the difference in Mr. Juarez' language, accent and customs associated with a non-American origin are more likely what elicited the prejudicial attitude[119] than the fact of the origin itself. It is unlikely that the supervisor, if questioned, would have accurately identified from what country Mr. Juarez' ancestors came. It is only through the medium of characteristics that ancestral origin becomes apparent.[120] "The fact that such characteristics are national origin-linked means that discrimination on that basis is national origin discrimination."[121]

Additionally, our facts show that Mr. Juarez is not likely to claim that he deserves special treatment just because of his national origin. Nor does he demand that he be hired simply because he was

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117. Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978).

118. "While it may be easier to refer to any language other than English as 'foreign', any language in use in this country cannot be 'foreign' to its native speakers. This is particularly true in the case of the Spanish language which was in use in what is now the southwest United States long before English was spoken there." Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 901 n.79 (1986).

119. The supervisor in our case may claim that Mr. Juarez was "irritating" to the other employees. However, the lame justification that a discriminatory policy helps preserve the peace is as unacceptable today in state agencies as it was in buses. "Catering to prejudice out of fear of provoking greater prejudice only perpetuates racism. Courts faithful to the Fourteenth Amendment will not permit, either by camouflage or cavalier treatment, equal protection so to be profaned." *Hernandez*, 368 F. Supp. 752, 755-56.

120. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1165 n.4 (1985) (hereinafter *National Origin Claims*).

121. *Id.* at 1166, n.12.

formerly the subject of discrimination.[122] Mr. Juarez' position would be that if he was discharged because of his accent and his desire to help Hispanics, the discharge should be job-related and not the result of personal prejudice against Mexican Americans.[123] The nature of Mr. Juarez' case would not be new in the federal courts. Non-English speaking plaintiffs have succeeded in placing language minority rights issues on the federal agenda. For example, Congress has made clear attempts to help meet the needs of those who speak English poorly or not at all.[124] There is no doubt, therefore, that even Congress recognizes the effect on an identifiable group if and when these services are withdrawn. In our case, that distinct group is made up exclusively of the type for whom Mr. Juarez was an advocate: Hispanics who speak little or no English.

Some litigants have argued that no factor is more intimately tied to a person's ethnic or national identity than his language.[125] One commentator suggests that a strong argument can be made for treating language minorities as a quasi-suspect class.[126] "For adults in particular, especially those with limited financial resources, learning a new language may be extremely difficult or impossible. The immutability of a trait suggests that courts should guard vigilantly against that trait's becoming the basis of discriminatory state actions."[127]

Thus, it is arguable that Mr. Juarez' parents upon their arrival in the United States may have found it nearly impossible to discard their Spanish accent. For this reason, Mr. Juarez now possesses a noticeable language accent. His supervisor, by discriminating on the basis of this immutable trait, discriminates in the same way as if it were race-based.[128] To imply to Mr. Juarez "that he must discard the characteristic manifestations of his national identity in order to have a truly equal and fair opportunity to [keep his] job is to tell him that his identity has no place in American society."[129]

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122. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

123. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977).

124. *See, e.g.*, The Court Interpreters Act, 28 U.S.C. § 1827(d) (1982) (requiring the Director of the Administrative Office of the United States Courts to establish a program for the use of interpreters in any action initiated by the United States in a United States district court); 42 U.S.C. § 254b(f)(3)(J), 254c(e)(3)(J) (1982) (requiring the use of languages other than English in federally funded migrant and community health centers); 42 U.S.C. § 4577(b) (1982 & Supp.III 1985) (requiring the use of languages other than English in federal alcohol abuse and treatment programs).

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

126. *See generally*, Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987).

127. *Id.* at 1354-55.

128. *See, e.g.*, Carino v. Univ. of Oklahoma, 25 Fair Empl. Prac. Cas. (BNA) 1332, 1337 (W.D. Okla. 1981) *aff'd*, 750 F.2d 815 (10th Cir. 1984).

129. Cutler, *National Origin Claims*, 94 YALE L.J. at 1177-78 (1985).

IV. A DOCTRINAL MODEL FOR ANALYSIS

This paper suggests that an equal protection § 1983 claim brought simultaneously with a Title VII claim is the best path for Mr. Juarez to follow. The first and most obvious reason for this suggestion is that a § 1983 plaintiff may proceed directly to federal court. Proceeding under a § 1983 claim, Mr. Juarez is not required to exhaust State administrative[130] or legal[131] remedies. By filing in federal court, Mr. Juarez has the advantage of liberal Ninth Circuit civil rights case law. Such case law may well support both an equitable and legal argument.[132] Under Title VII Mr. Juarez would be limited to purely equitable relief.[133] Additionally, a § 1983 case can provide compensatory[134] or punitive damages.[135]

Another important consideration for Mr. Juarez is that since he is seeking a damage award, he would now have access to a jury. His desire to present the evidence to a jury on emotional subject matter, such as race and national origin, is another reason to prefer an Equal Protection § 1983 suit alongside a Title VII claim.

Mr. Juarez should be able to maintain a § 1983 action for his preexisting constitutional right to equal protection as a result of Congress' extended Title VII coverage to state and local employees.[136] This is in keeping with Congressional intent that Title VII should be an independent statutory authority for an additional remedy in employment discrimination cases.[137] Thus, if the State has violated two independent rights that Mr. Juarez enjoys, Mr. Juarez should be able to redress each violation with the appropriate remedy.[138]

Clearly, Mr. Juarez' challenge in a § 1983 claim is more difficult to meet than that in a Title VII action. Some of the unique requirements under the statute are: to show that his supervisor acted under color of law, to show that his supervisor acted with discriminatory intent, and to show that the State is not immune. Why then, should he choose § 1983?

The reasons are clear. In addition to the above mentioned

130. Patsy v. Florida Board of Regents, 457 U.S. 496, 516 (1982).

131. Monroe, 365 U.S. at 183.

132. 42 U.S.C. § 1983 (1982).

133. *See, e.g.*, 42 U.S.C. § 2000e-5(g) (1982).

134. Carey v. Piphus, 435 U.S. 247, 254 (1978).

135. Smith v. Wade, 461 U.S. 30, 51 (1983) (punitive damages are proper in an action for "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law. . . .").

136. H.R. Rep. No. 238, 92nd Cong., 2nd Sess. *reprinted* in 1972 U.S. Code Cong. & Ad. News 2137 (1972).

137. *Id.* at 2154; *see also*, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975).

138. *See* Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 AM. L. REV. 93, 114 (1985).

remedies, Mr. Juarez may sue for mental and emotional distress.[139] He may also receive back pay beyond the two year limitation period provided for in Title VII.[140] If Mr. Juarez prevails, he is entitled to recover attorney's fees despite the Eleventh Amendment[141] "unless special circumstances would render an award unjust."[142]

V. ARE THERE ACCEPTABLE ALTERNATIVE SETTLEMENT METHODS?

In our hypothetical, assuming Eduardo Juarez chooses to pursue a § 1983 claim, he may be approached by the state in an effort to settle the dispute out of court. To effectuate the settlement, the State would likely invoke Rule 68 of the Federal Rules of Civil Procedure.[143] This is because the State is not likely to want any publicity in the media about its alleged discriminatory practices.

The purpose of the rule is to encourage settlements and avoid litigation. A person in Mr. Juarez' situation should then balance the risks and costs of litigation against the likelihood of success upon trial.

There is an incentive to this approach. As a result of *Marek v. Chesny*,[144] it is possible that Mr. Juarez might end up losing in the end. In *Marek*, the court held that defendants are not liable for plaintiffs' attorney's fees incurred after an offer of settlement which includes fees, has been made pursuant to Rule 68, and the judgement obtained after the trial is less favorable than the settlement offer.[145] The drawback, of course, is that Mr. Juarez may sacrifice more than he is willing by utilizing this approach. For example, if the State offers two years' back pay and his attorney's fees Mr. Juarez is free to turn the offer down. However, a trial could result in a judgment where the amount is much less than two years' pay and attorneys fees. In this case, Mr. Juarez must personally suffer the loss. Thus, a Rule 68 settlement is probably not the best route for Mr. Juarez to take if his goal is to help himself and draw attention to plight of Hispanics. Such a settlement would only address his personal situation.

Another possibility for settlement is negotiation. Under this approach the State may offer to grant Mr. Juarez' requests to hire Spanish-speaking staff persons and maybe even offer back pay. It is

139. *See generally*, Noble, *Civil Rights - An Analysis of Section 1983 and Title VII: A Comparative Strategy*, 23 TRIAL LAW. GUIDE 49, 77 (1979).
140. 42 U.S.C. § 2000e-5(g) (1982).
141. Hutto v. Finney, 437 U.S. 678 (1978).
142. Newman v. Piggie Park Enter., 390 U.S. 400 (1968); *see also*, 42 U.S.C. § 1988 (1982).
143. FED. R. CIV. P. 68.
144. 473 U.S. 1 (1985).
145. *Id.*

unlikely that the State would offer reinstatement of Mr. Juarez to his job. Yet resolving a dispute in this manner, like Rule 68, does not address the unique problems of Mr. Juarez. As one commentator notes: "In their search for alternatives to litigation, the advocates of [alternative dispute resolution] focus on social situations in which interpersonal relationships have been so thoroughly disrupted that there is no chance of reconciliation: People turn to courts when they are at the end of the road."[146] Therefore, this alternative method of settlement may also not be suitable for resolving Mr. Juarez' dual concern of employment and the hiring of Spanish-speaking staff persons.

VI. CONCLUSION

The questions presented to the reader in the hypothetical facts of Mr. Juarez' situation are by no means exhaustive of all the considerations deserving attention. This paper analyzes in detail only two avenues by which to pursue claims. However, there are others.

It is possible that Mr. Juarez will want to explore a claim based on his first amendment right of free speech. His claim could allege that the State was illegally suppressing his right to speak on behalf of Hispanics. Since his conduct promoting Hispanics did not interfere with his work performance in any way, Mr. Juarez may seek redress for an unwarranted and discriminatory deprivation of his right to free speech.

Additionally, if there was any negative publicity concerning his dismissal, he may claim that such publicity in essence "blackballed" him in his state of residency. Thus, he may be able to show that because of the "blackballing", he can no longer find any suitable work. So too, if any untruthful statements about him were made by State supervisory employees in the presence of witnesses. This would entail allegations on the part of Mr. Juarez of libel and slander and another paper to discuss them on the part of the author.

Even with the questions before us, there remain serious, unresolved issues. For example, what is Mr. Juarez attempting to accomplish by bringing an action against the State? Is he trying to draw attention to the plight of Hispanics in his State at the potential cost of his entire professional career? Or is he merely seeking compensation for the wrongs done to him? It appears the foundation is in the facts to pursue either claim. Of course, the proof will vary considerably between a class action and a purely personal suit. In any case, the decision is ultimately for Mr. Juarez to make.

Perhaps Mr. Juarez is one of the rare individuals who has experienced discrimination and chosen not to remain merely a victim.

146. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985).

He knows that to remain so would exaggerate the power of the State, deny his self-worth, and devalue the importance of his claim. As a result, Mr. Juarez must be committed not to allow his claim to become a "ritual of degradation" rather than a "rite of justice" in which he reconciles his powerlessness against social prejudices.[147]

The facts in our scenario suggest that Mr. Juarez can likely prevail in a § 1983 constitutional claim simultaneously with a Title VII claim. The better choice may be to pursue the constitutional claim using Title VII as an indicia of congressional intent to make Hispanics a protected class. The pivotal questions in the case would center on the intent of the State's supervisor in discharging Mr. Juarez.

There is no doubt in Mr. Juarez' mind as to the guilt of the State. This was not an accidental or incidental form of discrimination from his perspective. It was a clear attempt to exclude him from the payroll of the State because he spoke differently, he believed differently, and because he was Mexican-American. Thus, if asked on the stand, "Do you see in this courtroom the person who told you Hispanics are not a priority in this state?", Mr. Juarez would be justified in standing with the same courage of conviction as when Emmet Till's grandfather said, "Dar he!"

147. *See generally*, Bumiller, *Anti-Discrimination Law and the Enslavement of the Victim: The Denial of Self-Respect by Victims Without a Cause*, 6 D.P.R.P., Univ. Wis.-Mad. L.S. (1984).