Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction

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I. INTRODUCTION

Every person who reads this Article has an accent. Your accent carries the story of who you are—who first held you and talked to you when you were a child, where you have lived, your age, the schools you attended, the languages you know, your ethnicity, whom you admire, your loyalties, your profession, your class position: traces of your life and identity are woven into your pronunciation, your phrasing, your choice of words. Your self is inseparable from your accent.[1] Someone who tells you they don't like the way you speak is quite likely telling you that they don't like you.

Every person has an accent—even those who do not communicate with voice.[2] The deaf have an accent in the way they use American Sign Language. An observer familiar with deaf culture can identify Black signing, upper-class signing, "hearie" signing, regional signing, teenage signing, "heavy" signing,

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1. Indeed, an individual's accent is so much a marker of the self that experts in forensic sociolinguistics are used to identify speakers in legal cases in which the identity of the speaker is at issue. *See* Milroy, *Sociolinguistic Methodology and the Identification of Speakers' Voices in Legal Proceedings*, in APPLIED SOCIOLINGUISTICS 51-72 (P. Trudgill ed. 1984) (discussing use of sociolinguists as experts in determining whether persons accused of crimes such as blackmail, for example, are actually ones who made threatening phone calls).

2. I choose to use "they, those, and their" to refer to both individuals and groups in a gender-neutral fashion.

and signing associated with certain residential schools.[3] Every person has an accent. Yet, in ordinary usage, we say a person "has an accent" to mark difference from some unstated norm of non-accent, as though only some foreign few have accents.

This Article asks two questions, one small and one large. The small question involves the application of antidiscrimination law to accent-bias. The larger question, implicated by the smaller doctrinal one, is of what kind of world we want to live in, with what ranges of difference, under the constitutionally constituted experiment in pluralism we call democracy.

Posing these questions, and suggesting answers to them, will have a quaintly modernist bent to some readers. Posing questions presumes their answerability in universal terms that link reader and writer. It presumes that problems are solvable, that conversations about the right legal and ethical results in given cases are possible, and that application of reason to experience can yield ever closer approximations of truth and justice. In its modernist tendencies, this Article will sound like many of *The Yale Law Journal* articles published throughout the past one hundred years.

In its method and conclusions, however, this Article will sound deeply discordant to the ghosts of YLJ boards past. It is situated inevitably in the postmodern world that is the law school world of the coming century. It draws from the work of Critical Legal Studies, feminist jurisprudence, and Critical Race Theory. It looks for the coercive and hidden assumptions embedded in law, and values the multiple consciousness of the disempowered.[4] It does several things at once, often seemingly in contradiction. It suggests revolutionary change, while operating within the doctrinal and ideological world commanded by the rule of law.

The African American poet Gwendolyn Brooks once wrote:

> I had to kick their law into their teeth in order to save
> them, However, I have heard that sometimes you have to deal
> Devilishly with drowning men in order to swim them to shore.[5]

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3. Hall, *Train-Gone-Sorry: The Etiquette of Social Conversations in American Sign Language*, in AMERICAN DEAF CULTURE 91 (S. Wilcox ed. 1989) (discussing variations of sign language in deaf community). For additional discussion of deaf culture, history, and language, see also O. SACKS, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF (1989).

4. *See* Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989) (urging deliberate choice to view world from perspective of the oppressed).

5. G. BROOKS, *Negro Hero*, in BLACKS 48 (1945).

The Chicano poet Alurista once wrote:

we must bind his paws
and file his fangs
he may not kill
not us
not himself[6]

The drowning man, the fanged monster, of these poems is our country. The poets, at once separate, at once tied to the nation within whose boundaries they write, speak with the characteristic dualism of writers of color. They speak of saving the dominant ones in the process of seeking self-liberation. As willing as they are to wage a bitter fight, so are they willing to value and save the best parts of their enemy—parts that are inseparable from themselves. That a fan of these angry poems is asked to write for *The Yale Law Journal* speaks to the interesting lives we lead as legal theorists standing along our century's edge. In the pages that follow, I hope to speak with dualism—from and against the traditions of legal analysis—as I confront the problem of accent discrimination.

This Article will look familiar to readers immersed in the literature of Critical Race Theory, and unfamiliar to readers accustomed to traditional academic writing.[7] It will use personal experience in addition to cases and statutes. It will express emotion and desire alongside logic and analysis. It will borrow from a wide range of disciplines and analytical traditions. This eclectic and critical method will reflect the influence of postmodernism. It will reflect as well this writer's instrumental goals. There is no claim to neutrality or objectivity made in this piece. I do claim, however, that my choice of position and method is made from within a legitimate scholarly tradition. I strive throughout to meet the standards of rigorous inquiry and concern for justice

6. J. BRUCE-NOVOA, CHICANO AUTHORS: INQUIRY BY INTERVIEW 18 (1980) (quoting Hombre Ciego, in ALURISTA, FLORICANTO EN AZTLAŃ (1971)).

7. "Critical Race Theory," as I use it, refers to the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination. Works I would include in this movement are, inter alia, D. BELL, AND WE ARE NOT SAVED (1987); R. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Dalton, *AIDS in Blackface*, 1989 DAEDALUS 205; Delgado, *When a Story Is Just a Story: Does Voice Really Matter*, 76 VA. L. REV. 95 (1990); Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. (forthcoming 1991); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Torres, *Local Knowledge, Local Color: Critical Legal Studies and The Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988); Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

that mark the new critical scholarship.[8] I strive as well, in my use of new methods, to tell the reader exactly what I am doing, so that those unfamiliar with Critical Race Theory will nonetheless be able to follow my arguments.

This Article opens with stories of some of the accents that gave rise to the existing judicial decisions. The influence of the "turn to narrative"—the suggestion that human beings understand and form their worlds through stories—is evident here.[9] These narratives create a doctrinal puzzle, conceptualized in Part III. The puzzle is this: Courts recognize that discrimination against accent can function as the equivalent of prohibited national origin discrimination. The fact that communication is an important element of job performance, however, tends to trump this prohibition against discrimination, such that it is impossible to explain when or why plaintiffs will ever win in accent cases. In fact, they almost never do. Much of this section will sound like a positivist's plea for logic.

Part IV attempts to understand the cultural context of accent discrimination by considering the role of speech in society, and the ways in which prejudice and status assumptions are tied inextricably to speech evaluation. Given this sociolinguistic reality, I argue in Part V for a doctrinal reconstruction that will apply Title VII to accent cases in a rational way. I criticize the current, conclusory reasoning of most accent decisions, while acknowledging the difficulties courts face. This is positivism plus sociology of law—a kind of thinking I associate with the Yale Law School.[10] It demands that we apply our faculties of reason to the social reality of lived experience.

Having set forth what I believe is a rational and just application of Title VII principles to accent cases, the following sections consider the ethical implications of accepting or rejecting a doctrinal scheme intended to promote linguistic pluralism. Part VI explores liberal justifications for linguistic tolerance, and Part VII considers accent from within the perspective of emerging progressive theories of law, including Critical Legal Studies, Critical Race Theory, and feminist jurisprudence. Utilizing these critical theories, I inquire into the deeper meaning of accent discrimination as situated in structures of subordination. This part is influenced by the critical theorists who have confronted the issue of

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8. In response to the suggestion that such scholarship is devoid of standards, Milner Ball suggests that Critical Race Theory is appropriately subject to normative and analytical critique. *See* Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990).

9. The use of narrative in legal analysis is discussed in the *Michigan Law Review* symposium on storytelling and the law, vol. 87, no. 8 (1989). For examples of the narrative form in analysis of antidiscrimination law, see D. BELL, *supra* note 7; P. WILLIAMS, ALCHEMY OF RACE AND RIGHTS (forthcoming 1991); Lawrence, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L.J. 627 (1986); *see also* West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

10. Here I refer to the realists and postrealists at Yale who attempted to use empiricism and policy analysis to solve social problems. *See generally* L. KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); J.H. Schlegel, American Legal Realism and Empirical Social Science (paper presented at American Society for Legal History Meeting Oct. 1990, on file with author) (rehabilitating empiricist turn in legal realism at Yale).

audience: for whom do we write, and why? I attempt to make explicit my intended and multiple audiences, and my political goals.

I conclude with my personal utopian vision, which I believe is also an American utopian vision, of a time when the strength of the many voices in our heritage are heard and celebrated. I mean this both metaphorically and literally. I want to hear the voices that represent different ways of living and knowing, particularly those ways that come out of the culture of the historically subordinated. I want to hear as well the literal voices of difference—differences in language, accent, cadence, and sound that have made the streets of the North American cities I love vibrant and alive. I ask that we nurture these voices and keep them from fading. My urgency in this quest is tied to my belief that it is what we must do, as a nation, to save our national soul.

II. THE STORIES

I come from a place that is farther away from any place than any place. The islands of Hawaii, geographically isolated and peopled from all corners of the world, are a linguist's dream. The linguistic and ethnic heritage of the islands is more diverse than that of any other state in the United States.[11] In the voices of the islands one hears traces of Hawaiian, Portuguese, New England English, Japanese, Chinese, Filipino, and Spanish. It is thus no accident that two significant Title VII cases falling in the middle of the doctrinal puzzle of accent discrimination come from Hawaii.

Perhaps in explaining the puzzle, it is best to begin where all cases begin, with a person and the story they bring to court.

A. *Manuel Fragante's Story*[12]

Horatio Alger gained fame writing about men like Manuel Fragante, who faced adversity with resilience, self-reliance, intelligence, and hard work.[13] While Fragante shares those traits with Alger's heroes, his story ends in Title VII litigation, not in the triumphant recognition of his talents by the free market.

In 1981 Manuel Fragante took a civil service examination along with over 700 other applicants. He is an intelligent and educated man, and he was not

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11. The multicultural history of Hawaii is discussed in L. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1961); R. TAKAKI, PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII 1835-1920 (1983).

12. 1 Reporter's Transcript of Proceedings at 25-67, Fragante v. City and County of Honolulu, 699 F. Supp. 1429 (1987) [hereinafter Reporter's Transcript]. Manuel T. Fragante's story is reflected in his testimony at trial. He discusses his education, his military service, and his previous employment experiences in addition to his experiences with the Division of Motor Vehicles.

Additional facts were obtained through author's interviews with Manuel Fragante in May of 1987 and December 1990, and from Mr. Fragante's unpublished correspondence about his case, January 6, 1991 [hereinafter Unpublished Correspondence].

13. *See, e.g.*, H. ALGER, RAGGED DICK THE MATCHSTICK BOY (1895).

surprised when he received the highest score of all applicants who took the test. Fragante was ranked first on the list of eligibles, but, after a brief interview, he was turned down for the job of clerk in the Division of Motor Vehicles. When he asked why, he learned that he was rejected because of his Filipino accent. Manuel Fragante, combat veteran of two wars and true believer in the rhetoric of equality, promptly contacted a Filipino American state legislator, who in turn recommended that Fragante visit the run-down office of a neighborhood public interest law firm.

The lawyers advised Mr. Fragante that Title VII litigation is costly and difficult, that money damages in a case such as his are often nominal, and that although he was treated unfairly, discrimination is difficult to prove. Mr. Fragante listened carefully and replied that his case was a strong one, and that discrimination is not allowed under American law. He was prepared for a fight, even a long and bitter one, in order to show the truth about his case.

The lawyers were impressed. Here was an articulate and passionate plaintiff, unquestionably qualified in every respect for the job, turned down because of his accent. The issues were clean. The client was committed. The lawyers realized they would never get another plaintiff as good as Mr. Fragante to test the application of Title VII to accent cases. They agreed to fight the case to the end. And so they did, losing at every level before the federal courts.

Manuel Fragante was born and raised in the Philippines, during a time of heavy American influence there. He is an educated man, with a university degree in law. The Philippines is a land of many languages, including Ilocano, Ilongo, Visayan, Cebuano Visayan, Tagalog, and English—the last four of which Mr. Fragante speaks. In part because of this diversity, and in part because of the influence of the United States, English is the language used in many Filipino schools, universities, businesses, and media. All of Manuel Fragante's schooling was in English, and his command of the English language—given the strict, no-nonsense, prewar style of his early teachers—exceeds that of many Americans.

Manuel Fragante loves two countries: the Philippines, his birth home, and the United States, his adopted home. When Japan occupied the Philippine Islands, Fragante was one of thousands of young men who took to the hills to join the resistance. As a guerilla fighter, he swore to outlast the occupation, predicting the eventual liberation of his homeland. He fought for three years, surviving several bouts of malaria. After the war, like veterans of many nations of that time, Fragante started a family, furthered his education, and made modest economic gains as he continued to work in the military and in civilian enterprises. He believed in self-reliance, hard work, and respect for authority—the kind of ideas questioned and ridiculed by the generation that followed his. Fragante's loyalty to the United States, liberator of the Philippines, was solid. He volunteered from Manila to serve on the American side for a twenty-three-month tour of duty in the Vietnam War, and he continued military training in

places like Fort Harrison, Indiana, and Fort Leavenworth, Kansas. He is particularly proud of his performance in U.S. military schools, where his intellectual skills frequently put him ahead of American officers in test scores.

In all his years of service to the American military, he says, no one ever complained of his accent. His military superiors repeatedly rated his English language ability "excellent."[14] His acceptance in the military made him think more and more often of emigrating. His daughter was already settled in Honolulu. As he approached retirement age, he moved to Hawaii and became a naturalized citizen. Having worked all his life, he could not imagine remaining idle. He knew enough about American prejudice to guess that businesses might not welcome an older immigrant as an employee. The civil service system, with its tests and constant demand for clerical workers, seemed a better prospect.

The Division of Motor Vehicles (DMV) of the City and County of Honolulu is much like similar departments all over the United States.[15] Clerks dispense forms, administer tests, and take pictures for driver's licenses. Lines of waiting citizens move slowly throughout the day. Dog licenses, bicycle tags, car registration, driver permits—the bureaucratic necessities of modern life are doled out for the price of patience, paperwork, and the proper fee. Teenagers wait with parents for first driving tests, immigrants anxiously scan test preparation booklets, young soldiers complain that they can't possibly pay this tax on top of that fee and those insurance premiums. The Honolulu DMV differs from others only in the astonishing array of races among people who go there with their colorful dress and their many languages.

It is in the nature of such places that people are not always at their best. Some customers become impatient and demanding. The job of motor vehicle clerk is the lowest paying job in the city employment hierarchy. It has the highest turnover. Employees rarely last over a year, and the city is constantly looking for new clerks.

Because the DMV creates constant demand for new employees, the personnel department sent a specialist to study the job and devise a screening test to

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14. M. Fragante, Unpublished Correspondence, *supra* note 12. In Fragante's own words, "I have travelled to Europe and South America and managed to communicate effectively in English with strangers who hardly spoke the tongue. How, then, could certain English-speaking interviewers of the City government claim, or pretend, I could not be understood?! Outside that interview office, I never encountered any communication problem with anybody in Hawaii or on the mainland." *Id.*

Academic Reports from Mr. Fragante's military training report "an excellent command of both spoken and written English." Officers Report at Fort Leavenworth, Kan. (1966); "English Language Proficiency: Excellent . . . . This officer competed successfully with U.S. army officers and ranked near the top of his class . . . . His classroom contributions were always valuable and well received." Academic Report, Adjutant General's School, Fort Benjamin Harrison, Indianapolis, Ind. (1955).

15. In the words of the defendant's witness:

> [T]he vehicle registration section is . . . a high-volume work area. The clerks are under constant pressure every day, handling mainly the information counter, answering questions, and also answering telephone calls.
>
> And it's very important that whoever services the customer, either on the phone or over the counter, be able to explain whatever the customer is seeking in the way of information.

1 Reporter's Transcript, *supra* note 12, at 126 (testimony of George Kuwahara).

help identify a large pool of prospective clerks. This is a well-established procedure used by large employers. The specialist observed clerks on the job. The key skills she identified included alphabetizing, reproducing numbers and letters with accuracy, making change, exhibiting courtesy, and other routine clerical skills. A test was devised to measure these skills.

In these days of skepticism toward standardized tests, this particular type of test is still highly regarded by employment specialists.[16] Clerical skills are measurable with considerable accuracy, and performance in tasks such as accurately addressing large numbers of envelopes is largely predictable from test results.[17] If such a test is devised with actual job functions in mind, it tends to predict fairly, and is less susceptible to racial or cultural bias than other tests.[18] While general intelligence tests, personality tests, and scholastic aptitude tests are increasingly suspect because of their bias in favor of upper-class white men, tests of skills like alphabetizing and typing speed are biased in the good way: they favor only those with superior job skills.[19] It is no accident that tests like these form the backbone of the civil service system—a system historically supported by Jews, African Americans, and other outsiders to the old spoils system that handed out jobs in exchange for votes, rather than as the reward for ability.[20]

This was the premise Manuel Fragante relied on when he took the civil service examination and out-tested his 700 competitors. He was proud of his score and felt assured of the job. While others thought the job was beneath him given his age and experience, he was looking forward to the simplicity of its tasks, to the official feel of working for the government in an air-conditioned building, and to the chance to earn some spending money instead of wasting his time in boring idleness. He found warnings that the job was stressful mildly amusing. Having lived through invasion, war, and economic uncertainty,

16. *See* Reilly & Chao, *Validity and Fairness of Some Alternative Employee Selection Procedures*, 35 PERSONNEL PSYCHOLOGY 1 (1982); *cf.* Kelman, *Concepts of Discrimination with Special Reference to "General Ability" Job Testing*, 104 HARV. L. REV. (forthcoming Apr. 1991). Professor Kelman discusses the validity of cognitive aptitude tests. He states that "a test is content validated if the content of the examination matches the content of the job," criterion validated if performance on the predictor correlates to performance on the job, and construct validated if several of the traits measured are required by the job. Kelman states that the typical example of a content validated test is a typing test given to evaluate the typing skills of an individual for a position in a typing pool. The author thanks Professor Kelman for sharing his research in this area.

17. *Cf.* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATION AND PSYCHOLOGICAL TESTS 28 (1974) (authors discuss various testable skills, including typing, driving ability, and knowledge of certain regulatory laws).

18. *See generally* Ford, Kraiger & Schechtman, *Study of Race Effects in Objective Indices and Subjective Evaluations of Performance: A Meta-Analysis of Performance Criteria*, 99 PSYCHOLOGY BULL. 330 (1986).

19. *See* AMERICAN PSYCHOLOGICAL ASS'N, *supra* note 17. Examinations that test general knowledge are less reliable because it is harder to determine how much someone should know about a subject. It follows that the criterion used to test general knowledge is questionable. *Id.* at 27.

20. Historically, the government has been the employer of last resort for women, as well. This pattern has been evident in the employment of early women lawyers. *See* EARLY WOMEN LAWYERS OF HAWAII (M. Matsuda ed. forthcoming 1991).

Manuel Fragante figured he could handle an irate taxpayer complaining about a long wait in line. He thus walked in for his interview with a calm and assured dignity. He knew the job was his.

The interviewers were other employees of the DMV: a supervisor and a secretary. The interview surprised Mr. Fragante. It was less of an interview than a brief conversation, lasting ten to fifteen minutes. The interviewers had no list of standard questions. They did have a rating sheet devised by one of the interviewers. After Mr. Fragante left, the interviewers conferred and entered scores on the rating sheet.

An expert in employment practices would later state that the rating sheet was the "worst" he had seen in his thirty-five years of experience in the field.[21] It rated on a scale of one to ten, with no indication of what the numerical gradations stood for. It listed various oddly matched traits, such as "inarticulate" as the opposite of "convincing." Fragante was rated low in speech.[22] The interviewers made these comments:

"Difficult manner of pronunciation."[23]

"Pronounced" and "Heavy Filipino" accent.[24]

Manuel Fragante was passed over for the job. The administrator in charge of hiring recommendations stated, "because of his accent, I would not recommend him for this position."[25] The interviewers heard what any listener would hear in a brief conversation with Mr. Fragante: he speaks with a heavy Filipino accent, one that he is unlikely to lose at his age.

At the trial in the *Fragante* case, a linguist who studies Filipino and non-Filipino interactions stated that Mr. Fragante speaks grammatically correct, standard English, with the characteristic accent of someone raised in the Philippines.[26] There is a history, in Hawaii and elsewhere, of prejudice against this accent, the linguist explained, that will cause some listeners to "turn off" and not comprehend it. The degree of phonological—or sound—deviation in Fragante's speech was not, however, so far afield from other accents of English-speakers in Hawaii that he would not be understood. Any nonprejudiced

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21. 2 Reporter's Transcript, *supra* note 12, at 224. Dr. James J. Kirkpatrick, an expert in industrial psychology, testified on behalf of the plaintiff.

22. Appellant's Opening Brief at 36-37, Fragante v. Honolulu, 888 F.2d 591 (9th Cir. 1989) [hereinafter *Fragante* Brief].

23. *Id.* at 33. George Kuwahara, an assistant licensing administrator, was one of Fragante's interviewers. He gave Fragante a score of three out of ten for speech and noted on his rating sheet the comment quoted in the text.

24. *Fragante* Brief, *supra* note 22, at 32-33; *see also id.* at 30.

25. Memorandum from George Kuwahara to Peter Leong, admitted into evidence at trial (Apr. 13, 1982).

26. Dr. Michael Forman, a linguist specializing in interactions between English and Filipino speakers, evaluated Fragante's speech and found specifically that Fragante "has extensive verbal communication abilities in Standard English." 2 Reporter's Transcript, *supra* note 12, at 256. According to Dr. Forman, Fragante's testimony during the trial gave him "ample evidence . . . [that] there was a good deal of understanding of him from many directions." He went on to say that this validated his judgment that Fragante was a competent speaker of standard English. *Id.* at 267.

speaker of English would have no trouble understanding Mr. Fragante, the linguist concluded.[27]

The defendant's witnesses testified otherwise. They explained that the DMV is a place of high-stress, short-term interactions with an often unreasonable public. Communication is the essence of the job. They insisted they bore no prejudice against Filipinos. Mr. Fragante's degree of accent would simply not work in the job. At no time did any of the defendant's witnesses state that they could not understand Mr. Fragante.

The linguist sat through the trial and noted the proceedings with interest. Attorneys for both sides suffered lapses in grammar and sentence structure, as did the judge. Mr. Fragante's English, a review of the transcript confirmed, was more nearly perfect in standard grammar and syntax than any other speaker in the courtroom. Mr. Fragante testified for two days, under the stress of both direct and cross-examination. The judge and the examiners spoke to Fragante in English and understood his answers.[28] A court reporter understood and took down his words verbatim.[29] In the functional context of the trial, everyone understood Manuel Fragante's speech.[30] Yet the defendant's interviewers continued to claim Fragante could not be understood well enough to serve as a DMV clerk.[31]

In an irony particularly noticeable to the linguist, lawyers for both sides, as well as the defendant's witnesses, spoke with the accent characteristic of non-whites raised in Hawaii—the Hawaiian Creole accent that would become the subject of another significant Title VII accent case discussed below.[32] The linguist, trained as he was to recognize accents as intriguing differences rather than handicaps, was troubled by the legal result in the *Fragante* case.

The judge was on assignment from Arizona.[33] He listened to four days of testimony and concluded that Manuel Fragante was denied the job *not* because

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27. *See id.* at 256, 260-61.

28. *See* 1 Reporter's Transcript, *supra* note 12. The court transcript reveals that Fragante speaks educated, standard English. Dr. Kirkpatrick repeated several times in his testimony that he was able to understand Fragante despite his accent. *Id.* at 209. Also, Dr. Kirkpatrick noted during his testimony that Fragante was asked only twice by the court reporter to repeat what he had said, and one of those corrections dealt only with the request to repeat a proper name. *Id.*

Perhaps even more importantly, the transcript and record show that those present in the courtroom, including the judge and court reporter, were able to understand Fragante's responses to questioning. In approximately one half day of testimony and 40 pages of testimony transcript, the judge had communication difficulty on only one occasion. 1 Reporter's Transcript at 57:

Q. What happened after the interview?

A. After the interview we—we decided goodbye, thank you.

THE COURT: I'm sorry. What did you say?

THE WITNESS: After the interview we bid each other goodbye and I left the place.

29. *See id. See generally* 1, 2 Reporter's Transcript, *supra* note 12.

30. *See supra* notes 26-29.

31. *See* 2 Reporter's Transcript, *supra* note 12, at 157.

32. Kahakua v. Friday, 876 F.2d 896 (9th Cir. 1989) (No. 88-1668) (discussed *infra* text accompanying notes 45-47), *aff'g sub nom.* Kahakua v. Hallgren, No. 86-0434 (D. Haw. 1987).

33. The judge was the Hon. Paul G. Rosenblatt, District Judge, District of Arizona.

of national origin, but because of legitimate difficulties with his accent.[34] The opinion was somewhat of a puzzle. The judge found, as fact, that Manuel Fragante "has extensive verbal communication skill in English"[35] but paradoxically that he has a "difficult manner of pronunciation" and a "military bearing,"[36] and that some listeners would "stop listening"[37] when they hear a Filipino accent. The court made much of the high-stress communication required for the job, and found that speech was a bona fide occupational qualification. Finally, the court applied the *McDonnell Douglas* test, and found no proof of discriminatory intent or subterfuge.[38]

Manuel Fragante was upset by the opinion. Soon after losing out on the DMV job, he was hired by the State of Hawaii as a statistician. Much of his work involved telephone interviews. Fragante felt his employment with the State proved his claim that the city misjudged his accent. He told his attorneys he wanted to press forward with his case.

Fragante lost on appeal before the Ninth Circuit although he did gain the symbolic victory of the court's sympathetic recognition that accent discrimination could violate Title VII.[39] The U.S. Supreme Court denied certiorari.[40]

Manuel Fragante met his pledge to take his case as far as he could. His case has brought him a notoriety he is proud of, and he continues to argue against accent discrimination to community groups. Manuel Fragante, denied a job because of the way he speaks, has been interviewed on radio and television. He has spoken at fundraisers in California and Hawaii.[41] He has campaigned

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34. Fragrante v. City and County of Honolulu, 699 F. Supp. 1429, 1432 (D. Haw. 1987).

35. *Fragante*, 699 F. Supp. at 1431.

36. *Id.* at 1432.

37. *Id.* at 1431.

38. Fragante v. City and County of Honolulu, 888 F.2d 591, 594-95 (1989). The *McDonnell Douglas* test is discussed *infra* note 183.

39. *Id.* at 596-97. The court noted that the Equal Employment Opportunity Commission agreed with Fragante's claim that discrimination solely because of his accent "does establish a prima facie case of national origin discrimination." *Id.* In addition, the court cited Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam), holding that discrimination based on foreign accent established a prima facie case of discrimination based on national origin. The *Fragante* court acknowledged that EEOC guidelines include within the definition of discrimination the denial of employment opportunity based on the linguistic characteristic of the individual. *See infra* note 72 and accompanying text. The *Fragante* court went on to say that Fragante did establish a prima facie case of discrimination based on national origin. *See* 888 F.2d at 595-96.

40. Fragante v. City and County of Honolulu, 110 S. Ct. 1811 (1990).

41. Mr. Fragante was interviewed by the *Filam Courier* in February 1988. He has spoken at fundraisers before community groups in California and Hawaii. He has also given interviews on radio, television, and to journalists. A list of public speaking engagements, provided by Mr. Fragante, includes the following:

— Feb. 29, 1984 - Forum on Equal Employment Opportunity, sponsored by Oahu Filipino Community Council and Cavitenians and Associates of Hawaii at Waipahu Cultural Garden Park, Honolulu.
— July 21, 1985 - Interview, KISA Radio Station, Honolulu.
— Nov. 2, 1987 - Press Conference announcing intent to appeal. Channel 2 Television, Hawaii Public Radio.
— Nov. 6, 1987 - Speech at Na Lōio No Na Kanaka (Lawyers for the People of Hawaii) annual fundraiser, Honolulu.
— Jan. 1988 - Interview by Sol M. Miguel, Staff Writer, FILAM Courier, Honolulu.
— Feb. 17, 1988 - Panel discussion on accent discrimination at University of Hawaii, Honolulu.

actively, speaking in his own voice, against accent discrimination.[42]

B. *The Weather Forecasters*

If you take a trip to Hawaii you will hear this accent—probably before your plane even lands. You will hear the voice, sometimes called "local" or "pidgin," that linguists call "Hawaiian Creole."[43] When I am going home, I hear it instantly as I enter the waiting area for the plane departing for Hawaii. An Asian- or Polynesian-looking group of flyers, homeward bound, will break into lilting conversation, and I will smile. If I have been particularly tired or homesick, the accent will bring a welling of tears. On the plane, some of the flight attendants will speak with the same accent, with its clear, individually pronounced vowels and question marks noted by a gentle drop at the end of a sentence:

— Feb. 20, 1988 - Panel discussion, Channel 20, Oceanic Cable with Victor Mon and Julianne Puzon, Honolulu.
— Feb. 1988 - Telephone interview by Laird Harrison, Asian Week, San Francisco.
— Aug. 1988 - Interview in San Francisco by Lizette Reyes Dignan, Staff Writer, Philippine News.
— Sep. 4, 1988 - Extemporaneous speech on race discrimination at Filipino American Political Association annual convention, San Francisco.
— Nov. 14, 1988 - Speech at Fragante Support Committee Fundraiser at St. Theresa Church auditorium, Honolulu.
— 1988 - Telephone interview by Emil Guillermo, National Public Radio, Washington, D.C.
— Feb. 1989 - Interview by Floyd K. Takeuchi for Honolulu Star-Bulletin.
— Feb. 20, 1989 - Press conference at Federal Building, Honolulu, regarding petition to U.S. Supreme Court for writ of certiorari.

42. *See, e.g.*, Manuel Fragante's Speech to the National Convention of the Filipino American Political Association in San Francisco (Aug. 1988) (Philippine News, Apr. 5-11, 1989). The reporter, Rodel E. Rodis, wrote: "I heard Manuel Fragante speak. I understood him clearly. So did about 600 other delegates to the National Convention." *Id.*

43. For description, history, and analysis of Hawaiian Creole, see BICKERTON & ODO, 1 CHANGE AND VARIATION IN HAWAIIAN ENGLISH (1976); Sato, *Linguistic Inequality in Hawaii: The Post-Creole Dilemma*, in LANGUAGE OF INEQUALITY 255 (1985) [hereinafter *Linguistic Inequality*] (cited in Appellant's Opening Brief Addendum B, Kahakua v. Friday, 876 F.2d 896 (9th Cir. 1989) (No. 88-1668) [hereinafter *Kahakua* Brief]); *see also* J. REINECKE, LANGUAGE AND DIALECT IN HAWAII: A SOCIOLINGUISTIC HISTORY TO 1935 (S. Tsuzaki ed. 1935) [hereinafter LANGUAGE AND DIALECT IN HAWAII]; J. REINECKE & AIKO TOKIMASA, THE ENGLISH DIALECT OF HAWAII, AMERICAN SPEECH (1935) [hereinafter THE ENGLISH DIALECT OF HAWAII]; Glissmeyer, *Some Characteristics of English in Hawaii*, in VARIETIES OF PRESENT-DAY ENGLISH 190 (R. Bailey & J. Robinson eds. 1973); Sato, *Sociolinguistic Variation and Language Attitudes in Hawaii*, in ENGLISH AROUND THE WORLD: SOCIOLINGUISTIC PERSPECTIVES (J. Chesire ed. 1991) [hereinafter *Sociolinguistic Variation*]; C. Sato, Language Change in a Creole Continuum: Decreolization? (paper to be presented at the Conference on Language Progression and Regression, Univ. of Stockholm, Sweden Aug. 1991) [hereinafter Language Change in a Creole Continuum].

Are you from the ↘
mainland?[44]

rather than

mainland?
Are you from the ↗

At the Honolulu International Airport, the accent is everywhere—on the shuttle buses, at the newsstands, in the voices of old friends and family greeting each other at the baggage claim. It's the softest voice I know, from my own subjective position as a person who loves the islands. It is the accent of Hawaii.

In 1985, the National Weather Service advertised for a vacancy in the Honolulu forecast office.[45] Coursework in meteorology, climatology, physics, and mathematics was identified in the vacancy announcement as relevant to the position, as was meteorology experience. James Kahakua, a native Hawaiian, proudly possessed years of experience in meteorology, and a Bachelor of Science degree with coursework in all of the areas identified in the announcement. He applied for a promotion to the open position, but was turned down in favor of a "haole"—or white—newcomer to Hawaii. A speech consultant had rated Kahakua's Creole-tinged speech unacceptable for weather broadcasts. The white applicant had no college degree, and minimal experience in meteorology. He was selected because of his "excellent" broadcasting voice. Kahakua, along with other applicants who felt that the promotion of a neophyte constituted discrimination, sued the Weather Service and lost.

The National Weather Service prepares recorded weather announcements for the public. Over the years, complaints were received in Hawaii about the quality of the announcements.[46] Many of the complainants criticized mechanical failures and poor recording quality. Some, however, complained about the accent of the broadcasters. One audience for weather broadcasts in Hawaii comprises yacht owners, including wealthy whites who travel intermittently to Hawaii. Attorneys for the plaintiffs in the *Kahakua* case suspect that the most virulent and racist complaints, complete with references to "Tojo Tommy," were from that segment of the audience.[47] The attorneys reasoned that local boaters would be familiar with a local accent.

No one could reasonably complain that the announcers were not speaking English. The weather reports were read from a prepared script, written in standard English. The anger in some of the complaints seemed to reflect

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44. This drop is characteristic of questions that seek yes/no answers. Author's correspondence with Dr. Charlene Sato, linguist and expert on Hawaiian Creole English (on file with author).

45. *Kahakua* Brief, *supra* note 43, at 22. The announcement was posted in the Public Service Unit of the Honolulu Weather Service Forecast Office.

46. *Id.* at 23.

47. *Id.* at 47.

xenophobic resistance to Hawaiian enunciation, rather than problems of comprehension.

James Kahakua is typical of the residents of Hawaii who speak with the Hawaiian Creole accent. The history of the islands is revealed in his genealogy. He was born on the Big Island of Hawaii in 1936, the descendant of native Hawaiians who intermarried with nineteenth-century newcomers to the islands. His father's father was a Japanese worker on the sugar plantations. His mother's father was an Irish-Norwegian-German longshoreman. Both of these sojourners fell in love with and married native Hawaiian women; thus each of Kahakua's parents was one half Hawaiian, as is he. He attended school with other Asian and part-Hawaiian children, all of whom spoke Hawaiian Creole English.

Hawaiian Creole is the language born on Hawaii's sugar plantations.[48] The labor-intensive work of planting, weeding, irrigating, and cutting cane demanded ever increasing numbers of imported workers as the great sugar empires of Hawaii's plantation economy were built. Sugar companies hired contract workers by the thousands from Portugal, China, Japan, Okinawa, Puerto Rico, Korea, and the Philippines. These groups brought their widely divergent languages to the islands, and, as always happens when human beings from different language groups come to live in proximity and find a need to communicate, they developed a contact vernacular. This language of initial contact was Hawaiian pidgin, a shorthand language that borrowed bits and pieces from Hawaiian and English, as well as from the many language groups of its immigrant speakers. This was never a first language, but rather an acquired language of convenience, spoken around the turn of the century when there was no language common to all the workers.[49]

As the next generation—the first-born children of the immigrants—grew to adulthood on the plantations, so did Hawaiian pidgin grow to its linguistic adulthood. It changed from a broken contact vernacular of primitive structure and limited vocabulary to a true language, with all the attributes of a language. It developed rules and structure for indicating complexities of tense, gender, and all the things that verbs can do. Its vocabulary grew to cover all objects, all feelings, all concepts a human being could possibly want to express. Most of all, this language had now a generation of native speakers who passed it on to their children. Thousands grew up knowing this language as their first and

48. *See* Glissmeyer, *supra* note 43, at 192-94; *see also* THE ENGLISH DIALECT OF HAWAII, *supra* note 43, at 50.

49. The linguistic variation known as "pidgin" develops in areas where intense social intercourse between members of drastically different cultures takes place. Pidgin, which develops out of this linguistic heterogeneity, is a simplified system of communication. The maturation of pidgin and its adoption by subsequent generations results in a creolization of the language. Creoles are sophisticated variations of pidgin with increased vocabulary and grammatical devices and are considered normal languages by sociolinguists. *See* M. ATKINSON, D. KILBY & I. ROCA, FOUNDATIONS OF GENERAL LINGUISTICS 410-13 (2d ed. 1988).

most comfortable. It was the language they used in the schoolyard, in quarrels, in courtship, in business and at leisure.

The immigrant parents attempted to keep the languages of the old country alive. Children were marched reluctantly after English school to Japanese language school or Chinese language school where they recited by rote, but as soon as they were let out, they called out to each other in Hawaiian Creole: "You stay go home?" (Are you going home?) "You go stay go, I come bumbye." (You go ahead, I'll come later.)

In the public schools, teachers discouraged use of Hawaiian Creole. Some students managed to learn a second language, standard English, which they used with much success as code switchers. They used Creole in social situations that called for it, and standard English otherwise. Children who spoke Creole as a first language retained its phonological features—its pronunciations and inflections—even when they spoke standard English.[50]

A language is a fragile thing. It can change and disappear within one person's lifetime if there are pressures to end its use.[51] During the rise of Hawaiian Creole, a sad demise was taking place: the decline of the native Hawaiian language.[52] Native Hawaiians were encouraged to adopt English and abandon Hawaiian. There are some adults in Hawaii today who recall being punished for speaking Hawaiian. As English became the language of power, and Creole the language of social life, Hawaiian fell into disuse. As a low-status language, Hawaiian Creole could have easily faced a similar fate. A turn of linguistic history gave Hawaiian Creole, affectionately known as "pidgin" by most of its speakers, the key to its preservation. Because the Creole arose among plantation workers, it was never the language of American whites who lived in Hawaii. A combination of racism, class bias, and linguistic intolerance meant that Creole speakers were segregated both residentially and in school. Most Asian and Hawaiian children grew up with virtually no linguistic contact with whites. In this way the upward pressure by which languages so frequently are changed or disappear did not materialize. That is, there was no status-striving effort to sound white among children who heard Creole as the language of power in their segregated communities. A similar segregation effect, some argue, keeps Black English alive today.[53] In both cases—Black English and

50. *Id.* at 95-99. Phonology is a branch of linguistics that studies the "infinite variety of physical sound" and its correspondence to linguistically significant sound units. *See generally id.* at 93-127.

51. *See, e.g., infra* note 52 and accompanying text; *cf. infra* note 54.

52. *See* Day, *The Ultimate Inequality: Linguistic Genocide*, in LANGUAGE OF INEQUALITY, *supra* note 43, at 165-71 (discussing demise of Hawaiian language). Efforts are currently underway to preserve the Hawaiian language through immersion schools. The pool of native speakers of Hawaiian is presently limited to the isolated island of Ni'ihau and to elderly or rural speakers who have retained the language. A renaissance of pride in Hawaiian culture has led to a revival of the study of Hawaiian and efforts to preserve the language through Punana Leo, or "language nest schools." The effort was inspired in part by the successful revitalization of the Maori language in similar programs in Aotearoa, or New Zealand. Information on language preservation movements in Hawaii and Aotearoa are from the author's participation in meetings at the East-West Center on Language Retention, at Honolulu, Haw., Jan. 1988.

53. G. SMITHERMAN, TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA (1986).

Hawaiian Creole—another anti-assimilation effect is in play. The language, though looked down upon by whites, possesses covert prestige in its own community.[54]

Hawaii is the only state in the nation to have had a statewide system of segregation by language rather than race.[55] From 1924 to 1948, under pressure from a newly emerging white middle class, certain public schools were designated "English Standard," with an entrance examination based on proficiency in standard English. The nonstandard schools were for the Creole speakers.

Hawaii's present linguistic profile is, in part, the legacy of those segregated schools, which concentrated Creole speech among non-whites. Today, with the exception of the Portuguese, there are few white speakers of Hawaiian Creole. The language is spoken among non-whites in a range of varieties. Linguists identify a continuum from basilectal Creole, a truly distinct language nearly incomprehensible to English-only speakers, to acrolectal, a variety that shares vocabulary and grammar with standard English, but draws phonology from Hawaiian Creole.[56]

James Kahakua, like many of Hawaii's citizens, is a code switcher.[57] He

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54. *Id.*; *see also* C. Sato, Technical Description of Plaintiff's Speech, in Excerpts of the Record at 14, Kahakua v. Friday, 876 F.2d 896 (9th Cir. 1989) (No. 88-1668) [hereinafter Excerpts of the Record]. Dr. Sato stated that Hawaiian Creole English enjoys "covert prestige" and "its speakers are inwardly (if not outwardly) proud of its (and their) uniqueness. [Hawaiian Creole English] serves as a marker of in-group membership, of group solidarity." *See Kahakua* Brief, *supra* note 43, at 9. Covert prestige of low-status languages is also discussed in, inter alia, Linn & Piché, *Black and White Adolescent and Preadolescent Attitudes Toward Black English*, in DIALECT AND LANGUAGE VARIATION 574, 578 (H. Allen & M. Linn eds. 1986) (Black teens rated Black English speakers as likely to have more friends and be better-looking).

55. Segregation by language first occurred when the language of the islands was changed from Hawaiian to English around the mid-1800's. As time went on, the slow shift in language preference became evident in the school system. Schools that taught English were allotted a higher proportion of school funds. In fact, by 1857, 9.7% of the total student enrollment in English schools received a disproportionate 21% of the school funds. LANGUAGE AND DIALECT IN HAWAII, *supra* note 43, at 44-51. This gradual push toward standard English has continued. In the 1920's, English elitism resulted in a push for segregated public schooling. The nonplantation-employed haole, or white, population in Honolulu grew and began objecting to the contact with the "'pidgin-speaking' non-haole children." *Sociolinguistic Variation*, *supra* note 43, at 264. Instead of using racial segregation to accomplish this goal, students were grouped in different schools according to their levels of English proficiency. What this accomplished was "the further stratification of Hawaiian society along ethnic lines by means of discrimination along linguistic ones. By institutionalizing linguistic inequality in this way, the [English Standard] [s]chools legitimized the negative stereotyping of [Hawaiian Creole English] speakers . . ." *Id.* This system of segregation was not abolished until 1948, and the last class of English Standard students graduated in 1960. *Id.* at 264.

56. *Fragante* Brief, *supra* note 22, at 8-9. Sociolinguists such as Atkinson have defined the continuum as ranging from basilectal, which refers to the "broadest type of local speech," to acrolectal, which refers to the varieties of speech that are "clos[est] to the standard language." M. ATKINSON, D. KILBY & I. ROCA, *supra* note 49, at 409. Mesolectal generally refers to the "intermediate areas in the continuum." *Id.* The appellant's opening brief, which cites Dr. Sato's *Linguistic Inequality*, describes the sociolinguistic situation in Hawaii. *Sociolinguistic Variation*, *supra* note 43, at 4. Basilectal Hawaiian Creole English is a pure form of Creole and is on one end of the continuum. *Fragante* Brief, *supra* note 22, at 8-9. Acrolectal Hawaiian Creole English, also known as Standard Hawaiian English, is the variety closest to Standard Mainland English and is on the other end of the continuum. *Id.* at 9. Basilectal Hawaiian Creole English differs at every linguistic level from standard English, while Standard Hawaiian English incorporates standard English vocabulary and grammar. *Id.*

57. Dr. Sato states that many islanders modify their speech along the post-Creole continuum. Language Change in a Creole Continuum, *supra* note 43, at 9. Individuals can control the "creoleness of their speech"

can speak a mesolectal or "in between" variety of Creole. He can also speak standard English with a Creole accent. It was this accent that a speech specialist declared a "handicap," disqualifying him for the job of weather forecaster.

Kahakua was angered by this assessment. His English was good enough to serve him in the U. S. Army for twenty years. While in the Army, Kahakua studied meteorology and served as an instructor in ballistics at Fort Sill, Oklahoma. He spent several years as Chief Meteorological Supervisor at Schoefield Barracks in Hawaii, performing a wide range of weather observations, data collection, and predictions for the Army, Air Force, and Marine Corps. He also received a Bachelor of Science degree from the University of Hawaii. He was already in the employ of the Weather Service, and in that capacity he had recorded weather broadcasts. He was particularly careful in pronouncing complex Hawaiian place names, and he valued his broadcasting skills. He was also proud of his accomplishments as a meteorologist, and he was shocked when an inexperienced applicant, who had taken only one college-level correspondence course in meteorology, was selected for promotion in his stead. At no station other than Hawaii had the weather service used assessments of voice quality on tapes to determine promotions. James Kahakua, who had never had trouble making himself understood to any speaker of English, knew he was passed over because he didn't sound white. He knew that was against the law. He decided to sue.

The district judge, a visitor from Fresno, found that race was not a factor in the promotion.[58] The white candidate was selected because he had "better diction, better enunciation, better pronunciation, better cadence, better intonation, better voice clarity, and better understandability."[59] The judge credited the testimony of speech experts that "standard English is that used by radio and TV announcers" and that "standard English pronunciation should be used by radio broadcasters."[60] The court added, "there is no race or physiological reason why Kahakua could not have used standard English pronunciations."[61] The judge discounted the testimony of the linguist who stated that Hawaiian

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depending on the situation or the context. *Id.* This switch in speech inflections is termed "code switching" and involves "major modifications in words and sentence structure or simply minor changes in pronunciation or prosody (features such as intonation, stress, and rhythm)." *See* Excerpts of the Record, *supra* note 54, at 14. Shuy offers a literary example of code switching through the character Mellors in D.H. Lawrence's *Lady Chatterley's Lover*. Mellors code switches from the "lower-class" Derbyshire dialect to "upper-class" British dialect. Mellors discusses sex, for example, in standard English, while discussing other personal topics in Derbyshire dialect. R. Shuy, *Aspects of Language Variability and Two Areas of Application*, in DIALECT AND LANGUAGE VARIATION, *supra* note 54. Labov has argued that "code switching" may in fact represent one highly sophisticated system rather than switching between two systems. That is, the decision when to use which code is itself governed by a single code. *See generally* W. LABOV, THE SOCIAL STRATIFICATION OF ENGLISH IN NEW YORK CITY (1966).

58. The judge in this case was the Hon. M.D. Crocker, Senior U.S. District Judge, Eastern District of California.

59. Findings of Fact and Conclusions of Law at 18, Kahakua v. Hallgren, No. 86-0434 (D. Haw. 1987), *aff'd sub nom.* Kahakua v. Friday, 876 F.2d 896 (9th Cir. 1989) (No. 88-1668) [hereinafter Findings of Fact].

60. *Id.* at 22.

61. *Id.* at 23.

Creole pronunciation is not incorrect, rather it is one of the many varieties of pronunciation of standard English. The linguist, the judge stated, was not an expert in speech.[62]

C. *More Stories, More Voices*

In 1988, A.L. Hahn, a young Korean American, ran for city council in Santa Clara, California. The editorial page of the San Jose Mercury News, *an award-winning California newspaper, recommended against voting for Hahn, in spite of the paper's general agreement with Hahn on the issues. This seemed odd in an editorial that welcomed change and opened with criticism of the "old guard" of "powerful insiders," arguing against candidates with established real estate and institutional ties. Why would a pro-change editor reject a bright newcomer? The editorial stated:*

> *We like Hahn, 34, who was born in South Korea and whose positions on controlling growth are much like our own. Unfortunately, we think his heavy accent and somewhat limited contacts would make it difficult for him to be a councilman.*[63]

* * *

Dr. Mohammad Sirajullah was a board-certified surgeon who suddenly found himself without malpractice insurance. Among the reasons offered for denial of coverage was the insurance board's belief that Sirajullah's "foreign accent" would make it difficult for him to defend a lawsuit. A federal court upheld this denial, finding, among other things, that the regular pattern of rejection of doctors with foreign accents was evidence of nondiscrimination. The insurer had rejected nineteen other applicants because of their accents. This was taken to prove a legitimate concern on the part of the insurer, rather than an irrational objection to Dr. Sirajullah.[64]

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In Texas, school teachers seeking promotion were evaluated in interviews. A Chicana applicant was evaluated favorably by interviewers who found she

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62. Findings of Fact, *supra* note 59, at 22.

63. The author thanks Professor Angelo Ancheta for pointing out this editorial. *For Santa Clara County,* San Jose Mercury News, Oct. 18, 1988, at 6B; *see also* Salner & Wells, *Mercury News Editorial Stirs Protest: Asians Call Remark on Accent Unfair to Candidate,* San Jose Mercury News, Oct. 27, 1988, at B1; Chin & Walsh, *Editorial Blasted As Racist: Candidate Rejected for "Heavy Accent",* San Francisco Examiner, Oct. 25, 1988.

64. The *Sirajullah* case is discussed *infra* note 80.

spoke "without any trace of an accent and looked like an Anglo." Another candidate was rated "okay to teach Anglo children."[65]

* * *

A radio station owner needed a new announcer for a classical music station. An African American was already working at the station who, in the owner's words, "knew more about classical music than anyone I know, and he wanted the position." An African American accent, however, would not appeal to a classical music audience, according to market analysts. In the radio business, the owner said, "we sell accents." He would, he said, hire African Americans for an "urban contemporary format," but not for a classical format. Sensing disapproval, he wondered thoughtfully whether "people's attitudes will ever change if we don't start somewhere."[66]

* * *

A recent Government Accounting Office report cited widespread discrimination against "foreign-sounding" job applicants as a result of the Immigration Reform and Control Act of 1986.[67] *In one example:*

> *A pair of testers applied for a position with a manufacturer that was listed under "shipping" in the Sunday Chicago Tribune. The advertisement specified that the company wanted a "dependable, hardworking person" and that applicants should contact "Bill." The Hispanic tester called the specified phone number and, after inquiring about the job, was told by Bill that the position was filled. The Anglo tester called 15 minutes later and Bill invited him for an interview that day. After a 15-minute interview, the Anglo tester was offered the position. The two testers phoned about the job in the same manner to the same person. The only discernible difference in the phone contact was the Hispanic tester's accent.*[68]

The GAO found that 46% of employers treated "foreign-sounding" applicants differently. These findings were hardly surprising, given the additional survey data showing that employers, by their own admission, discriminate against "foreign-sounding" and "foreign-looking" applicants.[69]

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65. Garcia v. Victoria Indep. School Dist., 17 Empl. Prac. Dec. (CCH) ¶ 8,544 (S.D. Tex. 1978).
66. Author's discussion with anonymous informant, Nov. 1990.
67. Pub. L. No. 99-603, 100 Stat. 3359 (1989).
68. UNITED STATES GEN. ACCOUNTING OFFICE, EMPLOYER SANCTIONS § GGD 90-62 (1990).
69. *Id.*

Listening to these and other stories, I have found that accent discrimination is commonplace, natural, and socially acceptable. People who know of my strong commitment to civil rights felt no hesitation in telling me things like "I couldn't have someone who sounds like that represent our law school" or "People who talk like that sound so dumb" or "My business could not survive if I had to hire people with foreign accents."[70] This reality of accent prejudice creates a challenge for courts attempting to enforce antidiscrimination law.

III. The Doctrinal Puzzle of Accent and Antidiscrimination Law

This is the doctrinal puzzle presented by these stories:

1. Title VII absolutely disallows discrimination on the basis of race and national origin.
2. A fortiori, Title VII absolutely disallows discrimination on the basis of traits, like accent, when they are stand-ins for race and national origin.
3. Title VII absolutely allows employers to discriminate on the basis of job ability.
4. Communication, and therefore accent, employers will insist, are elements of job ability.

The puzzle in accent cases is that accent is often derivative of race and national origin. Only Filipino people speak with Filipino accents. Yet, within the range of employer prerogatives, it is reasonable to require communication skills of employees. The claim that accent impedes job ability is often made with both sincerity and economic rationality. How, then, should Title VII squeeze between the walls of accent as protected trait and speech as job requirement?

This puzzle is evident in every reported case considering accent and Title VII. The courts recognize that discrimination against a trait that is a stand-in for a protected category is prohibited.[71] An employer who says, "I'm not discriminating against people of color, I just don't want to hire people with dark skin," is in violation of Title VII. The EEOC has found that discrimination against an accent associated with foreign birth is the equivalent of discrimination against foreign birth, relying in part on evidence that it is nearly impossi-

70. Based upon author's discussions with various informants, *see, e.g.*, *supra* text accompanying note 66.

71. Note, *A Trait-Based Approach to National Origin Discrimination*, 94 YALE L.J. 1164 (1985) (authored by Stephen Cutler). Laws encouraging trait-based discrimination include the Immigration Reform and Control Act (IRCA). The Government Accounting Office found that under IRCA, which imposed employer sanctions for hiring undocumented workers, some employers simply refused to hire anyone who looked or sounded "foreign," regardless of U.S. citizenship. *See* Biskupic, *Employer Sanctions Draw Fire After Report on Bias*, CONG. Q. 1005 (Mar. 31, 1990); *see also supra* text accompanying note 68.

ble for an adult to eliminate their natural accent.[72] Even the skilled mimics of new accents frequently overcorrect.[73] That is, they blanketly apply stereotypical traits of the acquired accent, even in circumstances in which native speakers would drop the trait. To acquire natural, unself-conscious, and native-sounding speech with a new accent is a feat accomplished easily only by young children, who are still in the process of language acquisition.[74] Given this near-immutability, discrimination against accent is the functional equivalent of discrimination against foreign origin.[75]

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72. *See* Fragante v. Honolulu, 888 F.2d 591 (9th Cir. 1989). Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85,632-01 (Dec. 29, 1989), explicitly states that "[t]o prove a national origin claim, it is enough to show that the complainant was treated differently than others because of his or her foreign accent, appearance or physical characteristics." The Commission cites Berke v. Ohio Dep't of Public Welfare, 628 F.2d 980 (6th Cir. 1980), in which the Court of Appeals upheld a district court finding that the Ohio Department of Public Welfare discriminated against Berke because of her accent, which stemmed from her national (Polish) origin. The court stated that it was enough that she was treated differently solely because of her accent.

73. *See* text accompanying *infra* note 131 (regarding overcorrection). Labov notes that the second-highest status group in a community is the most likely to use hypercorrect speech forms. The highest status group will exhibit more freedom from overconcern with precise, standard speech. Labov, *Excerpt from the Study of Language in its Social Context*, in SOCIOLINGUISTICS SELECTED READINGS 191-93 (J. Pride & J. Holmes eds. 1972).

74. Research in language acquisition suggests that it is almost impossible for most people to lose the accent of their first language when speaking a second language acquired after childhood. *See* Long, *Maturational Constraints on Language Development SSLA*, in 12 STUDIES IN SECOND LANGUAGE ACQUISITION 251 (1990). There may be a neurological explanation for this phenomenon, as ease of language acquisition strongly correlates with stages of neurological development. *See* Tahta, Wood & Lowenthal, *Foreign Accents: Factors Relating to Transfer of Accent From the First Language to a Second Language*, 24 LANGUAGE & SPEECH 265 (1981). A study of 109 speakers, found that age at second language acquisition is critical to retention of accent: when a new language is acquired before ages six to seven, there is no accent transfer; from seven to nine, a good possibility of acquiring accent-free speech in second language; from nine to eleven, chances drop to about 50%; from adolescence onward, chances of accent-free second language speech are minimal. Authors tie findings to both maturational and cognitive development, although exact workings of these connections are unknown.

The difficulty of erasing an accent is illustrated in the literature of teachers who attempt to teach "accent correction." *See, e.g.*, Coates & Regdon, *Thrice: A Technique for Improving the American English Language Delivery of Non-Native Speakers*, 8 TESOL Q. 363 (1974). This article begins by describing talented professionals who "read, write, and express ideas in English relatively well," but who are "working in clerical positions, without hope of promotion, because their spoken English is so heavily accented that they would be unable to function well in supervisorial or management positions." *Id.* at 364. The authors accept the view that this speech problem will cause employers who "hired minority-group individuals such as these in good faith" to declare them unpromotable. *Id.* They describe an elaborate strategy for accent reduction using the techniques of behavior modification, summarized in the acronym "THRICE":

> Remind yourself to apply skills learned thrice daily for conscious correction. T: tongue down, mouth open, jaw loose, control palate. H: hold and dip the important vowels in the important words. R: reduce all other sounds. I: intone the phrase. C: contrast the stress. E: elide, or separate the words.

Id. at 370.

In this reader's subjective opinion, the THRICE method, as elaborated by the authors, seems both daunting and degrading. The authors are not completely unaware of this, noting that "[c]hange in language involves giving up part of one's culture, perhaps the last vestige of which is one's accent." *Id.* at 369; *see also*, Scarella, *Language Transfer in Language Learning*, in DISCOURSE ANALYSIS IN SECOND LANGUAGE RESEARCH (D. Larsen-Freeman ed. 1980) (asserting certain elements of non-native speech rarely become native-like).

75. The immutability justification for linguistic tolerance creates its own philosophical difficulties. *See* text accompanying *infra* notes 252-55.

The Ninth Circuit, in the *Fragante* case, agreed with the EEOC position that denial of employment opportunity because of a person's "linguistic characteristics of a national origin group" constitutes prohibited discrimination.[76] The court added:

> Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communications skills demanded by the job. We encourage a very searching look by the district courts at such a claim.[77]

The court accepted this proposition, but went on to hold that it was not Fragante's accent, but rather the "effect of his Filipino accent on his ability to communicate" that resulted in the selection of employees with "superior qualifications."[78] The court went on to find "no proof whatsoever of pretext," and therefore no Title VII violation.[79]

Once courts accept the proposition that accent discrimination can violate Title VII, they are in a difficult position when an employer comes to court saying, "I have nothing against Filipinos, but I can't hire someone with a heavy Filipino accent. None of my customers will understand them." In the daily work lives of most people, communication is an essential part of the job. The employer's plea seems, on its face, reasonable.

The problem is that in every accent case the employer will raise the "can't understand" defense, and in almost every reported case, the courts have accepted it.[80] The rule that trait-based discrimination against accent is prohibited

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76. Fragante v. Honolulu, 888 F.2d 591, 595 (9th Cir. 1988).

77. *Id.* at 596.

78. *Id.* at 599.

79. *Id.*

80. *See, e.g., In re* Tran v. City of Houston, Fair Empl. Prac. Cas. (BNA) No. 35, at 471 (S.D. Tex. 1983). In *Tran*, the plaintiff was qualified for the job of energy conservation inspector based on his education and experience, but his spoken English was found inadequate for a job that included explaining the law to building owners and helping them devise plans for energy conservation. Mr. Tran had served as an interpreter for the U.S. Armed Forces during the Vietnam war. The court found "[t]his has misled him to believe that his English is better than it is in reality," and that the employer was free to pick the employees who were best qualified. *See also* Sirajullah v. Illinois State Medical Inter-Ins. Exch., No. 86-C-8668 (N.D. Ill. Aug. 1, 1989). A board-certified orthopedic surgeon was denied insurance in part because the insurer claimed the surgeon's accent would make it difficult for him to communicate with patients and jurors and thus make him more susceptible to malpractice claims. The court stated:

> Accent is relevant where, as here, the ability to communicate is at issue. There is no evidence that the ability to communicate effectively in English is not a reasonably necessary prerequisite either to a successful medical practice or to the ability to defend a lawsuit. Therefore, it was not unreasonable for the defendants to rely on the effect of Sirajullah's English language disability as one of the reasons for denying his application.

Id. at 3.

national origin discrimination dissolves in application, when the courts are faced with the employer's efficiency-based complaint that accent impedes job function.

Who could win a Title VII accent case as the law presently stands? The Perfect Plaintiff might look like this: she has a slight trace of a European accent, but for the most part she has adopted the speech patterns associated vaguely with North American television newscasters. She is qualified in every other respect for a job that requires some basic communication ability. Speech is not, however, a major job function.

All courts would agree that this Plaintiff is entitled to equal employment opportunity. An employer may not reject her because of an irrational prejudice against her foreign-identified accent. That is precisely what Title VII at its core forbids: irrational prejudice.[81]

The harder cases present variations of those facts. The first variation is the accent itself. It could be a heavier accent, or one less familiar to the court. It could be an accent evoking a plethora of both conscious and unconscious prejudices. When Jimmy Carter was president, many Northerners admitted that they had a hard time believing that someone with a Georgia accent could be intelligent or well educated. This is an example of conscious bias.

The problem of unconscious bias is more difficult to discern.[82] Speech,

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To evidence the legitimacy of its claim that accent was a legitimate basis for rejecting applicants, the insurance board noted that it often rejected doctors because of accents. The court apparently accepted this argument, stating that:

> Significantly, as of July 1, 1986, the defendants rejected 19 other applicants of varying races and nationalities in part because they had foreign accents that prevented them from communicating effectively. Under these circumstances, Sirajullah cannot say that the defendants treated him differently than similarly situated applicants.

Id. at 3-4.

The court went on to grant summary judgment for the defendant in this section 1981 contract discrimination case. While the court cited other evidence of insurance risk, including complaints against the doctor, its emphasis on accent as a legitimate basis for discrimination is illustrative of the widely held belief that accent discrimination is legitimate. *Cf.* Bell v. Home Life Ins. Co., 596 F. Supp. 1549 (M.D.N.C. 1984) (heavy accent found to interfere with communication skills needed in job performance); Casas v. First Am. Bank, Fair Empl. Prac. Cas. (BNA) No. 31, at 1479 (D.D.C. 1983) (upholding requirement of English-fluency as bona fide occupational qualification where Filipino plaintiff passed over for promotion due to poor English skills). *But see* Carino v. University of Okla., Fair Empl. Prac. Cas. (BNA) No. 25, at 1332 (W.D. Okla. 1981) (rejecting employer's claim that Filipino accent impeded ability to work in a dental lab).

81. *See* Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978) ("Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with reason, based his decision on an impermissible consideration such as race.").

82. Lawrence, *supra* note 7. Professor Lawrence's well-known identification of unconscious racism as a pervasive phenomenon in American social life, and his analysis of the ways in which antidiscrimination law must account for unconscious racism in order to attain the Constitution's promise of equality, have obvious implications in the analysis of accent cases. *Id.* at 322-23; *see also* Lipski, *Prejudice and Pronunciation*, 51 AM. SPEECH 109 (1976) (noting frequency of unintentional mispronunciation of ethnically stigmatized names, including the author's easily pronounced name, "Lipski"). Professor Lipski notes that pronunciation difficulties are often unconscious: "[S]peakers are not aware of their deep-seated feelings and stereotypes and often honestly believe they are faced with impossible situations in which they are making the maximum effort." *Id.* at 117.

the sociolinguists tell us, serves an important function in addition to communication of ideas. Speech also positions people socially.[83] In many societies, certain dialects and accents are associated with wealth and power. Others are low-status, with negative associations. In a society with a speech hierarchy of this kind, it is quite common that speakers of the low-status speech variety, by necessity, are able to understand speakers of the high-status variety.[84] Speakers of the high-status variety, on the other hand, frequently report that they cannot understand speakers below them on the speech-status scale.

I once rented a house from a landlord, an older white woman, who told me I would not be able to understand a word that neighbor X said, because X "barely speaks English." Neighbor X turned out to be a graduate of an American university and a professional educator who spoke perfect English with an Asian accent. I had no trouble understanding the neighbor. Yet my landlord's honest belief was that X could barely speak English. Motivation, prejudice, familiarity, confidence in one's ability to comprehend a variety of accents—so many unconscious factors enter into comprehension and evaluation of speech. A major complicating factor in applying Title VII to accent cases is the difficulty in sorting out accents that actually impede job performance from accents that are simply different from some preferred norm imposed, whether consciously or subconsciously, by the employer. The reality that accent discrimination is often unconscious, renders the judicial search for pretext pointless. Pretext by definition involves a conscious choice to discriminate.

A second complicating factor is the role of speech in the job. In some jobs—say a 911 operator—speech is a critical and central job function. In other jobs, such as a bricklayer or a graphic artist, speech is helpful but not central to the work. In some cases the employer may want a certain accent because of its prestige value—say a French accent in a French restaurant. The range of reasons for wanting speech clarity will vary with the range of jobs.

These two complicating factors lead to the hard cases. Consider this typical composite of accent cases arising in our universities.[85]

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83. H. GILES & P. POWESLAND, SPEECH STYLE AND SOCIAL EVALUATION (1975); *see also* W. LABOV, *supra* note 57.

84. R. FASOLD, THE SOCIOLINGUISTICS OF SOCIETY 34-60 (1984) (discussing *diglossia*, or societies in which spoken language has distinctive high and low forms; often speakers of low form understand high form, but speakers of high form do not understand low form).

85. *See* Fisher, *At GWU, Accent is on English for Foreign Instructors: Student Complaints About Teaching Assistants Lead to Testing Program*, Wash. Post, Nov. 29, 1986, at B1 [hereinafter *At GWU, Accent Is on English*] (citing student complaints that "we just couldn't understand a word they were saying" and alleging that "classes degenerate into chorus of what did he say"). George Washington University and the University of Maryland are reported to have instituted testing programs to identify foreign TA's with deficient speech. Interestingly, the two students in the article who are identified as foreign-born suggest that the problem is overstated. "They didn't speak perfect proper English, but you could understand them," a Turkish student reported. *Id.* A Korean-born student said, "If they were admitted as graduate students, they have the ability to teach the material and they must be able to speak some English . . . . I am a minority student too, and I have trouble with the language, so I understand." *Id.*; *see also* Wycliff, *Chided for Pushing Research, Colleges Reaffirm Education*, N.Y. Times, Sept. 4, 1990, at A1, col. 1 [hereinafter *Chided for Pushing Research*] (discussing growing criticism of teaching at U.S. universities, including problem of

Tran is a lecturer in computer science. Approximately one-fourth of her time is spent in communication with students, either in class or in conference. The rest of her time is spent reviewing and grading papers, engaging in research and writing, and administering the computer lab. She excels at these tasks by all accounts. She has a heavy Vietnamese accent. Most of her students are white. There is evidence of strong prejudice in the community against Vietnamese, including acts of hate violence. Tran gets poor teaching evaluations in which students claim she "can't speak English" and that "we aren't learning a thing in class." Asian American students report no difficulty in understanding Tran. Some of the evaluations also contain racist and sexist slurs and obscenities. "Why can't we get real American teachers," one student complains. Tran is denied contract renewal, and she sues.

Communication is essential to the job of teaching. Inability to communicate clearly should disqualify the candidate from classroom teaching. The reality of

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"foreign teaching assistants who cannot be understood by English-speaking students," and describing Pennsylvania's newly enacted state law requiring English fluency for teachers in state universities). This article uses the phrases "English-speaking students" and "foreign TA's" as mutually exclusive sets, as though foreign-born, English speaking students are not a possibility, and as though the "foreign TA's" are not speaking English. *See Student Protest Movement Expands, and Its Voice Is That of the Consumer*, N.Y. Times, Oct. 17, 1990, at B6, col. 1 (students "across the country" are concerned with quality of university education, citing, inter alia, complaints about "foreign teaching assistants who cannot be understood by English-speaking students"; Syracuse, UCLA, Pennsylvania State, and Purdue universities have started proficiency programs for foreign TA's); *UI Foreign Faculty To Become Proficient in English*, UPI, Iowa City, Iowa (Mar. 1, 1988) (University of Iowa institutes program to test foreign TA's and exclude them from classroom jobs if they do not meet university standards); UPI, Lexington, KY (Oct. 6, 1986) (33 out of 96 TA's at University of Louisville are foreign born; the University tests for "spoken-English capabilities"). Many states test the English proficiency of International Teaching Assistants (ITA's). The status of state statutes regulating instructor language proficiency is in flux. At the writing of this paper, 11 states have drafted statutes or at least a joint resolution addressing language proficiency: California, Florida, Illinois, Missouri, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas. *Legal and Policy Issues in the Language and Proficiency Assessment of International Teaching Assistants*, Institute for Higher Education, Law and Governance, Monograph 90-1, at 3-4 (undated).

In addition, although some states have not enacted specific legislation, many have implemented other policy decisions affecting the oral proficiency of ITA's. For example, Minnesota does not have a statute, but its state legislature has mandated that the University must demonstrate the oral and reading proficiency of its ITA's and in so doing has tied fiscal appropriations to the proficiency demonstration. *Id.* The Oregon State System of Higher Education requires that international students who become graduate teaching assistants demonstrate writing and speaking proficiency. *Id.* A Kansas policy specifies a level of achievement on the Speak Test (also known as the Test of Spoken English). In both Kansas and Arizona, formal procedures for evaluation of ITA's call for panels of educators to assess ITA language proficiency. *Id.* at 4. Commentators in the Asian American community see the growth of English proficiency examinations as tied to the English-only movement and hostilities against Asian immigrants. *See* Soohoo, *Asian Accents: Constitutional Discrimination Against Asian-born TA's*, Pacific Ties, Nov. 1990. Soohoo states: "The growth of the 'English-Only' movement and the passage of Proposition 63 in 1986 (listing English as the official language), with its overtones of racism and chauvinism, is one manifestation of this public debate that may spill over to the so-called 'educational reform.'" *Id.* She also quotes a study:

> students will usually tolerate an instructor who has a heavy German or French accent, and make every effort to understand . . . in fact, they may even unconsciously attribute greater intelligence to people having such accents. On the other hand, they tend to be far less forgiving of instructors having Asian accents, which they may associate with cultures having much less prestige . . . .

Id.

significant anti-Asian sentiment,[86] however, gives one pause in determining whether to take the student complaints at face value.

In a rash of incidents like this one, teachers of Asian descent have been criticized for their speech and denied teaching positions when their speech is found inadequate.[87] Many of these cases are arising in the sciences, where there is a significant teacher shortage. There is a tradition in the American academy, going back to World War II, of hiring talented emigrés to teach in the sciences. There is also a tradition of stories of absent-minded professors, particularly in the sciences, who are poor communicators but brilliant scientists. Of late, however, the professor with the alleged poor communication skills is of Asian rather than European descent, and the affectionate stories of how "he's brilliant and incomprehensible" no longer apply.

To make the case harder, let's assume that Tran is able to prove to the court's satisfaction that with some minor adjustments, such as the student asking for a clarification or a word-spelling on the average of once in every three lectures, students will have no trouble comprehending lectures and taking notes. May the university still refuse to renew Tran's contract on the ground that it has a better candidate, Buddy, who speaks with an accent more familiar to the students? Buddy is similar to Tran in qualifications and experience. The only difference is that Buddy speaks in the same regional, white-identified accent as most of the students, and the university argues that rapport and the ability to counsel students and engage them in lively debate makes Buddy a better teacher.

The question here is whether the employer is free to choose the "best" accent from among a set of functional accents. Can Le Boutique de Rodeo choose the most-European-sounding, high-prestige accent? Can State U. choose the "sounds most appealing to our students" accent? Can Radio K-YUP choose

86. Recent years have shown a marked increase in overtly anti-Asian racist incidents on college campuses. One such incident occurred at the University of Connecticut on December 3, 1987. Chan & Ho, *The U. Conn Incident: Responding to Racism*, 7 EASTWIND 16 (1989). This incident occurred as eight Asian American students from the University of Connecticut began their bus ride to an off-campus semiformal dance. On the forty-five minute bus ride they were spit at and subjected to racial name-calling by a group of male university students. When the group arrived at the dance, they were exposed to constant verbal and physical harassment. Neither the administration nor the police came to their aid. *Id.* at 19. Only after repeated demands that the University acknowledge the racial incident were two of the main instigators finally punished. *Id* at 18-20. One was suspended for a year while the other was placed on probation for two years. *Id* at 17; *see also Six Men Assault Asian Student Near Seattle's Pike Place*, Pacific Citizen, Nov. 23, 1990, at 1, col. 3. This incident occurred in Seattle, Washington. A group of white men attacked an Asian American pre-med student, Darres Park, off-campus. Park and two white friends had spent the evening celebrating his birthday when they were assaulted and battered around midnight on October 25, 1990. In addition to calling Park racist names, two of the men attacked him with baseball bats. The scene attracted a crowd; however the onlookers encouraged the attackers and failed to summon the police. *Id.* When later interviewed, Park claims it was his training in martial arts that saved his life. *Id.* Although this incident occurred off-campus, it reflects the growing hostility and violence directed against Asian Americans.

87. *See supra* note 85.

the "sounds closest to our target market" accent?[88] What if, in all of these cases, the "best" accent just happens to be the white accent?[89]

The courts and the EEOC have made an unmistakably clear statement that discrimination against accents associated with foreign birth is national origin discrimination and is thus violative of Title VII.[90] If this clear statement is in fact true, one would expect to see plaintiffs regularly winning accent cases.

In fact, the opposite is true. Plaintiffs, like Kahakua and Fragante, are losing. They are losing because, somewhere between the resounding prohibition of accent discrimination and the ultimate finding of nondiscrimination, employers are allowed to restate their position, using discrimination against accents as job-related justification for discrimination against accents.

Employers will say that customers cannot understand a foreign accent. They will say this with sincerity. Courts will listen to this claim, and listen as well to the voice of the plaintiff. That voice may well sound difficult to the court, just as it did to the employer. The original commitment to the antidiscrimination principle fades as the court empathizes with the position of the employer. A judge may think, either consciously or unconsciously, "I wouldn't have hired this person either."

Professor Charles Lawrence has shown in his influential article, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, that all of us in this society have absorbed cultural messages of racial inferiority, which invade our seemingly neutral evaluations of others.[91] As discussed in the following pages,[92] sociolinguists have shown that in the area of speech evaluation, we are particularly susceptible to the cultural stereotypes we have absorbed.[93] Low-status accents will sound foreign and unintelligible. High-status accents will sound clear and competent.[94]

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88. *Cf.* Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987) (bilingual disc jockey fired for refusing to speak only English on the air). In the *Jurado* case, the radio station's marketing experts believed an ethnic format would "confuse" listeners and cause them to lose interest in the program. The alleged statement that "KIIS [the radio station] did not 'need the Mexicans or the blacks to win in L.A.'", the court found, "was referring to KIIS' demographic and marketing concerns, not expressing racial animus toward Jurado." *Id.* at 1410.

89. A law school administrator once told me that he interviewed a front-office clerical candidate with a strong African American accent, and he was concerned that "someone with that accent could not represent our school." I believe this administrator never would have said "only a white person can represent our school," and that, indeed, he would probably have been offended by that suggestion. He obviously did not believe that a preference for a white accent was the same as a preference for a white employee.

90. *See* Carino v. University of Okla. Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984); Lee v. Walters, 1988 WL 105887 (E.D. Pa.) ("To avoid discrimination in the United States, it has always been necessary to make considerable allowance of a person's foreign accent and difficulty in being understood."). *See generally* Note, *Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986*, 41 VAND. L. REV. 1323 (1988) (discussing national origin discrimination).

91. *See* Lawrence, *supra* note 7, at 355-62 (discussing recognition of cultural meaning as necessary to understanding when conduct violates equal protection clause).

92. *See infra* Part IV.B.

93. *See infra* note 121 and accompanying text.

94. *See supra* note 84 and accompanying text; *infra* note 124 and accompanying text.

Given the pervasive, unconscious bias against low-status accents, it is reasonable to inquire of employers exactly what they mean when they declare an accent nonfunctional for the job. If they mean consciously or unconsciously "I don't like foreign sounds and neither will my customers," they are arguing that discrimination is a justification for discrimination. This kind of tautology is obviously insufficient to surmount Title VII's prohibition against discrimination.

In the early days of Title VII, employers were frequently caught making honest and naive admissions about their discriminatory hiring practices. "We'd love to hire a Negro waitress, but our customers would refuse service from her," they argued. "We aren't opposed to male flight attendants, but we have to hire women because they are more naturally maternal and soothing to air travelers," they opined.[95] Women couldn't work on a road crew, "They can't lift heavy loads," they exclaimed.[96] These arguments were, of course, rejected by the courts. The point of Title VII was that ability to do the job, not racist and sexist presumptions, would henceforth govern employment decisions.[97] That is the core of both the letter and intent of the statute.

When it comes to speech, however, the defense claims presently accepted by the courts sound disconcertingly like the claims made in the early cases: "We have nothing against the foreign born—but of course we can't have anyone with *that* accent doing *this* job."

In many jobs, of course, speech is essential, and the courts cannot ignore the legitimate expectation of employers that workers will communicate at a level necessary for job performance. What I hope to do in the following sections is to suggest an analysis that respects legitimate employer expectations while disallowing the discrimination Title VII is intended to prevent.

The analysis suggested below is intended as a guide for sorting the cases in which an accent is legitimately nonfunctional in a given job from the cases in which a claim of nonfunctioning is merely a restatement of societal prejudice against the accent. In developing this means of sorting, it is necessary to understand the social role of speech and the range of attitudes toward accent

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95. *Cf.* Diaz v. Pan Am. World Airways, 311 F. Supp. 559, 563 (S.D. Fla. 1970) (female flight attendants alleged superior "in the 'non-mechanical' [aspects of the job, such as] providing reassurance to anxious passengers, giving courteous personalized service, and, in general, making flights as pleasurable as possible").

96. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971); Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1094 (S.D. Ohio 1971), *rev'd and remanded on other grounds*, 474 F.2d 949 (6th Cir. 1972); Local 246, Utility Workers Union v. Southern Cal. Edison Co., 320 F. Supp. 1262, 1264 (C.D. Cal. 1970); Cheatwood v. South Cent. Bell Tel. & Tel., 303 F. Supp. 754, 757-58 (M.D. Ala. 1969) ("Defendant contends that several features of these duties make them inappropriate for performance by women . . . [T]ires will need to be changed and . . . restroom facilities are occasionally inaccessible."); *see also* Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 339 (D. Or. 1960) (employer was relying on state statute, which court held was discriminatory).

97. *See* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1787 (1989) ("intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute's legislative history").

that pervade our society. The next part thus turns to the field of sociolinguistics. As a starting point, I ask the linguist's question: What is speech and what is its function?

IV. WHAT IS SPEECH?

A. *The Hundred Years War*

In trying to understand the function of speech in life and work I was drawn to an American community that exists in every state, that has suffered the burden of forced assimilation and linguistic tyranny, that has nevertheless survived and flourished and invented a rich language and culture of its own—one unknown to most of us even as we pass members of this oppressed community everyday on the streets of our cities. This community, unlike most subordinated communities in this country, is marked by neither race, nor class, nor gender, nor place of birth. It is marked instead by the absence of oral speech. It is the community of the American deaf.[98]

"The Hundred Years War" marks the period of struggle from the 1860's to the 1960's during which the deaf community fought for acceptance of American Sign Language.[99] In 1880, a group of non-deaf educators decreed that oralism—or lipreading and attempted approximations of speech—was the best communication method for the deaf, the only method appropriately imposed in schools for the deaf.[100] The deaf have always known that accurate lip-reading is difficult and that approximating natural speech, particularly for those deaf from birth, is also a cruelly unattainable goal.[101] On the other hand

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98. Carol Padden offers this definition of the deaf community:

> A deaf community is a group of people who live in a particular location, share the common goals of its members, and in various ways, work toward achieving these goals. A deaf community may include persons who are not themselves deaf, but who actively support the goals of the community and work with deaf people to achieve them.

Padden, *The Culture of Deaf People*, in AMERICAN DEAF CULTURE, *supra* note 3, at 1, 5. Note that this definition includes both status, being deaf, and politics, caring about the goals of the collective deaf. This definition echoes the efforts of outsiders in other communities to form identity around both status and culture, such that both are critical but neither is the exclusive basis for definition. *Cf.* Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990) (seeking to enrich theory with perspective of the subordinated using status plus critical consciousness as source of identity).

99. *See* Rutherford, *Funny in Deaf—Not in Hearing*, in AMERICAN DEAF CULTURE, *supra* note 3, at 65, 74.

100. *Id.* at 75.

101. *See* Charrow & Wilbur, *The Deaf Child*, in AMERICAN DEAF CULTURE, *supra* note 3, at 103, 107-09. Prelingually deaf children rarely learn English with full competence. ASL is their natural language. Reasons for this include the difficulty of reading lips before one knows a language. *Id.* at 109. Reading lips of a language one does not know is, obviously, impossible. Even if one knows the language, lipreading is only about 40% accurate. *Id.* at 107; *see also* H. KOHL, LANGUAGE AND EDUCATION OF THE DEAF 10 (1966) (observation that "cart" looks like "yarn" and "red" looks like "green" as examples of why lipreading is difficult), *cited with approval in* L. JACOBS, A DEAF ADULT SPEAKS OUT 47 (1989); Mow, *How Do You Dance Without Music*, in AMERICAN DEAF CULTURE, *supra* note 3, at 33, 35 (A deaf writer explains, "Seventy percent of the words when appearing on the lips are no more than blurs. Lipreading is a precarious and cruel art which rewards a few who have mastered it and tortures the many who have tried and failed.").

there is a rich, expressive language in which the deaf can both comprehend and articulate the full range of ideas and passions known to human kind. That language, American Sign Language, or ASL, is a language that developed within the American deaf community, spreading surreptitiously even in the days when children were punished for using ASL.[102] Because ASL was the only language in which most deaf people could truly communicate, it survived, even when it was forced underground.[103]

I have learned many things from reading the literature of the deaf community. Their story is of a people determined to communicate, to listen, to tell, at the highest levels. They resisted the unnatural language forced upon them because they could not tell their full story with it. They broke out of the belief that their indigenous language was a shameful, awkward language, and they came to know that it is a language as rich, as expressive, and as valuable as any other. They came, toward the end of their one-hundred-year war over the legitimacy of sign language, to a place of Deaf Pride.[104]

Deaf Pride resists the tyranny of oralism.[105] Oral speech is not the only means of effective communication. While most people in the hearing world equate speaking with sound, deaf culture refutes that equation. The deaf speak out, loudly and clearly, from a silent world. They speak in ASL, through the written word, and, when possible, through the spoken word.[106] The spoken word has no particular claim to superiority in the world of Deaf Pride—although many deaf still feel a lingering sense of inferiority because they do not use oral speech. This is particularly true of deaf children of hearing parents, especially if the parents pass on a conscious or unconscious belief in the superiority of oral speech.[107] Deaf children of deaf parents, growing up

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102. *See* L. JACOBS, *supra* note 101, at 40 (children punished for signing). The deaf poet Ella Lentz has signed:

> We were simply talking in our language of signs, When stormed by anthem-driven soldiers pitched
> a fever by the score of their regime. They cuffed our hands, strangled us with iron rings.
> "Follow me! Line up! Now sit!"
> The Captain, whip in hand,
> inflicts his sentence with this command:
> Speak!

Untitled poem, translated from sign to English in Wilcox, *Breaking Through the Culture of Silence*, in AMERICAN DEAF CULTURE, *supra* note 3, at 179.

103. O. SACKS, SEEING VOICES 138-39 (1989) (ASL survived underground). The same situation occurred when standard British Sign Language was prohibited in British schools. *Id.* at 12. Like ASL, British signing flourished underground. *Id.* at 12-13. Deaf children who know ASL, typically those with deaf parents, are accorded high status among deaf children, and will teach it to other children. *See* Charrow & Wilbur, *supra* note 101, at 112.

104. Deaf Pride, and the use of a capital "D" in deaf to show pride in deaf culture, is discussed in Bahan, *Notes From a Seeing Person*, in AMERICAN DEAF CULTURE, *supra* note 3, at 29, 31.

105. *See* L. JACOBS, *supra* note 102, at 14 (defining oralism as "A situation in which communication is restricted to speech and lipreading, although writing and reading are also used. Sign language and finger spelling are forbidden."); *see also* Rutherford, *supra* note 99, at 65, 74.

106. Padden, *supra* note 98, at 1, 11 (stressing that the deaf speak).

107. Unlike members of other subordinated cultures, deaf children often have parents from the hearing culture who are unable to pass on deaf cultural values and Pride in Deafness. *See* Woodward, *How You Gonna Get To Heaven If You Can't Talk To Jesus?: The Educational Establishment vs. the Deaf Community*,

in a lively world of interactive and natural non-oral communication are often the happiest members of the deaf community.[108]

People want to communicate, and they want to communicate in the way that is most effective for them. Sometimes that way is different from the majoritarian way. When I read of teachers punishing deaf children so they would not sign,[109] I wondered at the kind of fear and anger that would cause a society to act so cruelly and so desperately in its will to force children to speak in the one way, the way called normal, the way of those in power.

We have, fortunately, moved forward in our understanding of the deaf community. Most educators of the deaf now adhere to "total communication," the philosophy that encourages teaching of both ASL and oral skills so that children can rise to their highest levels of communication.[110] A few bitter holdouts still claim the superiority of oral methods, arguing it is better for the child to seek acceptance by the "real" world, the hearing world, through oral speech.[111]

The law surrounding education, employment, and public access for the differently-abled accepts the non-oral world of the deaf.[112] Schools, employers, and public facilities are required to make reasonable accommodation of the non-hearing. While the narrow definition of reasonable may leave much undone, the basic fact that not everyone hears and speaks orally, and that every-

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in AMERICAN DEAF CULTURE, *supra* note 3, at 163, 164; *see also*, L. JACOBS, *supra* note 101, at 16 ("I was born deaf of deaf parents who had an older deaf son. Therefore, my family was entirely deaf . . . . I grew up in a loving atmosphere and never knew any deprivation of communication; my parents knew my wants. . . . My only communication difficulties arose when I began doing business with the outside world, but I thought nothing about them because I had observed my parents' methods of overcoming those barriers.").

108. *See* L. JACOBS, *supra* note 101, at 1-6 (describing life as Deaf child of deaf parents).

109. *Id.* at 36-47 (discussing efforts to impose oralism on children).

110. *Id.* at 17 (defines total communication as "a philosophy in which full communication is established through the employment of one or more methods, . . . writing, reading, illustrating, amplification, speech, lipreading, sign language, finger spelling, gestures, body movements, and/or facial expressions.").

111. *Id.* at 35, 38; *see also*, Bahan, *What If Alexander Graham Bell Had Gotten His Way?*, in AMERICAN DEAF CULTURE, *supra* note 3, at 84-85. Alexander Graham Bell felt that deaf children should not be taught together in specialized institutions. In 1883 he presented a paper to the National Science Academy entitled *Memoirs Upon the Formation of the Deaf Variety of the Human Race*, cited in *id.* at 84, which pointed to perceived problems with deaf intermarriages. His claim was that since the deaf students were institutionalized together, they were intermarrying and having more deaf children. Bell relied on data showing that many of the deaf students at the same school had the last names of "Smith," "Brown," and "Miller," which proved to him that there was a high rate of intermarriage among them. His paranoid vision was that generations of intermarriages between deaf people, would breed a "deaf race."

112. *See* discussion of reasonable accomodation in disability law, *infra* note 179; *see also* Solomon v. Secretary, Smithsonian Inst., Fair Empl. Prac. Cas. (BNA) No. 50, at 386 (D.D.C. June 21, 1989), in which plaintiff claimed discrimination on the basis of her handicap, stuttering. The court found for the defendant, on the ground that the candidate chosen in lieu of plaintiff for a promotion was better qualified. The court also noted that the employer had made reasonable accomodations, including adding a partition to facilitate plaintiff's use of the telephone and allowing leave to attend speech therapy. *See* Board of Educ. v. Rowley, 458 U.S. 176 (1982) (defining school's responsibility to deaf child); Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 WASH. U.L.Q. 213 (1980).

one nonetheless is entitled to full participation in society, is accepted in the law.[113]

As I developed the hypothetical used earlier in this Article of a college lecturer with a Vietnamese accent, I used the hearing presumption that lecturers must speak clearly. I later rewrote "talk" as "communicate" when I learned that deaf professors are successfully teaching hearing students at California State University at Northridge.[114] Not everyone speaks with tongue and palate, and among those who do, not everyone speaks with the same accent. The legal response to the deaf, which accommodates an absence of speech, is an interesting starting point from which to consider the legal response to accent, or speech with a difference.

B. *What is Accent?*

Accent, as used in this Article, refers to pronunciation rather than choice of words. A linguist might break down the lay concept of accent into smaller components of phonology, including intonation, stress, and rhythm.[115] While this Article focuses on accent, much of the analysis is also relevant to dialect, or word choice.[116] There are many dialects of English, some more prestigious

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113. *See also infra* note 179 (discussing Americans with Disabilities Act).

114. According to Mike Gilpatrick, Acting Administrator of Planning and Evaluating from the National Center on Deafness at California State University at Northridge, deaf professors have taught a variety of courses. At the National Center on Deafness, which provides support services for deaf students, some academic classes are offered in freshman English and Math. While most of the students who attend these classes are deaf, hearing students have also taken the classes. Deaf professors also teach students in the Department of Deaf Studies in classes such as American Sign Language and Deaf Culture. The students in these classes are both hearing and deaf. No interpreters are needed to accommodate the hearing students. Gilpatrick also noted that some deaf professors have been hired from the community to teach courses in the general college curriculum. Some have taught courses in Theater, Physical Education, and Geology. Gilpatrick has noticed that most of the hearing students have no problems at all in understanding the deaf professors. He said that they may have to concentrate a little more at the beginning of the semester, but they quickly adapt to the professor's speech patterns as time goes on. Interview with Mike Gilpatrick (Nov. 28, 1990).

115. C. Sato, *supra* note 54. Sato refers to these terms in relation to the different aspects of pronunciation. In addition, see also M. ATKINSON, D. KILBY, & I. ROCA, *supra* note 49, at 87-88. Intonation is used commonly to differentiate "idiosyncratic emotional states of the speaker." *Id.* at 87. Most commonly, it is used to differentiate between statements and questions. *Id.* Stress is the "relative emphasis of a vowel or syllable with respect to the neighboring segments." *Id.* at 88.

116. M. ATKINSON, D. KILBY & I. ROCA, *supra* note 49, at 390-92. The difference between dialect and language can be seen as resting on prestige. *Id.* at 391. A local variety of the language can rise to official status and become standardized. *Id.* Linguists have difficulty identifying any criteria other than prestige on which to base this distinction. *Id.*; *see also* J. QUINN, AMERICAN TONGUE AND CHEEK (1980). In relation to Black Vernacular English, Quinn argues that:

> There is really no point in arguing whether Black Vernacular English is a language, a dialect, an argot, or a slang. That's like arguing whether a particular plant is a wild flower or a weed—the distinction is meaningless to botanists. The distinction between language and a dialect is also meaningless to linguists.

Id. at 59-60. Smitherman argues similarly. She states that

> in a popular sense, the term "dialect" suggests some form of speech that is substandard or inferior, but in a scientific, linguistic sense, a dialect is simply a variation of a language. Since everybody speaks a variation of "*the* language," everybody can be said to be speaking a dialect.

than others, providing many opportunities for discrimination.[117]

As feminist theorists have pointed out, everyone has a gender, but the hidden norm in law is male.[118] As critical race theorists have pointed out, everyone has a race, but the hidden norm in law is white.[119] In any dyadic relationship, the two ends are equidistant from each other. If the parties are equal in power, we see them as equally different from each other. When the parties are in a relationship of domination and subordination we tend to say that the dominant is normal, and the subordinate is different from normal.[120]

And so it is with accent. Everyone has an accent, but when an employer refuses to hire a person "with an accent," they are referring to a hidden norm of non-accent—a linguistic impossibility, but a socially constructed reality. People in power are perceived as speaking normal, unaccented English. Any speech that is different from that constructed norm is called an accent.

The unstated norm—the so-called standard American accent—is an odd choice for a norm, because only a minority of citizens speak it.[121] Most speakers of North American English have an accent that reflects their regional affiliations, their ethnicity, or their age. An odd recent phenomenon, the geographically dispersed, upper-middle-class, youth-based accent known as "valley" or "sunbelt-speak" is heard increasingly among law students across the country.[122] Because I grew up in a world in which accents tended to attach to races, it seems odd to me as a teacher to hear my students of different races speaking in this new, youth-based accent. (They might characterize a racist decision, for example, as "ruhley" unfair or "see-oh" ridiculous.)

G. SMITHERMAN, *supra* note 53, at 191.

117. *See* D. SMITH & R. SHUY, SOCIOLINGUISTICS IN CROSS-CULTURAL ANALYSIS 15, 67 (1972) (collection of papers including discussions of Black and Puerto Rican English). *See generally* VARIETIES OF PRESENT-DAY ENGLISH, *supra* note 43 (collection of articles on various dialects of English).

118. *See* C. MACKINNON, FEMINISM UNMODIFIED (1987); Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

119. For a definition of Critical Race Theory and articles attacking hidden norms, see *supra* note 7; *see also* J. Calmore, Toward Archie Shepp and the Return of Fire Music: Voicing Critical Race Theory and Securing an Authentic Cultural Life in a Multicultural World (unpublished manuscript, on file with author).

120. R. ROSALDO, CULTURE AND TRUTH (1989) (describing, from anthropologist's perspective, process of creating false centers and truths); *see also* MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

121. The so-called "General American" accent is an elusive one. *See generally* Van Riper, *General American: An Ambiguity*, in DIALECT AND LANGUAGE VARIATION, *supra* note 54, at 123, 124 (citing sources defining "General American" as, alternatively, neither eastern, nor southern). "[A] general or Western speech covering the rest of the country, and all speakers in New England and the South at moments when their speech is not local in character." *Id.* As one *Webster's Dictionary* defined its source of pronunciation: "largely that of the Western Reserve of Ohio, especially as used by literate speakers in the city of Cleveland." *Id.* at 128. Attempts to encompass large geographic expanses as the domain of "General American" speakers are consistently thwarted by the work of linguistic geographers, who have shown that "western" or "central" speech is actually divided into numerous subregions with distinctive pronunciations. *See* Atwood, *The Methods of American Dialectology*, in DIALECT AND LANGUAGE VARIATION, *supra* note 54, at 63; Kurath, *The Sociocultural Background of Dialect Areas in American English*, in DIALECT AND LANGUAGE VARIATION, *supra* note 54, at 48.

122. Cooke, *Are Accents Out? Hey, Dude, Like Neh-Oh Way!*, N.Y. Times, Nov. 19, 1989, § 6 (Magazine), at 50.

If almost no one speaks with standard pronunciation—or, as they call it in Great Britain, "received pronunciation"—the claim that standardization is important for comprehension loses some force.[123] Variability is the master rule of spoken North American English, and if variability impedes comprehension, then we are already living in the tower of Babel.

We are not. We understand each other, particularly when we are motivated to do so. One of the interesting lessons of sociolinguistics is that comprehension is as much a function of attitude as it is of variability.[124] Human beings can and do adjust to marked variation in pitch, intonation, and pronunciation in ways that scores of computer engineers working in the fields of fuzzy logic and artificial intelligence have been unable to duplicate.[125] The seemingly simple ability of a tiny child to recognize its own name whether spoken at Mom's pitch or at Dad's, is in actuality a complex feat of comprehension.[126] The magnificent switchboard that converts sound to understanding in the human mind can account for gaps, pauses, variations, and distortions of many kinds.[127]

Thus a twentieth-century North American can listen to the long-dead accents in a Shakespeare play and—after perhaps a moment of disorientation—soon follow the dialogue with ease. A traveler to a new region of English-speakers, after a sometimes hilarious miscue, will understand more and more of the local speech, especially if motivated by the need to get a bite to eat or a moment of

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123. *See* P. TRUDGILL, ON DIALECT 186-87 (1983) (about one person in sixty in United Kingdom speaks with upper-class, public school accent referred to as "received pronunciation").

124. *See, e.g., id.* at 196 ("claims of unintelligibility are often exaggerated, are usually unsupported by research data, and fail to acknowledge that it is normally much simpler and easier to learn to understand a new variety than to learn to speak one"); *see also* ATTITUDES TOWARDS LANGUAGE VARIATION (E. Ryan & H. Giles eds. 1982). Listener behavior, as well as attitude, changes with a change in accent. Edwards, *Language Attitudes and their Implications Among English Speakers*, in *id.* at 20. Prestige/standard accents can elicit more response, more listening, more helping behavior, etc. *See* Giles, Baker & Fielding, *Communication Length as a Behavioral Index of Accent Prejudice*, 166 LINGUISTICS 73 (1975).

An African American friend told me that when he calls his wife at work he often doesn't recognize her "whitened" telephone voice. Author's conversation with Professor John Calmore. One study suggested that callers with Black accents received less help over the phone. *See also* J. ANGLE, LANGUAGE MAINTENANCE, LANGUAGE SHIFT, AND OCCUPATIONAL ACHIEVEMENT IN THE UNITED STATES (1978) (makes strong statement against accent discrimination based on the following findings: maintenance of mother tongue has many advantages, such as "wantedness" and identity; segregation leads to next generation also having accent; and tolerance for deviation and attitudes towards prestige groups is equal to listener's comprehension.); Graff, Labov & Harris, *Testing Listener Reactions to Phonological Markers of Ethnic Identity*, in DIVERSITY AND DIACHRONY 46 (Sankoff ed. 1986); Seggie, *Attribution of Guilt as a Function of Ethnic Accent & Type of Crime*, 4 J. MULTILINGUAL MULTICULTURAL DEV. 2-3, 197-206 (1983).

125. *See* INFORMATION ACCESS CO., NATURAL LANGUAGE UNDERSTANDING AND SPEECH RECOGNITION (Aug. 1990) (attaining computer understanding of human speech is difficult because of acoustic ambiguity and frequency of rule violation in spoken language).

126. *Cf.* Day, *Children's Attitudes Towards Language*, in ATTITUDES TOWARDS LANGUAGE VARIATION, *supra* note 124, at 116. This study found that by age three children grasp language differences and develop attitudes towards languages that parallel their attitudes towards race and ethnicity. Young children also have the ability to distinguish between different dialects.

127. *Id.*

human company.[128] We have all, at various times, performed the miracle of comprehension across a vast sea of phonological difference.

The ability to comprehend across variations is accompanied by a clumsy inability to alter speech across variations. Most of us feel noticeably uncomfortable and phony when we try to imitate other accents, and few succeed at the task of acquiring a permanent, unself-conscious, new accent.

When the Beatles were an unknown Liverpool band trying to make it in the new world of rock and roll, they inserted "R's" in their pronunciation in order to sound more American.[129] As the British invasion captured the fancy of young whites in America, it became more acceptable to sound British. By the time the Beatles hit superstar status, they had reverted to the "R" dropping that characterized their working class, British backgrounds.[130] The Sergeant Pepper album—which established the Beatles as musicians destined to go down in popular history as more than just another pretty band—is notably authentic in its "R"-lessness.

Meanwhile, back in the midwest, U.S.A.—land of "R" pronunciation so abundant it appears even in words like "wash"—a young white musician named Bob Dylan regularly dropped "R's" in his singing. He did this not because he wanted to sound British, but because he wanted to sound like his idols—the African Americans who regularly dropped "R's" in their creation of the indigenous American art form known as the blues.[131] The boys from Liverpool had made a characteristic imitator's error of overcorrection. In adding R's prodigiously to their early recordings they ended up sounding more like Pat Boone than like their African American inspiration, Little Richard. Bob Dylan, more sophisticated in his understanding of "R" usage in the United States, knew that in the world of contemporary American music, status moved south in more ways than one. Sounding Black, sounding down in the power hierarchy, sounding blue, was the definition of cool among the truly down, downtown, non-"R" pronouncers.

The view of most sociolinguists, grounded as they are in the field of anthropology, is that accent is a societal and cultural creation. It situates people socially and helps them sort through social contexts.[132] Most of us do this

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128. Listener understanding of non-native speakers improves with exposure and familiarity. *See* Gass & Varonis, *The Effect of Familiarity on the Comprehensibility of Nonnative Speech*, 34 LANGUAGE LEARNING 65 (1984) (identifying four types of familiarity and showing these improve comprehension: familiarity with topic; with non-native speech in general; with the particular, non-native accent; and with the particular, non-native speaker). For general discussion of native and non-native speech interactions and the ways in which communication can be enhanced, see D. LARSEN-FREEMAN, DISCOURSE ANALYSIS IN SECOND LANGUAGE RESEARCH (1980).

129. *See* P. TRUDGILL, *supra* note 123, at 151-58 (discussion of linguistic analysis of "prevocolic R" and Beatles, Rolling Stones, Bob Dylan, and Elvis).

130. *Id.* at 151.

131. *Id.* at 146.

132. R. FASOLD, *supra* note 84, at ix (in addition to "transmitting information . . . the speaker is using language to make statements about who she is, what her group loyalties are, how she perceives her relationship to her hearer, and what sort of speech event she considers herself to be engaged in").

unconsciously—we speak differently at work, at play, to children, to authority figures.

Sitting on my porch in Honolulu one day, I was talking long distance to my friend Barb in California. Because I lived in L.A. as a child, it's easy for me to shift into a voice that matches hers when we talk. Shifting closer in accent to someone we like is a common signal of intimacy. As we spoke, the newspaper girl, a thirteen-year-old Tongan-Samoan immigrant, walked by and I called out a friendly greeting and asked her a question.

"Oh, how cute, you're talking local," Barb said over the phone. I laughed, because I hadn't realized I had made a shift, but Barb recognized the melodic, inquiring intonation of "local" Hawaii talk that was so absent when I was speaking to an L.A. friend. Because she has lived in Hawaii and liked it, the accent had a good connotation for her.

Accents sometimes charm us with difference. Barb and I both laugh over the accent of the man who cuts our hair. His is a marked Italian accent, sometimes incomprehensible to both of us. In the West L.A. shop where he works, his accent adds the cachet of difference that recalls an old Beverly Hills joke about the patient who refused a local anesthetic, insisting instead on the imported.

At other times accents can repel us. In that same West L.A. salon, I overheard a beautiful stylist complaining to a client in Brooklynese, "I can't stand the way I talk, it sounds so low class." Media stereotyping can make some accents sound ignorant or threatening. These evaluations are imposed, not natural. As much as we may believe that certain accents "just sound better" or "sound so harsh," our judgments are mediated judgments. The evidence suggests there is no such thing as an inherently pleasant accent. What sounds "low-class, vulgar, rough" in one culture can sound "interesting, pretty" to someone from another culture unfamiliar with the status position of the accent.[133]

I cling to certain notions of accent attitudes as pure and not culturally generated. I am fond of saying that the Hawaiian language sounds beautiful, as though this were absolutely true rather than true to my ears, in relation to the English I am used to, and in connection with my knowledge of the generous, loving aspects of Hawaiian culture that infuse the language. Similarly, I am fond of saying that a particular person has a beautiful voice or a sexy voice as though that were absolutely true, rather than true as a convocation of Hollywood, Madison Avenue, Motown, and my own desires.

We want to believe, when we say of an accent that it is good, or bad, or easy, or difficult, that we are speaking of facts rather than social constructions. Facts, especially when the alternative conclusion is that our evaluations are produced by bigotry or our own feelings of fear and inadequacy.

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133. *See generally* P. TRUDGILL, ACCENT, DIALECT AND THE SCHOOL (1975).

While the sociolinguists tell us that accent is a social phenomenon, some experts in the field called "speech" or "communications" hold quite a different view. Books on accents are typically found in two separate places in the libraries: under Sociolinguistics and under Speech Pathology. In the Speech Pathology section, accent is considered a disease in need of a cure.[134] There, chapters on accent are side-by-side with chapters on stuttering and aphasia. Rather than seeing accent as a social phenomenon marking speakers as equidistant from each other, the speech pathology view sees an "accent" as an unfortunate deviation from a standard.[135] This deviation is at once labeled disease and declared curable with a series of exercises and manipulations.[136] This view persists in spite of the evidence that eliminating one's native accent is nearly impossible for most adults.[137]

The presumption behind the speech pathology view is that variability is harmful, both for the speaker and the community. Private accent-elimination classes now exist in some cities to help immigrants sound "less foreign."[138] Speech consultants help employers pick "good" voices. In the *Kahakua* case, the employer's speech consultant discussed the joys of eradicating an ethnic accent in almost sexual tones. Writing of one Japanese American candidate, she stated:

> [H]e needs specific help in the area of developing good speech habits through deleting "pidgin" from his daily vocabulary in order to insure that Standard English can become his automatic model. This will take disciplined work by means of professional help, but he should make every effort to receive such help. It is my belief that he would experience a most gratifying surge of renewed self-confidence and pride in his accomplishment.[139]

As to the "pidgin" of another candidate, she stated:

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134. *See generally* J. CHREIST, FOREIGN ACCENT (1964).

135. J. BUCHMAN, AN ESSAY TOWARDS ESTABLISHING A STANDARD FOR AN ELEGANT & UNIFORM PRONUNCIATION OF THE ENGLISH LANGUAGE (1979) (short essay and long word list with pronunciations) (available on microfilm from University Microfilm); *cf. English as She Is Mis-Spoke*, ECONOMIST July 16, 1988, at 16.

136. See *supra* note 74.

137. See *supra* note 74 and accompanying text.

138. *See* Solomon, *Lose That Thick Accent To Gain Career Ground*, Wall St. J., Jan. 4, 1990, at 1, col. 2 (noting emergence of "accent reduction schools" for foreign-born professional workers "whose careers have stalled because of thick accents, even though their grammar and vocabulary skills are good"). This columnist seems to accept accent discrimination as inevitable, stating that "Sometimes an American inflection is necessary not because of clarity, but because listeners tune out what they don't like." *Id.* A communications consultant is quoted as saying that "Americans have difficulty listening" to Asian and Latin accents. *Id.* Note that in these statements, "American" means white. A spokesperson at an accent school in Cleveland closes out the piece by saying "Face it, prejudice exists." *Id.*

Advertisements for private courses in "American Accent Training" regularly appeared on bulletin boards at Stanford University when I visited there in the 1989-1990 school year. *See also All Things Considered* 14-16 (National Public Radio broadcast, Sept. 12, 1990) (transcript on file with the author).

139. Excerpts of the Record, *supra* note 54, at 31.

> [H]e is likely to be handicapped in the professional world wherever good Standard English is required. . . . I urgently recommend he seek professional help in striving to lessen this handicap. . . . *"Pidgin" can be controlled.* And if an individual is totally committed to improving, professional help on a long-term basis can produce results.[140]

The language of "control" and "handicap" is typical of the speech pathology view. In referring to the accent as "pidgin" the speech consultant shows unfamiliarity with linguistic terminology. Pidgin is a broken English that is spoken by non-native speakers.[141] Neither speaker evaluated in the passages above was speaking pidgin when evaluated. Both were lifelong, native speakers of English. They were reading a weather report written in standard English. The horrible handicap, subject to control through disciplined study, was simply the local accent native to most non-whites who grow up in Hawaii.

The linguist's evaluation of speakers in the *Kahakua* case differed notably from the speech consultant's.[142] The linguist found that both speakers used an acrolectal variety of Hawaiian Standard English. That is, their speech was quite close to standard mainland pronunciation with certain phonological features characteristic of Hawaiian Creole speakers, such as occasional substitution of the "d" sound for the "th" sound.

The linguist concluded that both speakers

> speak what a large portion of Hawaiian-born, educated, professional people (e.g. the governor and most state legislators) speak: Hawaii Standard English . . . both use an acrolectal and highly intelligible English. The HCE [Hawaiian Creole English] features that are observable are phonetic ones that do mark their identity as non-Caucasians, however, they are not accurately viewed as linguistic deficiencies of any kind. Just as one would not fault the southern accent of former President Jimmy Carter or Jim Lehrer (of the McNeil/Lehrer News Hour) . . . .[143]

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140. *Id.* at 32 (emphasis in original).

141. *Id.* at 12-13 n.1 (referring to DeCamp's definition of pidgin as "contact vernacular, normally not the native language of any of its speakers. It is used in trading or in any situation requiring communication between persons who do not speak each other's native languages"). In her Technical Description of Plaintiffs' Speech, Dr. Charlene Sato states that pidgin is "characterized by a limited vocabulary, an elimination of many grammatical devices such as number and gender, and a drastic reduction of redundant features." *Id.* Sato distinguishes between Hawaiian Pidgin English (HPE) and Hawaiian Creole English (HCE). She states that "pidgin is a speaker's second language . . . [while] creole is a speaker's mother tongue." *Id.*; *see also* M. ATKINSON, D. KILBY & I. ROCA, *supra* note 49, at 410-13; P. TRUDGILL, *supra* note 123, at 133.

142. Reporter's Transcript, *supra* note 12, at 13-18. Dr. Sato, an Assistant Professor of English as a Second Language at the University of Hawaii, was the plaintiff's expert witness on the sociolinguistics of the Hawaiian Islands. She has a Ph.D. in Applied Linguistics from UCLA. She is also the principal investigator for a research project on Hawaiian Creole English funded by the National Science Foundation.

143. *Id.* at 17.

The linguist thus viewed the accents as acceptable and intelligible, while the speech consultant viewed them as handicaps in need of correction. The linguist's view is supported by research that shows that language variability is inevitable and that moderate accent differences rarely impede communication when listeners are motivated and nonprejudiced. The speech consultant's view is supported by a widely held belief that speech standardization is necessary, good, and attainable, and that accent interferes with intelligibility.

Given the tendency of these schools of thought to clash so absolutely, even when evaluating the same speakers, the courts must decide which view coincides with the underlying principles of Title VII. The reported decisions evidence judicial difficulty in making this choice. The typical opinion states that blanket discrimination against foreign accents is prohibited, but that the employer reasonably rejected the particular accent involved.[144] This conclusory type of opinion offers little guidance to employers, potential litigants, and the courts.

From the employer's perspective, predictability of judicial outcomes is critical. "I don't care what you say I have to do, so long as I can figure out what you want so I can stay out of trouble," is a typical plea in response to unpredictability in antidiscrimination law.[145] The accent cases give no clue as to which accents an employer may discriminate against, which are protected, and how one tells the difference. In the part that follows, I propose an analysis of accent cases that could impart greater rationality and predictability to the process of applying Title VII to accent cases.

More significantly, this type of analysis is essential because of the inevitability of bias in evaluation of accents. Given the sociolinguistic reality of a status hierarchy of accents, any application of Title VII to accent cases must avoid confusion of low-status with lack of job ability. The framework suggested in the following pages is designed to identify actual job requirements and to avoid biased presumptions against low-status accents.

V. Toward a Doctrinal Reconstruction

This part will propose a Title VII analysis for accent cases that considers both the legitimate concerns of employers and the societal goal of eliminating discriminatory employment practices.

This doctrinal framework is not intended as a complete guide to the intricacies of Title VII as applied to accent cases. Title VII is one of the most litigated of all federal statutes, and the many significant nuances of Title VII litigation are beyond the scope of this piece. Rather, the intent here is to suggest the critical areas of inquiry that must be part of the analysis of any Title VII accent

144. *See, e.g.*, Lee v. Walters, 1988 WL 105887 (E.D. Pa.).

145. Interview with Congressman Chris Cox, R. Calif. (Spring 1990). I thank him for educating me about the employer's concerns.

case, and to suggest why and how a conscientious court would conduct such inquiry.

I suggest that courts should consider four separate questions in accent cases:

1. What level of communication is required for the job?
2. Was the candidate's speech fairly evaluated?
3. Is the candidate intelligible to the pool of relevant, nonprejudiced listeners, such that job performance is not unreasonably impeded?
4. What accommodations are reasonable given the job and any limitations in intelligibility?

Asking each question separately rationalizes the judicial inquiry and avoids the kind of conclusory reasoning that plagues existing accent cases. Setting up separate areas of inquiry also helps sort out the relative burdens of persuasion, avoiding blanket deference to employer arguments while requiring plaintiffs at all times to maintain the burden of proof. That is, the plaintiff retains the burden of persuasion at each level of this inquiry, but the employer bears a burden of production. Once a prima facie case is made, the employer must offer some evidence that the candidate's speech was fairly evaluated, that the candidate's speech was not adequate for the job, and that no reasonable accommodation could rectify the inadequacy.

The reasonable accommodation language is an element that goes beyond existing Title VII doctrine. It is borrowed from disability law[146] and addresses the potential anomaly of treating physical speech impediments as more deserving of protection than accents. As is discussed below, requiring accommodation is a logical extension of Title VII principles, necessary in accent cases in order to eliminate discrimination in an area where removing bias in evaluation is impossible.[147] The reader unwilling to apply the reasonable accommodation principle should still find the first three steps in the analysis useful because these steps apply current doctrine in a logical way. It is hoped that this analysis will lend regularity and efficiency both to judicial decisions in Title VII accent cases and to the personnel decisions of employers who wish to make a good faith effort to comply with Title VII.

146. For recent cases applying reasonable accommodation in the context of disability law, see Wynne v. Tufts Univ. School of Medicine, 1990 WL 52715 (1st Cir. 1990) (former medical student claiming discharge consituted unlawful discrimination based on handicap); Ackerman v. Western Elec. Co., 860 F.2d 1514 (9th Cir. 1988) (affirming decision for handicapped employee where company failed to come forth with evidence that plaintiff could not perform essential functions of job with reasonable accommodation to disability).

147. *See supra* text accompanying notes 91-94.

A. *Step One: The Level of Communication Required for the Job*

There are many jobs that people do in silence. In some work places, the level of industrial noise is so high that conversation is impossible.[148] Jobs that rely on visual, manual, and intellectual skills have traditionally comprised the employment of the deaf. The deaf, however, are proving that even jobs that require regular communication can be done by individuals with little or no speech. Our assumption that speech is integral to a job may reflect "hearie" bias.[149]

There are some jobs, however, in which speech is central. Broadcasters and telephone operators, for example, regularly use speech in their jobs.

The importance of speech in a particular job is a critical point of inquiry in an accent case, and responding to that inquiry in a principled way requires separating assumption from workplace reality in order to recognize the gradation between speech as essential and speech as irrelevant. Considering examples helps outline the gradations.

The paradigmatic job requiring maximum oral clarity is the 911 operator. Several elements mark the importance of speech in that position:

1. The consequences of miscommunication are grave.
2. Giving and receiving oral communication are a substantial part of the job.
3. The speech interactions are under high stress, where time is of the essence, increasing probability of miscommunication.
4. The interactions are typically one-time calls, such that the caller has little time to adjust in listening and comprehension patterns.

If one or more of these elements is absent, the degree of importance of speech decreases. For example, if time is not of the essence, but clarity of communication is important to avoid grave consequences, forms of communication other than speech—such as writing—may be more appropriate. If interactions are repeated, such that listeners can adjust, again a difference in speech style becomes less of a barrier. Consider, for example, the way in which the regulars at a pier-side fish auction can understand an auctioneer's rapid-fire babble, while newcomers find it incomprehensible.

As one moves farther away from the 911 paradigm, there are a range of jobs in which facility in oral communication is useful but not critical if other job skills are present. Computer programmers, word processors, janitors,

148. INFORMATION ACCESS CO., FOUNDRY MANAGEMENT & TECHNOLOGY (Dec. 1985); *Quiet! No Noise Is Good Noise as the Cacophony in Our World Keeps Growing*, Seattle Times, Feb. 18, 1990 (Pacific), at 6 (high-speed drills destroying hearing of dentists; other workplace noise problems).

149. Humphries, Martin & Coye, *A Bilingual, Bicultural Approach to Teaching English (How Two Hearies and a Deafie Got Together to Teach English)*, in AMERICAN DEAF CULTURE, *supra* note 3, at 121 (discussing methods of teaching that avoid presumption of superiority of spoken English).

dancers, assembly line workers, parking lot attendants, architects, and laboratory technicians, for example, all fall somewhere between the polar opposites of "speech is critical" and "speech is inconsequential."

To sort through the various jobs requires factual inquiry. If the claim is that speech is critical, the courts should ask specifically why it is critical. What consequences will follow from miscommunication? Is oral speech the only way to avoid miscommunication? If not, is it the best way? In what ways are alternative forms of communication better or worse? What percentage of the job functions do not involve speech?

Exiting a parking lot in San Francisco's Chinatown, I asked the lot attendant for directions to the freeway. Instead of going into a long oral explanation, the attendant pointed to a large sign with a map and directions. This proved a much better traveler's aid than oral directions would have been. Without exploring the alternatives to speech, it's easy to assume that speech is critical. Considering alternatives may actually produce better communication results.

A useful exercise to test the degree of pro-speech assumptions people with speaking skills are wont to make is to try to re-imagine doing various jobs without speaking. For example, in attempting to list "high speech" jobs in the beginning of this part, I began to write "psychotherapist," visualizing a competent psychotherapist as a woman sitting in a chair dispensing wise advice to her client. I had made a speech assumption. In fact, the best psychotherapists are often sitting in the chair saying little—they are listening actively and urging clients to articulate their own solutions to problems, intervening at critical points with questions and comments.[150] As a teacher I've come to learn that my best classes are often the ones in which I say very little, allowing the students to question, challenge, and debate among themselves. As a friend/lay-therapist I am trying to learn that when people come to me with a problem I need to resist the urge to blurt out my own solutions, allowing instead the strength and wisdom of the advice-seeker to emerge in the seeker's own words.

In a range of jobs in which speech seems critical—doctor, bank teller, police officer, teacher, lawyer—consideration of the actual job tasks and needs of patients/customers/clients is useful. Is "bedside manner" the equivalent of oral facility? Not necessarily. Some very articulate doctors have weak skills in empathy. Care, concern, and understanding are communicated by nonspeech—posture, eye contact, touch, and taking the time to listen—as well as speech.

While the lawyers on *L.A. Law* are always talking, many real-life lawyers spend much of their time in silence: reading, writing, proofing, analyzing. A common beginner's error in law practice is to overrely on oral communication, rather than on the carefully written letter or "memo to file" that will

150. Interview with Dr. Chalsa Loo, a psychotherapist in Honolulu, Hawaii (Jan. 1991).

prevent future misunderstanding. The stereotype of lawyer as mouthpiece overemphasizes the role of speech on the job.

We once thought of the bank teller as a person whose job required public contact and therefore speech. The new bank machines have shown us that most transactions can take place without speech. While we may miss the human contact, what we miss may well be the smile and the show of individualized concern—things communicated with relatively low-level speech, or nonspeech. Anyone who has encountered an articulate but rude person in a public service job knows that attitude, not speech, often determines the quality of these kinds of interactions.

It may turn out that when we look more closely at what tellers do—counting money, reconciling accounts, entering data—we will find that a job that we thought of as "high speech" is actually relatively "low speech." At a minimum, we should make sure that we are evaluating the facts and not our assumptions.

The principle that there are gradations of communication skills required in different jobs was recognized by the Ninth Circuit Court of Appeals in *Nanty v. Barrows*.[151] In that case, the employer refused to hire Mr. Nanty, a Native American, for a job as a furniture mover, claiming, among other things, that Nanty was "inarticulate." That claim alone, without any evidence of why articulate speech was essential for the job, was unpersuasive to the court. The applicant was an experienced furniture mover. The court was suspicious of the claim that Mr. Nanty was inarticulate, especially given the fact that the employer had not even conducted an interview.[152] An employer who is serious about the necessity for oral communication will have some job screening mechanism that rationally measures oral skills.[153] The next section discusses applicant screening and fair evaluation.

B. *Step Two: Fair Evaluation*

An employer who claims speech is a critical job function, but who does not fairly evaluate speech of candidates, is behaving irrationally, or discriminatorily, or both. As Justice Rehnquist suggested in the *Furnco* case, we reasonably presume that economic entities act rationally.[154] When they do not—when

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151. 660 F.2d 1327 (9th Cir. 1981).

152. *Id.* at 1332.

153. For example, Syracuse, UCLA, Pennsylvania State, and Purdue Universities have started proficiency programs for foreign TA's that test for English-speaking capabilities. *See, e.g.*, *Chided for Pushing Research*, *supra* note 85 (33 out of 196 TA's at the University of Louisville are foreign born). George Washington University and the University of Maryland also have such programs. *At GWU, Accent Is on English*, *supra* note 85.

154. "Thus, when all legitimate reasons for rejecting the applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis in original).

they prefer less-qualified applicants, for example—it is probable that prejudice is entering into the process. Evaluation of accent is particularly susceptible to bias and distortion, and thus it is appropriate for courts to examine the evaluation process.

Without some experience in speech evaluation, the lay listener is likely to err—often on the side of negative stereotypes.[155] I once rode an airport shuttle van on the way to give a talk about accents. The driver was a friendly Anglo. Over the two-way radio I could hear a second driver with a heavy Filipino accent talking to the dispatcher, who sounded Anglo. I asked my driver, "What do you think of that driver's accent?"

He replied: "It's terrible! He can't even speak English. I don't see how they can hire someone like that. I can't understand a word he says." The driver was quite adamant about his position, insisting—perhaps because he was speaking to an Asian woman—that he has "nothing against foreigners" but that the driver's accent should have disqualified him for the job.

The funny thing about this conversation was that everyone in the van could hear the Filipino driver and the Anglo dispatcher communicating rather complex information, in a rapid-fire exchange of English and radio-slang, with no breakdowns in communication. The driver relayed his location, passenger count, reasons for delays, and traffic conditions. The dispatcher requested additional stops and asked for other information. The driver of my van could listen to all this and still report that "the guy can't even speak English."

When we hear a different voice we are likely to devalue it, particularly when it triggers the collective xenophobic unconscious that is the ironic legacy of a nation populated largely by people from other continents.[156] Because misevaluation of speech, and particularly of speech associated with historical targets of discrimination, is common, claims that accent impedes job performance are not credible unless they stem from fair evaluation. An informal answer-a-few-questions interview is less reliable than an evaluation of on-the-

155. Numerous studies show that negative stereotyping in evaluation of speech affects employment judgments. *See, e.g.*, Akinnoso & Ajirotutu, *Performance and Ethnic Style in Job Interviews*, in LANGUAGE AND SOCIAL IDENTITY 119 (J. Gumperz ed. 1982); Hopper & Williams, *Speech Characteristics and Employability*, 40 SPEECH MONOGRAPHS 296 (1973); Jupp, Roberts & Cook-Gumperz, *Language and Disadvantage: The Hidden Process*, in LANGUAGE AND SOCIAL IDENTITY, *supra*, at 232; Kalin & Rayko, *Discrimination in Evaluative Judgments against Foreign-Accented Job Candidates*, 43 PSYCHOLOGICAL REP. 1203 (1978); Shuy, *Language and Success: Who Are the Judges*, in VARIETIES OF PRESENT-DAY ENGLISH, *supra* note 43, at 316.

The Canadian subjects in the Kalin and Rayko study rated foreign-accented applicants lower for high-status jobs and higher for low-status jobs than applicants with a native-sounding English-Canadian accent. The "applicants," evaluated by 203 college students, all spoke fluent, grammatically correct English, and they were given comparable résumés. Students found foreign-accented speakers less qualified for jobs such as "foreman" and more qualified for jobs such as "plant cleaner." *See* Kalin & Rayko, *supra*, at 1207. While such studies cannot completely recreate real-life job evaluations, the authors point out that, if anything, the artificial setting might tend to underreport actual prejudice against accents, because the socialization of college students makes them reluctant to admit prejudice. *Id.* at 1208.

156. *See* R. TAKAKI, FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (1987).

job performance, whether simulated or actual. Rather than assuming an accent would be unintelligible over the phone, for example, a candidate might be asked to complete an actual or simulated phone call to see whether breakdowns in communication occur.

Similarly, evaluations that rely on subjective impressions of untrained interviewers are less credible.[157] Interviewers and others making employment decisions can be trained to avoid accent bias. The State of California, for example, has produced a training manual that explains in simple language the danger of bias and prejudice in evaluation of accents.[158]

In discussing my research on accents with friends and colleagues I've seen people's attitudes change as they become more aware of the many accents around them, and of the way in which attitude affects comprehension. People have brought me accent stories—of times when they really could not understand, and of times when they could, even after they thought they'd never be able to. Simple awareness that accent discrimination is a potential problem can avoid unthinking negative reaction to accents, and an effort to bring this awareness to the hiring and promotion process evidences good faith on the part of employers.

If the evaluation process is fair—if it indeed tests what it purports to test in a way that minimizes subjective bias—the next question is what kind of accent may an employer, after fair evaluation, reject.

C. *Step Three: Comprehension by the Relevant, Nonprejudiced Listener at the Level Required for the Job*

If the employer fairly evaluates the speaker, and if speech is an important job function, then it is reasonable to reject a speaker whose accent impedes intelligibility by the relevant, nonprejudiced listener.

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157. The court in *Garcia v. Victoria Independent School District* found that subjective determinations, made without objective guidelines, invited discrimination in promotion determinations for school teachers. Garcia v. Victoria Indep. School Dist., 17 Empl. Prac. Dec. (CCH) ¶ 8,544 (S.D. Tex. 1978). The court found that use of vague and subjective criteria helped maintain a stratified employment structure, with whites in supervisory positions and Mexican Americans confined to lower ranks. *Id.*; *see also* Sparks v. Griffin, 460 F.2d 433, 436 n.1 (5th Cir. 1972) (African American school teacher dismissed because of alleged "language problem"). The school superintendent stated in a letter that "she cannot help the negro dialect, but it is certainly bad for the children to be subjected to it all day." *Id.* The court questioned the ability of the superintendent to make this subjective determination, adding in a footnote that "with no disposition to be unkind, we question, based on the spelling and composition of the two letters . . . the ability of [the superintendent] to diagnose a 'language problem.'" *Id.* at 442 n.2.

158. *See* CALIFORNIA STATE PERSONNEL BD., WORKING TOGETHER, A PRESENTATION ABOUT FOREIGN ACCENTS (1987) (on file with author); *see also*, Jupp, Roberts & Cook-Gumperz, *supra* note 155, at 239-44 (discussing Industrial Language Training Service (ILT) in Great Britain). The authors note that training with the objective of overcoming communication problems has been proven difficult largely because communication breakdowns in cross-cultural speech are caused by both listeners and speakers. *Id.* at 239. They therefore suggest training in the workplace setting for both native English speakers and speakers of English as a second language in order to facilitate understanding across linguistic difference. *Id.* at 247-50.

Identifying the relevant listeners is important. The worker need not be understood by all possible listeners, only by those who are in the relevant listener pool, including, possibly, coworkers, supervisors, customers, and other business contacts. This is not an imaginary pool.[159] It comprises real people often identifiable by geography, demographics, and even specific identity. For example, if there are ten workers and two supervisors working in a factory and the workers have no employment-related need to communicate with anyone other than each other or the supervisors, the listener pool is identifiable with some specificity.

In public contact jobs, the listener pool is identifiable by region and demography. A bank teller, for example, generally serves clientele from within one city. Having a regional accent, when most of one's clients are from the same region, can enhance rather than impede communication. The point here is that intelligibility is not absolute. It is relational.[160] To whom we speak determines whether our accent helps or hurts communication.

Thus even in the case of the 911 operator, "generic intelligibility" is impossible to determine out of context. Depending on the community served, the ability to speak and understand Spanish, for example, may be critical to job performance. Similarly, a police officer who speaks with an African American accent may have an easier time conducting an investigation in some neighborhoods than others. What sounds unintelligible to some is normal speech to others.[161]

The testimony of experts familiar with speech interactions in the relevant listener pool is thus entitled to considerable weight in meeting the plaintiff's burden of persuasion.[162] In the *Kahakua* case, the speech pathologist who de-

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159. *See* Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990). Professor Delgado warns that there are hidden ideologies of the inferiority of people of color lurking behind pool metaphors in debates over discriminatory hiring. In using the "pool" language, I refer to the usage of the term that identifies people by demography; I reject the use of pool metaphors to create the impression that only a fixed and limited number of competent candidates from underrepresented groups exist in academia or elsewhere.

160. Here I draw from the work of philosophers, political theorists, anthropologists, and psychologists who have argued in various ways that human beings in their interactions form, and are formed by, the world around them, both individually and in the grand cloth of history. People and events do not happen in a vacuum; they happen interactively, dialectically, and relationally. *See, e.g.*, G. HEGEL, PHENOMENOLOGY OF SPIRIT (1977); R. ROSALDO, *supra* note 120.

161. *See* Eisenstein & Verdi, *The Intelligibility of Social Dialects For Working-Class Adult Learners of English*, 35 LANGUAGE LEARNING 287 (1985) (immigrants to U.S. found high-status dialects more intelligible, even when they had considerable exposure to nonstandard speech). Many sociolinguists consider speech across gender to be cross-cultural communication requiring adjustment and accommodation. *See, e.g.*, D. SPENDER, MAN-MADE LANGUAGE (1980); D. TANNEN, YOU JUST DON'T UNDERSTAND (1990). Indeed, insistence on generic intelligibility standards is associated with the colonial past. *See, e.g.*, Delbridge, *Australian English Now*, in THE STATE OF THE LANGUAGE 71 (C. Ricks & L. Michaels eds. 1990) (quoting chair of Australian Broadcasting Corporation who complained about "throatiness and distortion" of Australian speech, stating that, in searches for broadcasting announcers, "the number of men most suitable have been Englishmen").

162. In the case of speech evaluation, linguists bring special knowledge otherwise unavailable to courts and juries. Expert testimony is appropriate in such cases. *See, e.g.*, MCCORMICK ON EVIDENCE 33 (E. Cleary 3d ed. 1984):

clared the Creole-accented speech substandard was not from Hawaii, nor did she purport to speak from knowledge of the relevant listener pool. Instead, she used a generic "broadcasting" standard to conclude that a white candidate's accent was superior.

The plaintiff's expert was a linguist whose field of expertise was speech interactions within the relevant listener pool. She testified that the local-accented speech of the plaintiffs was easily intelligible to *all* residents of Hawaii, including white newcomers, and that for the majority of residents who themselves have some level of a local accent, communication was enhanced by speech in that accent.[163]

The court in *Kahakua* apparently applied the speech pathologist's generic standard, rather than the linguist's contextualized standard. The problem with the court's approach is that it imposes a standard on the community without any rationale for choosing the standard. It is not a majoritarian standard, since most Americans speak with an ethnic or regional accent. It is not an intelligibility standard, because there is no evidence that there is a generic accent that is always more intelligible than any other accent in a given listener pool.[164]

The hidden rationale thus becomes a nationalist/monocultural one.[165] That is, holding people in a nation as radically diverse in accents as ours to one standard of pronunciation is a declaration that this is a nation of one voice. In the same way that some insist ours is a Christian nation with Christianity the norm against which all other religions are seen as different, the fiction of a generic American accent implies that this is a white, upper-class nation, and all nonwhite, ethnic, regional, and lower-class accents are subnormal.[166] Rather than imagining a fictional generic listener, the unbiased court would look to the actual listeners.

In addition to asking what listener pool is relevant, the logical inquiry is whether the candidate can speak effectively to that pool at the level required for the job. Thus in a low-speech job, the candidate need not be able to communicate in fancy, long-winded speeches. Occasional gaps in understanding, or extra time taken to repeat, may prove inconsequential depending on the job realities.

An observer is qualified to testify because he has firsthand knowledge of the situation or transaction at issue. The expert has something different to contribute. This is the power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony two general elements are required. First, some courts state that the subject of inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of laymen.

163. *See* C. Sato, *supra* note 54.

164. *See supra* notes 84, 121, 124.

165. Nationalism as a goal of monolinguilism is discussed in R. FASOLD, *supra* note 84, at 4.

166. *See* Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32-33 (1987) (discussing presumed norms such as "white, able-bodied Christian man," and other unstated assumptions in law).

People from different linguistic worlds meet everyday in our cities.[167] In California, in particular, I've noticed playful encounters among native and non-native speakers as coworkers laugh over language gaps, or trade off roles of teacher and student.

"Hey—do you know what this is called?" a checker calls out to a bagboy at my neighborhood grocery store in a tone that suggests camaraderie. The checker turns to me with a smile and says, "That guy's Iranian—he's cracking me up, the way he calls things." In a pizza restaurant in Santa Monica, a valley-girl waitress tells a busboy, "Okay, you got table fifteen? Fifteen—umm—dias y cinco, right?" and he patiently goes over a Spanish counting lesson with her in a way that suggests this is an ongoing project of theirs.[168]

Outside my office door I can hear a Caribbean voice and an African American voice involved in deep discussion as a maintenance crew works its way down the hall. Each accent is thick and deeply divergent both from the other and from the generic standard of the evening news. The conversation, however, is urgent and lively and the difference is no barrier. As I eavesdrop and sit in my office thinking about accents I think, "I want to live in a country that sounds like this"—a land of many voices, each bringing a gift of wisdom and culture wrapped with a gold ribbon of accent. People want to learn to talk to others, and to teach others how to talk to them. Given the opportunity to set aside fears of linguistic difference, workers often find they enjoy the differences. Job satisfaction and performance are enhanced, not impeded, by it.

D. *Rejecting the Gift: The Problem of the Prejudiced Listener*

What should we do when members of the relevant listener pool are prejudiced and can't or won't tolerate an accent? In applying Step 3 above, the principles of Title VII require removing prejudiced listeners from analysis of the relevant listener pool.

It is well established under Title VII that bigoted preferences of customers, however real and economically effective, may not govern employment decisions.[169] Even when employers can prove that they will lose customers who

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167. *See, e.g.*, Limon, *Language, Mexican Immigration, and the Human Connection: A Perspective From the Ethnography of Communication*, in MEXICAN IMMIGRANTS AND MEXICAN AMERICANS: AN EVOLVING RELATION 194 (H. Browning & R. de la Garza eds. 1986) (Limon's ethnography of a Mexican restaurant shows workers with various degrees of English proficiency interact regularly, and new immigrants are aggressive in attempts to learn English, contrary to popular myth that they don't want to speak English).

168. These language exchanges are, of course, within a power distribution that advantages the native English speaker. I recount them not to deny that disparity, but to show that it is possible to work within the disparity with goodwill.

169. Rucker v. Higher Educ. Aid Bd., 699 F.2d 1179, 1181 (7th Cir. 1983) ("It is clearly forbidden by Title VII to refuse on racial grounds to hire someone because your customers or clients do not like his race."); Gerdon v. Continental Airlines, 692 F.2d 602, 609 (9th Cir. 1982); Fernandez v. Wynn Oil, 653 F.2d 1273, 1276-77 (9th Cir. 1981).

prefer not to do business with women, for example, Title VII requires employers to hire qualified women.[170] By holding all employers to this nondiscriminatory standard, Title VII intervenes in the market and disallows an economic advantage to those employers who are otherwise eager to accede to the racist or sexist demands of customers.[171] Title VII was designed to alter business practices in order to eliminate racism and sexism as a factor in hiring, promotion, and setting conditions of work.[172]

When the law made this intervention, many employers found that they had misjudged customer preferences: airline passengers accepted male flight attendants and white hotel patrons willingly transacted business with African American front desk clerks. The fear that "the customers won't stand for it" proved unfounded.

Some of the earliest studies in sociolinguistics show that employers believe there is a market advantage to certain accents. In attempting to study language in a natural setting, without knowledge of the objects of study, William Labov approached hundreds of sales clerks in New York City, asking for directions to a department on the fourth floor. He walked away and carefully recorded the results on index cards. At the pricey Saks Fifth Avenue, the clerks directed him to the "fourth floor." At the budget-priced Loehmans, the clerks directed him to the "fot floah." Macy's fell in between—both in prices and in enunciation of the R's in "fourth floor." Saks apparently chose a waspy, upper-class accent to create an up-scale image.[173]

The claim that customers will refuse to do business with employees with ethnic accents raises two problems. First is the problem that customer preference claims are often made without empirical foundation, reflecting false assumptions about the inability of customers to comprehend certain accents. Given the linguistic evidence that comprehension adjustments are relatively easy for motivated listeners, claims of customer preference, at a minimum, should be supported by some evidence of actual refusal to deal.

At the second level is the problem of actual prejudice. Certain accents, to certain listeners, sound "untrustworthy," for example, regardless of the sincerity of the speaker.[174] An employer concerned with establishing customer confidence might be tempted to exclude from the workplace ethnic accents that key customers find untrustworthy. This is not allowed under Title VII. A particular accent sounds untrustworthy, or lazy, or ignorant to a listener when the listener

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170. *Rucker*, 699 F.2d at 1179.

171. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 223 (1989).

172. *See, e.g.*, Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1301-02 (1990); Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REF. 265, 266 (1990).

173. *See* W. LABOV, SOCIOLINGUISTIC PATTERNS 43-69 (1972).

174. *See, e.g.*, Masterson, Mullins & Mulvihill, *Components of Evaluative Reaction to Varieties of Irish Accents*, 26 LANGUAGE & SPEECH 215, 215-16 (1983); *see also supra* notes 116, 124, 155, 161, *infra* note 178.

has attached a cultural meaning, typically a racist cultural meaning, to the accent. In matched guise tests, linguists have shown that these cultural meanings rather than any combination of pronunciation or inflection, create the negative impression.[175] Under the matched guise method, listeners hear tapes of the same words spoken by an actor using different accents.[176] The listeners are not told that one person is acting out the different accents. They are then asked to evaluate what they assume are different speakers for qualities such as intelligence, confidence, trustworthiness, and warmth. The use of the same text and same speaker eliminates the role of personality traits or voice quality of the speaker in evaluation. The subjects are also tested separately to determine what racial stereotypes and prejudices they harbor. In repeated studies of this type, there is a high correlation between negative stereotyping of certain races and negative evaluation of accents associated with those races. The listener who thinks X people are lazy will evaluate a speaker with an X accent as lazy. Listeners can even internalize stereotypes about themselves. Members of subordinated groups in one study evaluated speakers of their own accent as "less intelligent" and "more warm" indicating in-group loyalties, as well as internalization of dominant group stereotypes about intellect.[177]

Prejudice is a fact of life in contemporary America, and prejudice against accent is its fellow traveler. Requiring employers to use job skills, and not customer prejudice, in making employment decisions helps move us away from the sorry cycle of stereotype limiting opportunity, and limited opportunity reinforcing stereotype.

This will admittedly impose some hardship on businesses that rely heavily on pleasing customer whims. Telemarketers, for example, depend upon the ability to establish instant oral rapport with a fickle audience. In the absence of legal intervention, however, all employers would have to cave in to customer bias. It could be economic suicide to refuse to discriminate when other employers are using bigoted hiring practices to increase sales. In order to avoid penalizing the employers who wish to practice equal opportunity, it is necessary to reject customer preference arguments.

The customer preference argument is different from a claim that nonprejudiced listeners in the relevant listener pool cannot understand the accent, even when they make a good faith effort to do so. In analyzing accent cases it is important to separate those two claims.

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175. *Id.*

176. *See* R. FASOLD, *supra* note 84, at 150 (describing matched guise techniques). In contrast to the structured experiments of the matched guise type, some sociolinguists use language-in-context studies, attempting to study language interactions in natural location. *See, e.g.*, Gumperz, Aulakh & Kaltman, *Thematic Structure and Progression in Discourse*, in LANGUAGE AND SOCIAL IDENTITY, *supra* note 155, at 22 (studying recordings of natural conversations occuring among Indian and Pakastani residents of Great Britain). Both types of studies confirm that attitude toward certain types of speech influences comprehension and evaluation of the speaker.

177. Masterson, Mullins & Mulvihill, *supra* note 174, at 215-17.

The problem, however, is that an unintelligibility claim often masks a preference claim. "I can't understand" often translates into "I can't tolerate differences" or "I've lived a monocultural life for so long that there is no place within me that can hear you."[178] These claims are blended in ways that go deep into the parts of all of us that have absorbed myriad messages of racial inferiority—the parts that fear change, the parts that tie our own self-doubt to a need to judge and control others. Because of this, a final step is necessary in the analysis of accent cases. The next step attempts to minimize the possibility that unintelligibility claims are stand-ins for bias by inquiring into the reasonable accommodations employers could make to avoid linguistic barriers to communication.

E. *Step Four: Can the Employee Be Understood with Reasonable Accommodation of Linguistic Difference?*

To determine whether prejudice rather than unintelligibility motivates linguistic discrimination, it is useful to ask whether the employer can make reasonable changes in the workplace that would increase communication within the relevant listener pool. The concept of reasonable accommodation is well developed in the law governing employment of the differently-abled.[179] It asks

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178. Direct evidence of discrimination is often unavailable. *See* U.S. Postal Serv. v. Aikens, 460 U.S. 711 (1983). Thus, indirect evidence of listener prejudice against certain accents is important in analyzing accent cases. *See, e.g.*, Eisenstein, *Native Reactions to Nonnative Speech: A Review of Empirical Research*, 5 STUDIES IN SECOND LANGUAGE ACQUISITION 160 (1983) (attitudes toward particular accents affect intelligibility); Giles, *Ethnocentrism and the Evaluation of Accented Speech*, 10 BRIT. J. SOC. & CLINICAL PSYCHOLOGY 187, 187 (1971). In one interesting study, immigrants (mostly Spanish-speaking) who were studying English were asked to rate speakers of "standard," "New York," and "Black" speech. The learners rated Black speech lower in intelligibility, as well as in personality characteristics like attractiveness, friendliness, and status. The researchers speculated that the learners had acquired the prejudices of their new country. Ironically, some of the learners themselves were using Black speech patterns because of their residential proximity to Blacks. Eisenstein & Verdi, *supra* note 161.

179. *See, e.g.*, School Bd. of Nassau County v. Airline, 480 U.S. 273, 287-88 (1987) (courts must consider whether any reasonable accommodation by employer will enable handicapped person to do job); Engel & Konefsky, *Law Students with Disabilities: Removing Barriers in the Law School Community*, 38 BUFFALO L. REV. 551 (1990) (discussing ways in which law schools can accommodate the differently-abled); Gellet, *The Judge Who Could Not Tell His Right from His Left and Other Tales of Learning Disabilities*, 37 BUFFALO L. REV. 739 (1988-89) (learning disabled judge discusses his experiences as legal professional). Under the Americans with Disabilities Act of 1989, Pub. L. No. 101-336, 104 Stat. 327, it is illegal for an employer to fail to make reasonable accommodations to the known physical or mental limitations of a qualified individual who is an applicant or employee, unless the accommodation would impose an undue hardship on the operation of the business. S. 933, 101st Cong., 1st Sess. § 102(b)(5) (1989); *see supra* notes 146-47 and accompanying text. This law is a response to the various forms of employment discrimination that individuals with disabilities have and continue to suffer. In enacting the Disabilities Act, Congress found that: (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older; (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services; (4) unlike individuals who have experienced discrimination on the basis of race, sex, national origin, religion, or age, individuals who have

not that employers go broke in order to accommodate physical differences. Rather, it asks that employers make those alterations which are either costless or impose costs that, while they may cut into short-term returns, will have the long-term benefit of bringing qualified handicapped individuals into the labor force. Wheelchair ramps, braille in elevators, and grab-bars in restroom stalls are all accommodations we have grown accustomed to in recent years. We have made a collective decision that the costs, while not inconsequential, are reasonable in light of the benefits gained.

In our educational institutions, in the workplace, and in the communications industry, efforts are underway to accommodate the deaf through ASL interpreters, captioned television programming, and other electronically enhanced communication devices.[180] In the case of accents, accommodation is less complicated. Speaking English with an accent, even a heavy accent, does not require the same degree of accommodation as does a completely different language, or the absence of speech. Our willingness to accommodate absence of speech but not difference of speech is an interesting contradiction.

Using visual back-ups, writing memos, using pictographs, using sign language, training employees in both speaking and listening skills, and minimizing opportunities for miscommunication by standardizing procedures are often simple, and cost-effective accommodations to speech differences. Consider the Chinese restaurant menu that allows the customer to order a "number 4" if they have trouble pronouncing Chinese names, or the pictograph for "children crossing" that conveys an important message without written words or oral speech. When clarity of communication is critical, it is often rational to use a non-oral medium.

In the case of the university lecturer, it helps to note that communication breakdowns occur with and without accents. Any university student can tell us about native English speakers who are poor communicators. Sometimes this is because the teacher speaks poorly—mumbling, droning, or saying too much too quickly. Other times it is because the teacher has little empathy for how students learn, and is unable to explain concepts in a way that is useful for

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experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination; (5) individuals with disabilities continually encounter various forms of discrimination in addition to outright intentional exclusion; the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities; (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. *Id.* at § 2(a)(1)(7).

180. L. JACOBS, *supra* note 101, at 103-15 (discussing captioned television, access to telephone, ASL, and other programs for the deaf).

beginners in a field. Our university system, which seeks out the best researchers and writers and hands them teaching roles, is not particularly conducive to choosing strong classroom communicators.

Native as well as non-native speakers are among the pool of less effective teachers. If the problem is one of passing substantive knowledge and methods of critical inquiry on to students, perhaps better teaching materials, computer-aided instruction, good student-teacher ratios, peer teaching, training in pedagogy, individualized instruction, and other strategies are as important as accent conformity. When universities place lecturers in charge of large classes without requiring even one minute of instruction on teaching techniques, one questions their sudden need to screen out "bad accents." If effective classroom communication is the goal, many appropriate accommodations and strategies that could help meet that goal are presently ignored.

If the university does take teaching seriously, isn't it then possible to make a good faith claim that students simply cannot learn if the accent is too strong? At what point does the student's right to learn justify accent-screening?

There are several specific inquiries that help separate legitimate communication difficulty from biased evaluation. First, as discussed above, expert witnesses can help in identifying the relevant, nonprejudiced listeners, and in determining whether the accent discrepancies are so divergent as to impede communication.[181] Second, accommodations, including assistance to both speakers and listeners in bridging communication gaps, help show that any residual non-understanding reflects a genuine, irremediable intelligibility problem.[182] Finally, the court can inquire into the level of prejudice against the accent. If the accent is one historically subjected to discrimination, for example, this cautions particular scrutiny and special efforts at accommodation in order to avoid the probability of biased evaluations. Again, experts are useful in determining whether there is a demonstrable history of prejudice against a particular accent, and in identifying kinds of phonological differences that actually do impede comprehension.

Some readers will puzzle over the inclusion of disability law analysis in a discussion of accents. The comparison of accent to speech impediments might, alternatively, stigmatize accent or trivialize physical handicap. I borrow an inexact analogy deliberately, because I believe disability law confronts head-on the fact of difference among human beings and the benefit gained from accom-

181. Debates among teachers of English as a second language over whether they should teach "correct" pronunciation or whether other skills are more likely to enhance communication are exacerbated by the growing body of evidence that correctness of speech is not necessarily correlated with comprehension. That is, factors of attitude and "irritation" often impede comprehension independently of objective performance of second language speakers. *See* Albrechtsen, Henriksen & Faerch, *Native Speaker Reactions to Learners, Spoken Interlanguage*, 30 LANGUAGE LEARNING 365, 395 (1980).

182. For discussion of the efforts of labor unions to meet the needs of linguistically diverse workers and illiterate workers, see Gregory, *Union Leadership and Workers' Voices: Meeting the Needs of Linguistically Heterogeneous Union Members*, 58 U. CIN. L. REV. 115 (1989).

modating those differences. Much of the confusion in the current cases analyzing accent discrimination stems from the Title VII premise that we are all the same, and from the impossibility of applying that premise to the reality of linguistic difference.

In addition to the substantive issues of difference involved in accent cases, there are also issues of process. The following section outlines briefly a suggested application of the procedural rules of Title VII in accent cases.

F. *A Word on Procedure and Burdens of Proof*

The procedure in Title VII cases is well developed. The courts divide the analytical steps in framing a case between "intent" and "impact" issues.[183] Impact cases typically involve large numbers of potential plaintiffs and statistical evidence to show systemic employment discrimination.[184] Intent, or "disparate treatment," cases typically involve a single plaintiff who is able to show discriminatory intent lurking behind an employment decision.[185]

Accent cases fit in neither analysis.[186] They look like disparate treatment

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183. Conduct giving rise to a disparate impact typically affects many individuals, while disparate treatment pertains only to certain individuals. In impact cases, the plaintiff has the initial burden of establishing that a rule or classification has the effect of denying employment opportunities to a protected class based on national origin. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1147-96 (1976). Once discriminatory impact is established, the employer carries the burden of establishing that the qualifications are justified by objective proof of "business necessity." "Business necessity" is defined not in general or conclusory terms, but by specific reference to the employee's ability to perform a particular job.

Plaintiff has the initial burden of establishing a prima facie case of illegal disparate treatment in an intent case. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). The plaintiff can establish a prima facie case by showing that: (1) they belong to a racial minority; (2) they applied and were qualified for a job for which the employer was seeking applicants; (3) they were rejected despite their qualification; and (4) after their rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

184. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (percentage of minority to nonminority persons within potential applicant pool who possess qualification compared); Hill v. Western Elec. Co., 596 F.2d 99 (4th Cir. 1979) (percentage of minorities promoted to supervisory positions compared to percentage of minorities working for employer at nonsupervisory positions); Green v. Missouri Pac. R.R., 523 F.2d 1290, 1294 (8th Cir. 1975) (testimony that disqualification of persons with criminal records adversely impacted on African Americans; stating that in urban areas over 36% of all African Americans would incur conviction in lifetime, compared to only about 12% of whites).

185. *See, e.g., McDonnell Douglas*, 411 U.S. at 792 (former employee not rehired because he had engaged in civil rights "stall-in" at employer's premises); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (female employee discriminated against solely because of sex; position was given to junior male employee); Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1970) (preference for females rejected), *cert. denied* 404 U.S. 950 (1971).

186. The case of Stephens v. PGA Sheraton Resorts, 875 F.2d 276 (11th Cir. 1989), illustrates the procedural dilemma of plaintiffs. In that case, Stephens, an immigrant from Haiti, prevailed in the district court because he exposed a job classification scheme as having had a disparate impact on African Americans. The court of appeals reversed, finding that Stephens' termination was a legitimate result of speech/communication difficulty, thus rendering proof of disparate impact irrelevant. In choosing to emphasize the impact theory over a treatment theory, which could have addressed bias against his accent—a plausible choice given the district court's finding—the plaintiff may have neglected to develop the treatment theory.

cases because they typically involve a single plaintiff. Linguistic discrimination by definition focuses on the odd accent, the isolated difference in speech that stands out and is called "an accent." The accent cases rarely, however, involve conscious pretext or discriminatory intent. There are few contemporary employers, one would like to believe, who are so evil that they consciously devise a scheme to eliminate a certain ethnic group from the workplace by creating a bogus claim that an accent impedes job functioning. More typically, accent discrimination occurs because of unconscious bias, careless evaluation, false assumptions about speech and intelligibility, mistaken overvaluing of the role of speech on the job, or concessions to customer prejudice. While all of these errors can violate the principle of equal employment opportunity, if the plaintiff must prove a deliberate scheme to use accent as a cover for discrimination, plaintiffs in accent cases will always lose. Accent cases look more like impact cases because the employer is using a seemingly neutral speech standard in a way that impacts certain linguistic groups negatively.

Because the courts acknowledge the danger of accent discrimination, it makes no sense to apply a procedural scheme under which no plaintiff could ever win. Thus, as a procedural matter, the following scheme of burdens of proof and production is suggested. It retains at all times the plaintiff's burden of proof, while recognizing that in accent cases, elements of both impact and treatment analysis are useful.

Plaintiff's case-in-chief must show:

a. Plaintiff is "otherwise qualified" for the job.[187]
b. The job is available.[188]
c. Plaintiff was not hired because of accent discrimination, even though the job remained open to others.[189]

These elements establish a prima facie case of discrimination. In response, the defendant must allege and produce some evidence[190] that:

187. "Otherwise" qualified means only a threshold or basic ability to perform the job. It does not encompass a comparative analysis. If an unskilled job is open, the plaintiffs are "qualified" if they have the physical characteristics necessary to perform. If a skilled job is being filled, plaintiffs are qualified if they can perform the basic elements of that skill. Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1283 (7th Cir. 1977). Thus, "[w]here employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be 'shown to bear a demonstrable relationship to successful performance of the jobs' for which they were used." *McDonnell Douglas*, 411 U.S. at 802 n.14 (quoting *Griggs*, 401 U.S. at 431).

188. *See McDonnell Douglas*, 411 U.S. at 802 (plaintiff must show they applied for job "for which the employer was seeking applicants").

189. *Id.* at 802 (plaintiff must show "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications").

190. *See* Player, *The Evidentiary Nature of the Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984) (analyzing employer's burden of establishing that purported legitimate nondiscriminatory purpose actually exists).

a. Plaintiff's speech was fairly evaluated.
b. Plaintiff could not communicate with relevant, nonprejudiced listeners at the level required for the job.
c. Reasonable accommodation could not alleviate the inability to communicate at the level required for the job.

Plaintiff then has the burden of disproving one or more of the elements of defendant's claim of nondiscrimination. The defendant's burden is one of production, with all its concomitant implications in the law of pretrial motions.[191] The plaintiff's burden is one of persuasion.[192] The plaintiff must prove each element of the case-in-chief, *and* must disprove at least one of the elements raised in defense.[193] This approach follows well-developed Title VII law in the areas of proof and procedure, tailoring the analysis to the typical patterns in an accent case, and to the doctrinal reconstruction suggested in the preceding section.[194]

G. *Application*

How would the doctrinal reconstruction suggested above apply to the facts of the existing cases? This section will suggest briefly the ways in which the framework of inquiry presented in this Article would have altered the outcome in cases like *Fragante* and *Kahakua.*

1. Fragante *Reconsidered*

In *Fragante,* the level of communication required for the job was admittedly low-level and routine. The employer suggested that the communication, while routine, was delivered under high-stress conditions. While there is room to dispute the finding of the trial court that speech was a significant part of the job, the most critical steps in analysis of the *Fragante* case are Steps 2 and 3: fair evaluation and intelligibility.

The evaluation of Fragante was shoddy. Given the care and effort put into the civil service examination process, the cursory interview by untrained office workers seems an irrational allocation of resources. The interviewers who found

191. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1980) (after plaintiff persuades court of prima facie case, burden shifts to defendant to rebut by "producing evidence that the plaintiff was rejected . . . for a legitimate, nondiscriminatory reason").

192. *Cf. id.* at 256 (plaintiff retains burden of showing discrimination).

193. Disproving one or more of the defense claims destroys the inference of nondiscrimination, and thus surmounts defendant's rebuttal. *Cf.* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (plaintiff need not produce direct evidence of intent to discriminate; once plaintiff sets forth prima facie case and defendant presents some evidence in response, issue is joined and court must decide whether there was discrimination).

194. The courts have emphasized the importance of flexibility in applying the procedural scheme set forth in cases like *McDonnell Douglas. See United States Postal Serv. Bd. of Governors,* 460 U.S. at 715 (quoting *McDonnell Douglas,* 411 U.S. at 715 (test "never intended to be rigid, mechanized, or ritualistic")).

Fragante's accent "difficult" did not identify any incidences of misunderstanding during the interview. The lack of standard interview questions, the irrationality of the rating sheet, and the absence in the interview process of training or instruction in either speech assessment or the obligation of nondiscrimination, reveal a weak system of evaluation. This weakness is unjustified given the size and the resources of the employer, and the regular turnover in the job. Significantly, the evaluation process did not include a functional component. That is, Fragante's speech was never tested in a real or simulated job setting. There was no evidence other than presumption that Fragante could not communicate with customers at the DMV.

The evaluation process invited discretion and subjective judgment. As the sociolinguistic evidence would have predicted, a candidate with an accent identified as foreign and inferior is unlikely to survive such a subjective process.[195] The interviewers concluded that a person with a heavy Filipino accent could not function in the job.[196] The expert/linguist concluded the opposite.[197] He testified that the unprejudiced listener would have no trouble understanding Fragante.[198] There is significant evidence on the record that every listener in the courtroom could understand Mr. Fragante during direct and cross-examinations,[199] which required speech more complex than that described by the employer as necessary for the job. A reviewing court could easily find, on this record, an absence of fair evaluation. At a minimum, a reviewing court should require that trial courts scrutinize the fairness of the evaluation process.

The trial judge, as well as the employer's interviewers, found Fragante's accent "difficult."[200] There is no distinction in the trial court opinion between "difficult" meaning "foreign, unusual, a strain on my ears because it is not how most people I know talk," and intelligibility at the level necessary to perform job tasks. The failure to make this critical distinction would, at a minimum, require a remand for clarification. The only legitimate inquiry, given the Title VII rule of nondiscrimination, is whether the speaker can communicate at the level required for the job.

The Ninth Circuit opinion in *Fragante* fails to make this distinction. The court found that there was no proof of discriminatory pretext and that the individuals selected in lieu of Fragante "had superior qualifications."[201] The only "superior qualification" on record is speaking without a Filipino accent. The opinion seems to allow the employer to select a favored accent in lieu of a "foreign" accent. If the intent of the court is to prohibit accent discrimination,

195. *See* 2 Reporter's Transcript, *supra* note 12, at 261-62.
196. *See supra* notes 23-25.
197. *See supra* note 26.
198. *Id.*
199. *See supra* notes 28-30 and accompanying text.
200. *See supra* notes 36-37 and accompanying text.
201. Fragante v. Honolulu, 888 F.2d 591, 598 (9th Cir. 1989).

clarification is required on this point. The court should state unequivocally that once a person's speech is found functional, the employer may not reject it because a competitor's speech is "less foreign."

If the court intends to keep clear the line between prejudice and business necessity, it should require a specific finding that the particular accented speech in question will not function in the job. The finding that Fragante's speech is "difficult," particularly in view of the additional finding that Fragante possesses excellent verbal communication skills, blurs the line. The trial court gave no reason for ignoring the uncontroverted linguistic testimony that Fragante was easy to understand. It made no finding that Fragante could not communicate high-level information to other speakers of English.

Finally, if the courts had considered the possibility of reasonable accommodation, they might well have altered their ultimate conclusions in *Fragante*. If, as the employer claims, customers are frequently frustrated and confused when they visit the DMV, perhaps there are other alterations to procedures, written information, and staffing, that could ease this burden. If a Filipino accent will "turn off" some listeners, those listeners could, perhaps, be directed to another line, or they could ask for a slower repetition of instructions.

In attempting to make such accommodations, I suspect the employer will discover two things. First, rationalizing office procedures to avoid miscommunication will benefit all customers and employees, regardless of their accents. Second, accents that seem impossible are often quite understandable and functional once we let them into the workplace.

2. Kahakua *Reconsidered*

I believe that same miraculous discovery could have occurred in the weather forecaster's case. Everyone for whom I have played a tape recording of Mr. Kahakua's speech finds him comprehensible.[202] If the court had asked whether Kahakua was intelligible to the nonprejudiced listener, he would have won his case. Instead the court looked for pretext, and could not find it. It found that the employer had selected the best accent in good faith, with no intent to create a cover for discrimination. This was the wrong inquiry. Looking for pretext will never get at the underlying, pervasive, and subconscious bias of an employer or a speech consultant who sincerely believes that only "standard American" accents are appropriate for broadcasting weather forecasts.[203]

As in *Fragante*, the trial court in *Kahakua* gave no explanation for ignoring the uncontroverted linguistic testimony that any nonprejudiced listener could understand the plaintiffs. The court leaves the impression that an employer is free to choose a "sounds white" accent over all others.

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202. National Public Radio broadcast recording of James Kahakua (on file with the author).

203. *See supra* note 60 and accompanying text.

The courts in *Fragante* and *Kahakua* did not intend to promote linguistic intolerance, and in fact they recognized that the purpose of Title VII is to promote just the opposite.[204] Caught in the existing doctrinal emphasis on a search for "pretext," however, they missed the reality of how linguistic discrimination works. It works not through pretext, but through a set of ingrained prejudices and assumptions that are inevitably lodged in the process of evaluation and in the ways in which we assign values like "difficult," "standard," and "intelligible" from our own vantage point. In separating out the areas appropriately subject to judicial scrutiny in accent cases, this Article offers the courts a way to find and prohibit the prejudices and assumptions that violate the goals of Title VII.

This section has suggested a legal response to the particular problem of accent discrimination. Because most of us no longer believe that legal responses derive inexorably from logic,[205] the remainder of this Article offers an ethical and political justification for the doctrinal scheme suggested here.

VI. ACCENT, ETHICS, AND LIBERALISM

What kind of people demand uniformity of accent? The demand for speech uniformity suggests preference for conformity, distrust of difference, and attachment to a large, looming notion of "we." The demand for speech uniformity is scary, in the scary sense of statism, nationalism, territorial acquisitiveness, and purist conceptions of race.

The nations—including ours, in its worst moments—that have humiliated school children for speaking "the wrong way"—have been the imperial ones, the bullies, the takers without right, and the teachers of intolerance.[206] Given this history, linguistic pluralism represents our better self: the generous and tolerant self that marvels at difference and feels no need to destroy individual variability in the process of self-definition. The presence of a variety of accents in schools, in the workplace, in the media, in all public spaces, promotes the value of tolerance. It makes variability commonplace and unfrightening. It remembers that we can be our best, welcoming, unafraid self.

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204. *See supra* notes 75-81 and accompanying text.

205. Legal Realism is generally thought to dominate contemporary legal thought. *See, e.g.*, Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 413 (D. Kairys ed. 1982); Mensch, *The History of Mainstream Legal Thought*, in *id.* at 13.

206. *See, e.g.*, R. FASOLD, *supra* note 84, at 16 (school children once flogged in Paraguay for speaking native language, Guaraní, instead of Spanish). Mitsuye Yamada writes of her experiences as a Japanese-speaking child in American schools:

> In first grade I was forced to sit crouched in the kneehole of the teacher's desk for hours in punishment for speaking to my brother in Japanese . . . . Among other things, I learned that speaking Japanese in public leads to humiliation. The lines were clearly drawn. English is like Sunday clothes and is the superior language. By extension I learned that the whites who speak it must be the superior race, and I must learn to speak as the whites do.

Yamada, *The Cult of the "Perfect" Language: Censorship by Class, Gender and Race*, in SOWING TI LEAVES: WRITINGS BY MULTI-CULTURAL WOMEN 111, 124 (M. Yamada & S. Hylkema eds. 1990).

There are several levels of ethical justification for tolerance of accent variety. At the level of the aesthetic or hedonistic, accents make life interesting. Informants—a fancy word for people I've talked to about their attitudes toward accents—recall being charmed, surprised, and intrigued by accents. The incongruity of a familiar language spoken in a different way can be funny—like putting sunglasses on a family pet. It can be funny in a generous way. Who is the ridiculous one when we find the speech of others amusing? The joke is on the listener who previously thought the linguistic world was smaller than it really is.[207]

"I've been attracted to a woman because of her accent," a man told me. The statement might suggest ugly patriarchy: accent is lack of proficiency, is female weakness, is sexy. It might suggest racist exoticism: women with accents are objectified as alluring nonpeople. It might suggest pop-Freud: we are attracted to the difference we fear and it is us. It might suggest healthy pluralism: sameness is no fun and difference is what we celebrate in life, and love. The various explanations for accent adoration are at best unsatisfactory and at worst deeply troubling. It is not enough to rest the ethical basis for accent pluralism on the aesthetic.

An ethical basis derived from the values of liberalism is more promising. The promotion of individual personhood, the goal of human flourishing, and the procedural caution of noninterference with relatively harmless life choices suggest linguistic tolerance. The way in which we speak reflects self, personhood, identity. To tell people they cannot express themselves in the way that comes naturally to them is to tell them they cannot speak.

There are two general classes of liberal justification for linguistic tolerance. One is procedural: the more ideas the better.[208] The other is substantive: the starting point for measuring justice is the sanctity of the individual.[209]

The first justification is reflected in First Amendment jurisprudence and in equal protection theory.[210] There is an advantage to the community in recognizing the language rights of the individual. If liberal democracy requires

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207. People who have heard of my research have brought me accent jokes. Here's one, courtesy of professor Larry Levine, of the University of California at Berkeley. A woman taking her first trip to Hawaii is intent on being the perfect tourist. She is thrilled when the plane lands, and she goes up to the first person she sees at the airport and says, "Listen, this is my first trip to Hawaii, and I'm so excited. I want to make sure I'm pronouncing things correctly. Tell me, is it Ha-wah-ee or Ha-vah-ee?" The man answers, "It's Ha-vah-ee." "Oh, thank you!" the woman exclaims. "You're velcome," the man answers.

208. *See* L. BOLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986). Diverse citizens bring more than political ideas. They also bring diverse skills, person-power, economic participation. Thus some have argued that linguistic diversity brings economic vitality. *See, e.g.*, Gregory, *supra* note 182 ("parochial monolinguism is not a solution: it would only further debilitate our already weakened ability to compete in international business and to conduct effective and sensitive foreign relations. The United States needs more citizens and workers with multilingual fluency.").

209. *See* West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990) (discussing role of individual freedom in liberal democracy).

210. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927) ("freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth").

speech, requires participation, requires a brisk exchange of ideas, then it requires linguistic tolerance. We don't learn from talking only to ourselves.[211] We can learn some things from talking to ourselves, but a little introspection ought to reveal blockages and self-deceptions that are most easily overcome by the intervention of others.[212]

The idea of tolerance in liberal thought is tied to a modernist humility in truth-seeking.[213] No oracle, no God, declares absolute truth in the modern world. If there is God, we approach God's grace though human struggle over truth and meaning. To silence, to exclude, to extinguish the voice of part of the human constituency could cause our ultimate fall from grace—it could keep us from the knowledge we need to save our lives, our progeny, and our planet.

From the notion that we should promote a flowering of speech and ideas, however bizarre, however heretical to existing notions of reality, unreality, right, and wrong, we derive the liberal notion of tolerance and broad-based participation in political life.[214] This notion is expressed constitutionally in the First Amendment, as well as the Fourteenth, and, in part, in many contemporary notions of civil rights, including affirmative action.[215] We hurt ourselves when we exclude the possible knowledge that diversity in participation can bring.

The second part of the liberal rationale is somewhat at odds with the utilitarian logic that tolerance is best overall for the community. It is a separate notion altogether: the notion of the special, sacred standing of the individual.[216] Like the first rationale, it is in part a modernist notion. The idea that

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211. *See* Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 3 (1988) ("human beings learn and grow through interaction with difference, not by reproducing what they already know") (citation omitted).

212. I keep a journal, and I find that when I'm writing about something in my journal that I don't want to talk to friends about, chances are I'm not being honest with myself.

213. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990) (discussing pragmatists' resistance to absolute truth).

214. The confluence of First Amendment and affirmative action goals is recognized in the Supreme Court's recent upholding of affirmative action in broadcasting. *See* Metro Broadcasting v. FCC, 110 S. Ct. 2997 (1990) (recognizing that broadcasting diversity is significant governmental objective).

Justice Powell's opinion in the *Bakke* case also recognizes the educative and communicative importance of diversity in meeting the liberal goal of the pursuit of knowledge through interaction among different kinds of students. University of Calif. Bd. of Regents v. Bakke, 438 U.S. 265, 311-12 (1978). For a discussion of the value of pluralism's informing First Amendment debates, see Post, *Cultural Heterogeneity and the Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1988). Accent-bias impedes the free flow of ideas. *See* Giles, *Communicative Effectiveness as a Function of Accented Speech*, 40 SPEECH MONOGRAPHS 330 (1973) (British listeners more affected by arguments made in received pronunciation than in other accents).

In contrast, consider the English-only movement manifested in workplace rules forbidding use of languages other than English on the job, and in state and local laws declaring English the official language and forbidding, for example, businesses to put up signs in languages other than English. *See* Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989); Note, *Official English: Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987).

215. *See* Kennedy, *Comment: A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 790.

216. Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) (Philippine law forbidding merchants to transact business in Chinese violates due process and equal protection rights); Hernandez v. Erlenbusch, 368 F. Supp.

the individual in its glory and spirit stands, like Michelangelo's David, on its own two feet apart from the community that nourishes it, is one that accompanies the human journey from communitarian undifferentiated notions of self, to sharp divides between self and society.[217] There are parts of the rationale, however, that go back in time to premodern societies. Every culture that cared for the souls of each of its dead, that wept over the loss of a familiar friend, that rejoiced at the idiosyncracies of each baby child, knew something of the sacred in the individual. This spirit forms a separate justification for tolerance. Each person, on their own, apart from their value to the community, is entitled to dream and express their dreams in their own way.

The sanctity of the individual and the belief in individual will is reflected in the cases that protect personal choice in matters of religion, politics, culture, and belief. The government cannot require that we bow down before the flag, cannot direct the prayers of our children, cannot deny the teaching of our many languages.[218] The courts have drawn a line between the goal of national unity and the inviolable place of personal conscience. In doing this, they have come close, at times, to declaring a right to one's culture.[219]

Tolerance of difference, of course, has limits carefully drawn in contemporary law in all the cases that measure rights of the community against the individual, rights of individuals against individuals, and so forth. I have argued elsewhere that racist hate speech, for example, impedes equality goals and is therefore appropriately subject to limited restriction.[220] In arguing for such restrictions I emphasized that tolerance is an important goal, not lightly set aside. A contextual analysis of the moment in which tolerance claims are raised is critical because absolutism is unworkable as a tool of analysis.

The liberal justifications for tolerance apply fully in the context of accent discrimination. In telling people they must abandon their native accent, we impede their ability to participate in the democratic process. Try this exercise:

> Imagine you are about to speak at a public meeting on an issue of great concern to you and to the community. Choose an issue that you care deeply about and have knowledge of. Now try to share your ideas, speaking with an accent other than your own.

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752 (D. Or. 1973) (tavern that refuses to serve Spanish-speaking customers violates 42 U.S.C. §§ 1981, 1982); *see also* T. PAINE, THE RIGHTS OF MAN 212 (1958) (classic statement of inalienable rights of the individual).

217. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979) (discussing self/other conflict). I use a European art object to make this point because the modern, liberal notion of the individual is associated with Europe. I don't mean to devalue other art.

218. For a discussion of the right of individual consciousness, discussing both religious and secular belief, see Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 311 (1980). While this Article discusses values and beliefs, its reasoning applies as well to the concept of culture.

219. *Id.*

220. Matsuda, *supra* note 7; *see also*, Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

Most people—unless they had early and regular practice in code switching—have trouble achieving articulate and convincing speech in an accent that is not their own. The personhood rationale also applies in accent cases. Even if people can change their accents—and in response to social pressure some people do—should they have to if they don't want to, or if a significant part of their identity and sense of self is tied to their accent?

It took a student's voice to help me understand what hurt and enraged me about accent cases. After giving a formal presentation of my ideas on accent and Title VII to a group of Asian American students and faculty at a California University, I answered several questions. The questions were posed in formal "school" voices, as were my answers—carefully phrased legal language in "acrolectal" accents. Suddenly a woman who had been silent during the entire exchange began to speak softly, without first raising her hand, without using her school voice. She was an Asian American student born and raised in Hawaii. She said quietly, "I don't see how they can come to our place and tell us we can't talk the way we talk," and she began to cry. As she spoke, I began to cry as well, and for the first time I realized that inside this law professor who argues doctrine and rationale was a person deeply wounded by the notion that people like me, people I grew up with, my parents, my aunts and uncles, are somehow unworthy because of the way we talk.

Self-worth, identity, integrity, and autonomy are the words academics use to express an idea that infuses the core of our Constitution and creed: people have a right to be what they are. The popular notion of the Constitution distills to that idea—"it's a free country," children yell back at bossy elders. This core notion of individual freedom is understood by millions of Americans who could not recite a line from the Bill of Rights.[221]

The way we talk, whether it is a life choice or an immutable characteristic, is akin to other attributes of the self that the law protects. In privacy law, due process law, protection against cruel and unusual punishment, and freedom from inquisition, we say the state cannot intrude upon the core of you, cannot take away your sacred places of the self.[222] A citizen's accent, I would argue,

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221. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring, joined by Holmes, J.):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . .

222. According to Professor Tribe:

> [Privacy] rights have been located in the "liberty" protected by the due process clauses of the fifth and fourteenth amendments. They have been cut from the cloth of the ninth amendment—conceived as a rule against cramped construction—or from the privileges and immunities clauses of article IV and of the fourteenth amendment. Encompassing rights to shape one's inner life and rights to control the face one presents to the world, they have materialized like holograms from the "emanations" and "penumbras"—most recently dubbed simply the "shadows"—of the

resides in one of those places.

These liberal rationales for accent rights are important in the application of Title VII. Title VII, in many ways, comes from the same set of principles and values.[223] Its goal was to bring the strengths of many into the workforce, and to acknowledge the pluralist origins of our nation. No race, no gender, no religion, no accident of birth, the statute declared, justified denying the talents of the individual. While Title VII is technically an exercise of commerce clause power, its rationale implicates the liberal values that run through the Bill of Rights.[224] I argue that these values support a vigorous application of Title VII restrictions to outlaw accent discrimination. I argue this because I believe in these values.

There are, however, serious pitfalls in using liberal values without attention to history and context. In the next part, I consider the critique of liberalism suggested by critical legal theorists, feminists, and critical race theorists, and conclude that an even stronger rationale for accent pluralism lies outside liberal thought.

VII. ACCENT AND ANTISUBORDINATION: A RADICAL CRITIQUE

This Article is written out of contradiction, and this part enters the theoretical world that sees contradiction at the core of meaning in life and law. The contradiction in this Article, the irony of it, is that a self-conscious radical, schooled in the postmodern world, argues from cases, rules, and principles for a result that she sees as liberating.[225] That same system of cases, rules, and principles has enslaved and excluded, taken lives and stilled dissent. That same system of cases, rules, and principles has entrenched ideas of objectivity, neutrality, necessity, and right that have made enslavement, exclusion, murder, and oligarchy seem natural and inevitable. These are the teachings of the feminists, critical legal scholars, and critical race scholars who are the voices of dissent in the world of legal theory.[226] These critical voices constitute the

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first, third, fourth, and fifth amendments. They elaborate the "blessings of liberty" promised in the Preamble, and have been held implicit in the eighth amendment's prohibition against cruel and unusual punishments.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 893 (1978); *see also* Crenshaw, *supra* note 7, at 135.

223. *See* Crenshaw, *supra* note 7, at 135.

224. *Cf.* G. GUNTHER, CONSTITUTIONAL LAW 163 (11th ed. 1985). Professor Gerald Gunther's letter of June 5, 1963, to the Department of Justice, urged that the public accommodations provisions of the administration's civil rights bill be premised on the Fourteenth Amendment rather than on the commerce clause.

225. *See, e.g.*, M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 186-212 (1987) (critique of legal-process ideology).

226. For feminist readings relating to law, see *The Femcrits' Reading List*, available Professor Frances Olsen, UCLA School of Law, and Professor Mary Jo Frug, New England School of Law (on file with author). In defining Critical Race Theory, Professor Kimberlé Crenshaw says:

[It] draws upon several traditions, including poststructuralism, postmodernism, Marxism, feminism, literary criticism, liberalism, neopragmatism and discourses of self-determination such as Black nationalism and radical pluralism. . . . Critical race theory goes beyond liberal understandings of race

community of scholar-activists whom I consider my colleagues in a most-serious quest for a just world. This part is my tribute to them.

It looks at accent discrimination from within that critical world, to try to understand what is really going on in accent cases, and to suggest an explicitly political justification for the doctrinal position set forth above. If the doctrinal section was "do the logical thing," and the preceding section was "do the liberal thing," I add now, not in jest and not because I reject either logic or liberalism, a section to plead, "do the right thing." This Article is an attempt to do legal scholarship using the tools of critical legal analysis. The method of the following sections follows a pattern emerging within such scholarship:[227]

- First, it attempts to unmask false claims of objectivity, merit, neutrality, and necessity in the rhetoric of accent cases;
- Second, it examines the context of power in which accent cases arise, and draws from an emerging phenomenonology of subordination to understand how accent discrimination fits into broader social, historical, and psychological structures of subordination;
- Third, it is explicit, partisan, and non-neutral in its commitment to the ends of dismantling structures of subordination and promoting radical pluralism;
- Fourth, it understands doctrinal puzzles concerning accent and Title VII as cites of contestation with both ideological and material consequences; and
- Finally, it employs a strategy of legal analysis designed to promote both reformist and radical agendas by exploiting existing tensions in civil rights law. More specifically, by delineating a fair and logical application of Title VII doctrine to accent cases, I hope to affect three constituencies:
  a. Readers—including judges, lawyers, possible litigants, and legal theorists of goodwill—who are committed to the values I draw upon in this Article but who are unclear about how or whether those values should apply in accent cases;
  b. Activists and theorists seeking to form and critique strategies for radical social change; and
  c. Gatekeepers of the established order, whom I hope to reveal as self-interested and politically motivated should they choose to reject a logical argument for accent egalitarianism.

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and racism by exploring those of its manifestations that support patriarchy, heterosexism, and class stratification. The normative stance of critical race theory is that massive social transformation is a necessary precondition of racial justice.

Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in THE POLITICS OF LAW 195, 214 n.7 (D. Kairys 2d ed. 1990) (proceeding to list selection of readings in this tradition).

227. These patterns are, of course, not definitive. This outline highlights aspects of critical methods I found useful in approaching accent discrimination.

A. *Accent and the Critique of Objectivity*

The work of feminists, critical legal scholars, critical race theorists, and other progressive scholars has been the work of unmasking: unmasking a grab for power disguised as science, unmasking a justification for tyranny disguised as history, unmasking an assault on the poor disguised as law.[228] Applying this new scholarship to the accent cases helps reveal the power disparities and contests for control that lie behind the doctrine.

What employers purport to do when they identify an accent and declare it unintelligible is to apply neutral standards of evaluation to objective reality. This familiar process, critical scholars have argued, is often what disguises value as fact.[229] In looking at the accent cases, what emerges is not the "fact" that Asian or Latino or African American accents are unintelligible, but the hidden assumption of an Anglo accent at the center. The Anglo speech is normal, everything else is different, and acceptability of any given speech depends upon its closeness to Anglo speech.

This lesson was well learned by young African Americans in one study of race and class differences in speech.[230] The researchers were surprised to find that the "best speakers" by Anglo standards of complex sentence structure were young upper-class Blacks. They outperformed whites of the same age and income levels. Perhaps the high language attainment of these youngsters is a result of their intuitive status-striving in a racist world, the researchers speculated. These children may well have known what other studies have born out: people in power evaluate African American speech negatively. In one study, teachers were asked to predict the academic success of children based on audio tapes of the children reading the same passage. The teachers rated white children higher than Black children.[231]

Which accent is seen as normal, intelligent, most-likely-to-succeed, is a function of power distribution. Thus the key inquiry in understanding accent cases is "what are the power distributions." Attempting to apply Title VII without asking that question is what allows courts to suggest that employers can pick the best accent out of many, without seeing that "best" points up the

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228. For critique of false claims to objectivity, see THE POLITICS OF LAW, *supra* note 226; Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83); Keller, *Feminism and Science*, in FEMINIST THEORY: A CRITIQUE OF IDEOLOGY 113 (N. Keohane et al. eds. 1982); Wiener, *Radical Historians and the Crisis in American History*, 76 J. AM. HIST. 399 (1989); *see also* S. HARDING, THE SCIENCE QUESTION IN FEMINISM (1986); Scott, *History in Crisis? The Others' Side of the Story*, 94 AM. HIST. REV. 680 (1989).

229. *See* R. ROSALDO, *supra* note 120, at 168-74. The way in which linguistic patterns are seen as natural rather than socially constructed is evident in judicial opinions. *See, e.g.*, Dowdell v. Dun & Bradstreet, 14 Empl. Prac. Dec. ¶ 5924, 5928 (D. Ala. 1977) (rejecting claim of African American women on the ground that correct grammar is related to job performance and not to race).

230. Williams & Naremore, *Social Class Differences in Children's Syntactic Performance: A Quantitative Analysis of Field Study Data*, 12 J. SPEECH & HEARING RES. 778, 791 (1969).

231. Ford, *Language Attitude Studies: A Review of Selected Research*, 12 FLA. REP. 53 (1974).

racial hierarchy. Unmasking the hidden center reveals accent evaluation for what it is: an exercise in power.

Seeing accent evaluation as an exercise of power helps refute the typical justifications for excluding or repressing certain accents, which include:

1. *The inherent superiority of the standard accent.*
   The claim here is that the standard accent is more pure, more eloquent, more expressive, more valuable.
2. *The universality of the standard accent.*
   Most people speak it and everyone understands it, therefore it is reasonably designated the national standard.
3. *Standardization is efficient.*
   Even if the standard is somewhat arbitrary, having a standard increases communication among diverse speakers. It reduces misunderstanding and saves time.
4. *The standard is unifying.*
   Having a standard helps forge a national identity and avoids the balkanizing disarray that comes with language variation.

The concept of positioned perspective, developed by feminists and critical race theorists,[232] and the critique of neutrality associated with Foucault and the critical legal theorists,[233] rejects the idea of a universal measure of accent quality. Add to this critique the empirical work of sociolinguists, and the argument that standard pronunciation is inherently superior and universal disappears.[234] While most people in power speak the standard, the critical technique of challenging false norms as creations of power helps show how the seemingly absolute universality of standard pronunciation is actually an imposed universality.

This leaves the final two arguments of efficiency and unity. The argument that uniformity is efficient presumes that uniformity is attainable and that variability impedes communication. Both claims are historically and empirically false. Uniformity never has been and by all indications never will be the reality of spoken English. Language is a living, moving thing. Linguistic geographers show this graphically in an obscure but fascinating form of cartography that charts the journeys of words and pronunciation over space and time. The names we call things by are born, expand outward gathering more speakers of those names, and die, as other names take over. The word "orts" for scraps of garbage traveled from England to Massachusetts in the time of the colonies, where it thrived and then faded until only one informant in Bar Harbor and one in New Bedford could tell field researchers what it meant.[235] Similarly, "stan-

232. *See, e.g.*, Crenshaw, *Foreward: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2 (1989).

233. *See, e.g.*, M. FOUCAULT, POWER/KNOWLEDGE 131 (1972) ("Truth is a thing of this world.").

234. *See supra* notes 84, 121, 124.

235. C. CARVER, AMERICAN REGIONAL DIALECTS, A WORD GEOGRAPHY 25 (1989).

dard pronunciation" varies both regionally in our time and historically over time.[236] The teachers of "correct enunciation" of fifty years ago would hang their heads in sorrow over what passes for correct on Cable News Network today.

The standard and the nonstandard interact in a dynamic way. Like two human beings forging a true friendship, neither is exactly the same as before the influence of the other. Through and across the change, interaction, and variation that is our living language, we still speak and understand.

The inefficiency argument envisions the costs of translations and the slowdowns caused by miscommunication. It ignores the capacity of human beings to comprehend across difference when fear and prejudice are removed as barriers.[237] It ignores the benefits to commerce and social life that come from linguistic variety, and the comparative and historical example of economically vibrant multilingual or multilectal societies.

Most people who are multilingual value the way in which variation expands their thinking and experience. We tell stories of how *besame mucho* is something that sounds romantic in Spanish and ridiculous in English.[238] We laugh at jokes that reflect variety; we are nostalgic for accents of our youth; we learn moral lessons from the humility of languages that prefer passive constructions, suggesting that the universe works upon human beings and not the other way around. While standardization—even if it were attainable—might be efficient in the narrow sense, it is inefficient in the broad sense. It is inefficient in bringing the wonders of the wide world to us.

When efficiency is undermined as a rationale for accent discrimination, national unity becomes the stubborn remainder of reason in support of standardization. Should we create a center, even where there is none, in order to forge national unity and to give meaning to national citizenship?[239]

Asking the question in this way implies that our nationalism can only arise from uniformity, from pride in America singularly defined. The alternative of a diverse, dynamic, and diffuse concept of national culture, of a living, moving interactive culture imaginable as expanding circles of sameness and difference, is ignored when uniformity is seen as essential to national identity. The following section considers the strange and passionate attachment to uniformity that underlies the phenomenon of accent discrimination.

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236. The use of standardization to forge national unity is associated with Daniel Webster, patriot and great standardizer of American usage. Note, however, that Webster's urge to create an American standard was an anticolonialist one. He rejected England as the sole proprietor of English. *See* Delbridge, *supra* note 161, at 69.

237. *See supra* text accompanying notes 84, 121, 124.

238. For non-Spanish speaking readers, *besame mucho* means "kiss me much." —Ed.

239. *See* G. PULLAM, *Here Come the Linguistic Fascists*, in THE GREAT ESKIMO VOCABULARY HOAX (forthcoming 1991).

B. *What Fear Is This? Accent and the Culture of Domination*

Unmasking the false neutrality of accent discrimination raises a deeper set of questions: Why are employers so willing to discriminate on the basis of accent, and why are courts so willing to allow this? Why does accent discrimination seem like an employer's entitlement, such that employers willingly confess to intentional discrimination on the basis of accent? The answer may be that we are acculturated to domination. As a student once wrote in response to an exam question on the rights of aliens, "What would be the point of being a citizen" if noncitizens had equal rights?[240] In thinking about accents, we come up against the inside/outside culture of dominance that is so fundamental to our understanding of the universe that we don't see it as ideology. In trying to name and see the ideology, I ask how accent is situated in the structures of domination.

This Article has suggested that the prejudices people harbor will surface in their response to accents. Is accent evaluation merely a reflection of prejudice, or is it something more—part of an embedded culture of domination? In exploring this question I write tentatively, with recognition that many readers will find the linkages made disconcerting. These linkages connect accent discrimination to systemic and structural subordination, to the distinction between public and private power, and to the distortion of human needs and fears that, I believe, underlie all forms of domination.

When certain accents are deemed inappropriate for the workplace, for political life, for use in schools and boardrooms, a policing of public and private boundaries occurs. Who may speak, when, and where, is a typical mechanism for distributing power. Who is competent to testify in court, who may speak at political meetings, who is an expert authority—answers to these questions stand at the border between the public realm of power and the private realm of the personal.[241]

As it has become increasingly unacceptable to deny public speech on the basis of race or gender, accent becomes a significant means of maintaining boundaries. The recent push for English-only laws, and the attack on bilingual education, may represent new outlets for racial anxiety now that many traditional outlets are denied. The angry insistence that "they" should speak English serves as a proxy for a whole range of fears displaced by the social opprobrium directed at explicit racism.

Class boundaries, as well, are maintained by accent. Linguists have found that, while all accents are subject to natural drift and change over time, upper-class accents tend to resist blending into middle-class accents, even when this

240. Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 27-28 (1990).

241. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989) (feminist analysis of legal voice).

requires awkward phonological maneuvers.[242] Upper-class speech will even borrow from foreign accents in order to maintain distance from other speech.[243] Accent serves an ideological function: it helps elites to stand apart from—superior to—the masses.

Accents thus construct social boundaries, and social boundaries reinforce accents. The circumstances that perpetuate accents—including residential segregation, tracking systems in schools, and social distancing—are socially created. In distributing social standing according to accent, we distribute according to accents we have, in part, created.

Even if we were not a nation of immigrants, it seems, we would have had to construct speech markers to maintain social distinctions that are important to us. We have done this with other types of distinctions, including race, gender, and sexual preference, attaching social meanings to differences and maintaining those meanings as though driven by some fear, some need to control, that is beyond ourselves.

The need to control, cordon, conquer, correct, at all costs; the perverse sexuality of technical triumph that feminists critique as the patriarchy of scientism[244]—this seems to generate the hate in accent cases. The disease model, the idea that accent is the human voice out of control, calls for the sledgehammer discipline of technology. The image of Eliza Doolittle, breathing heavily into a maze of laboratory instruments until she changes her accent and ends up happy in the bed of the good doctor, captures all of this.[245]

I ask what needs we fulfill by treating accent as disease, by using it to set up hierarchies among human beings, and by allowing a chosen few with the best accents to rise above the ordinary. I ask that we consider a way out of the ideology of domination that marks our present response to accent.

C. *Producing Counter-Ideology: Antisubordination Strategies in Law*

The process of unmasking hidden centers and false objectivity is an important first step in producing a counter-ideology of antisubordination, as is acknowledging the psychology of dominance that accompanies subordination. The doctrinal elaboration set forth in this Article is an attempt to recast existing Title VII tools in a way that introduces this counter-ideology to the law.

Progressive legal theorists seek to include antisubordination ideology in the law through such strategies as affirmative action,[246] reparations,[247] and re-

242. Kroch, *Toward a Theory of Social Dialect Variation*, in DIALECT AND LANGUAGE VARIATION, *supra* note 54, at 345.

243. *Id.* at 346.

244. *See, e.g.*, S. HARDING, *supra* note 228; Keller, *supra* note 228.

245. *See* G.B. SHAW, PYGMALION (1930).

246. *See, e.g.*, J. DREYFUSS & C. LAWRENCE, THE *BAKKE* CASE: THE POLITICS OF INEQUALITY (1979); Edley, *Affirmative Action and the Rights Rhetoric Trap*, 3 HARV. BLACKLETTER J. 9 (1986).

striction of hate speech.[248] All of these legal positions recognize that ours is a non-neutral world in which legal attention to past and present injustice requires rules that work against the flood of structural subordination.[249] Anyone who has swum against the tide knows that it requires effort. Staying still means moving backward.

The accent cases illustrate some of what we know about subordination. We know that subordination has material and ideological dimensions. In the case of accent, the material dimensions include the real denial of life chances: jobs, housing, and educational opportunity may depend on talking the right way. Whether one can speak persuasively before the law—before a police officer or a judge or a legislature or a jury—may determine life or death, freedom or jail, protection or neglect. The ideological dimension of accent discrimination is the creation and maintenance of a belief system that sees some as worthy and others as unworthy based on accent, such that disparities in wealth and power are naturalized.

Much of the system of thinking that justifies subordination depends on such in/out sorting. Some people deserve degraded status because they are lazy, stupid, ill-mannered, latecomers without vested rights, outside the circle of those we care about. Other people deserve privileged status because they are smarter, more hardworking, more like us, more like the entitled insiders. An interesting opening in the sacred circle of the entitled is made for those who are seen to have fallen from the circle through no fault of their own—those who are enough like us that we can give them charity. The concept of the deserving poor, the psychological identification with earthquake victims, and the outpouring of care for children who fall into wells, suggest this.[250] After the California earthquake, many emergency shelters made a distinction between the new homeless, who were welcome in the shelters, and the old homeless, who were not. In order to stay in an earthquake relief shelter, one had to prove they had a home before the earthquake.[251]

The sympathy generated by natural disaster together with the implied lack of human agency behind earthquake-generated homelessness, raises the issue of immutability as a justification for favored treatment under law. Ever since

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247. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

248. Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Lawrence, *supra* note 7; Matsuda, *supra* note 7.

249. *See* West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990).

250. Okabe, *Texas Toddler's Rescue Grabs World Headlines*, UPI (Oct. 17, 1987) (world-wide attention focused on rescue of Jessica McClure from an abandoned well in Midland, TX).

251. *World News Tonight with Peter Jennings* (ABC television broadcast Jan. 30, 1990) (transcript on file with author) (reporter Ken Kashiwahara stated: "The catch is disaster relief agencies were set up to help those made homeless because of the earthquake, not those who were homeless before. FEMA, the Federal Emergency Management Agency, requires proof of permanent residency before it will help."); *Quake Aid for Poor Inadequate, Groups Say*, L.A. Times, Nov. 16, 1989, at A3, col. 1 (Federal Emergency Management Agency accused of failing to provide adequate assistance to those displaced from low-income housing and who cannot meet FEMA proof of permanent residency requirements).

the famous footnote four, the idea of difference-by-act-of-God has fed our notions of equal protection and deservedness.[252] People can't help it if they are born Black, or female, or foreign, therefore it is unfair to disadvantage them based on an "unfortunate accident of birth." The widespread generosity of ordinary Americans toward the handicapped and afflicted is a proud fact of our national culture. Millions contribute to telethons, walkathons, blood drives, and other charitable activities for various illnesses and disabilities. Overcoming handicap is a significant theme in books devoured by young readers.[253]

Our discomfort when disadvantage is somehow linked to choice stands in contrast to this passion for the faultless victim. For this reason many gay rights activists, and sympathizers in the popular media, emphasize the immutability of sexual orientation: we can't help it if we were born gay. Growing numbers of gay and lesbian activists are dissatisfied by the immutability argument.[254] Lesbians in particular often see woman-to-woman sexuality as a choice—a political, prideful, and joyous choice determined not by biology but by love of womankind.[255]

Similarly, many religious and ethnic groups choose to live a certain way—to speak, act, eat, dance or not dance according to custom and meaning deliberately constructed to define separation from the dominant culture. If immutability determines when the law cares about our differences, the logical corollary is that difference by choice is not protected.

Thus in a range of distinctions we divide "innocent victims of AIDS" from those who somehow deserve what they got. We separate the "deserving" welfare recipients from the lazy poor. We cull out the "typical Jews" from the assimilated ones, ever sorting between those who can enter the circle of public power and care and those who are rightfully left outside. The core group of the entitled will, through beneficence, let in the anointed few whose difference does not offend.

Immutability arguments feed into this hierarchical ideology. In arguing for accent tolerance, the rationale of accent as immutable is thus a dangerous one. A more progressive argument is that even if accent is changeable, no citizen should have to alter core parts of identity in order to participate in society. A true antisubordination agenda would apply reasonable accommodation to all differences, whether chosen or immutable, that are historically subject to exploitation or oppression by dominant groups.

In arguing that Title VII should prohibit accent discrimination, the more powerful justification is a notion of radical pluralism, not a notion of charitable

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252. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (Justice Stone's discussion of the legal process and "discrete and insular" minorities).

253. *See, e.g.*, H. KELLER, HELEN KELLER'S JOURNAL (1938); M. KILLILEA, KAREN (1952).

254. *See, e.g.*, Halley, *The Politics of the Closet: Towards Equal Protection For Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

255. *See generally id.*

concern for the immutably afflicted. Indeed, I am coming to see the antisubordination principle and the radical pluralism principle as necessarily linked.

D. *Accent and Radical Pluralism*

When we reveal "accent" as a social construction used to distribute power, we threaten the notion of a national culture. Other writers, including Frank Michelman, Kenneth Karst, Robert Post, and Gerald Torres, are considering the idea that pluralism, or an entitlement to cultural diversity, is mandated by the Constitution and by the principles of democracy.[256] When I say there is no accent, no single culture at the center of this country, I approach radical pluralism, and had best define it. By radical pluralism, I mean that groups and individuals as members of groups are free to live in and express their culture—including their language, their religion, and their style of living. There is no norm in any of these things that a democratic nation can legitimately impose, and the right to cultural difference must spread to the full range of culture chosen and defined by the group, not by any dominant culture. That is, we cannot say "Thai food, yes, Thai accents no" or "Black music, yes, Black English no." The selective filter that appropriates certain aspects of subordinate culture and discards others is not pluralism; it is domination. Radical pluralism includes self-determination—the rights to make and promote one's culture and to share it in whole cloth with other politically equal cultures.

Diversity in culture is a good thing. Just as diversity in the gene pool, in the variability of life on earth, is necessary for our survival, so is cultural diversity a great pool from which we can draw ideas and practices we need to live by. The culture of modern science, for example, often benefits from the study of other cultural practices in herbalism, agriculture, and ecological maintenance. As we live the reality of war,[257] feminists, pacifists, and others call for study of the dispute resolution techniques of peaceful cultures.[258] In the method of cultural comparison, we learn what is valuable in our own culture and what is not. Through multicultural experiences we can exercise the limited agency of human beings to escape harmful cultural practices and invent new ones.

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256. Karst, *Paths to Belonging, the Constitution and Cultural Identity*, 64 N.C.L. REV. 303 (1985-86); Michelman, *Saving Old Glory: On Constitutional Ichonography*, 42 STAN. L. REV. 1337 (1990); Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1988); Torres, *supra* note 7; *see also* Arons & Lawrence, *supra* note 218.

257. At the time the author was finishing this Article, our country began its "Operation Desert Storm."

258. *See* Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPPERDINE L. REV. 5 (1989). *But see* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1542 (1983) (arguing that deformalized proceedings often result in perpetuation of hierarchy and domination). For another perspective, see Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984).

What does accent have to do with this? It is said by language-rights activists that language is the cradle of culture. There are ways of thinking and being that are so closely connected to language and speech style that one cannot think or be that way without the language.

When my father accidently hits his thumb with a hammer, he is likely to blurt out an expletive in Spanish. There are no cuss words in Japanese, he says, and so many of the Nisei from Boyle Heights, where he grew up, swear in Spanish.

In the one semester I lived in Japan, I found it hard to be my feminist self. The language, particularly the usages assigned to woman, is full of modest, indirect, and dainty constructions. On the other hand, my Japanese side is difficult to express in English. In interactions with non-Japanese friends, I've been asked "Why are you apologizing so much?," to which I am tempted to reply "I'm sorry." In Japanese, the words "I'm sorry," or "I've been rude," are used regularly—almost as fillers—in daily interactions and conversation. It would seem strange and rude not to use them, for example, in entering a store, or passing in front of someone in a theater, or interspersed regularly in any conversation with an older person.

If language is the nest of culture, and cultural diversity is an absolute good, than linguistic tolerance is a legitimate end of the law. Saying this raises questions of how radical pluralism will work in practice as our imaginations call up much that is ugly when we speak of pluralism, including bitter cultural clashes and domination disguised as cultural expression, to name two.

This is why I believe the antisubordination goal and the radical pluralism goal are necessarily twin goals. In promoting cultural difference, we must maintain both a collective and separate ability to critique domination. Cultural practices that degrade women, children, and others, for example, should remain subject to carefully deployed collective sanction as well as vigorous intragroup challenge. Cultures are never static. They change, and can change and remain strong, I believe, in conjunction with an antisubordination agenda. Before launching antisubordination attacks on cultural expression, however, we need mechanisms to avoid using such attacks as a mask for power grabbing. As Professor Kimberlé Crenshaw has suggested, the violent, antiwomen expression of some African American rap artists is a danger to her community, but nor did the white men who prosecuted Two Live Crew have the interests of her community at heart.[259]

We are just beginning to put radical pluralism and antisubordination together, and to consider the mechanisms for doing that. In the meantime, the rich range of cultural expression—including accent—that harms no one, is something we can celebrate and protect.

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259. Crenshaw, *Race, Gender and Violence: A Black Feminist Perspective*, STAN. L. REV. (forthcoming 1991).

In summary, the antisubordination rationale for accent tolerance suggests a radically pluralistic re-visioning of national identity. The only center, the only glue, that makes us a nation is our many-centered cultural heritage. Just as our use of language is rich, varied, interactive, and changeable, so is our national culture. We are the only country in which an Okinawan vendor serves Kosher pastrami and stir-fried vegetables wrapped in a tortilla to young white punk rockers at 3:00 a.m. in the morning.[260] We are the only country in which a white child sleeps blissfully under a quilt lovingly stitched by his aunt, emblazoned with a life-sized portrait of an African American basketball star.[261] We are the only country in which a group of parents planning a little league fundraiser around a transvestite beauty contest would call the ACLU to defend their right to use a public park for the event, and convince a mayor named Hannibal Tavares to change his mind about a permit.[262] From the oversized plaster chickens and donuts that mark our highways to the exquisite wisps of nouvelle Franco-Latin-Japanese cuisine set before our expense-account diners, we are a nation fantastic and wide-ranging in our vernacular and our juxtapositions. From the Grand Ole Opry to neo-metal, from zydeco to the Met, we are a range of tastes and sounds wider than ever before known to the nations of this planet. That is the defining centrality of the American culture I grew up in and love: a broad and delightfully incongruous coming together of difference. In acknowledging plural culture as a strength, and in recognizing and dismantling the false hierarchies that place one culture over another, it may come to pass that we live together in celebration and peace.

E. *To Save Our Own Souls: Law for the Last Reconstruction*

Throughout this Article, I have written to persuade readers of good will to adopt legal rules and ethical positions that promote linguistic pluralism. I have used existing legal doctrine, traditional liberal theory, and new critical theories in this effort. This eclecticism might seem as odd as the kosher burrito and as dangerous as the Ku Klux Klan to those who see impassioned pleas for favored constituencies and eclectic borrowing from many traditions as unprincipled and undisciplined. I believe the antisubordination principle is a principle, and that it can inform our law in a way that is as principled and as disciplined as the ideas of property, equality, and due process that are our constitutional legacy. I have tried to show that accent discrimination is rooted in a culture of dominance fundamentally at odds with the creed of this nation—at odds both with the Enlightenment ideals of liberalism that attended our national birth and the

260. Confirmed by author's personal experience, accompanied by Ms. Barbara A. Lubow, Esq., at Okidogs, Los Angeles, Cal. (Jan. 21, 1991).

261. Letter to the editor, with photo, SPORTS ILLUSTRATED, February 1990.

262. Author's interview with Dan Foley, former staff Attorney of ACLU-Hawaii (1984).

ideal of antisubordination that has constituted the core of our defining struggles against slavery, against fascism, against Jim Crow.

The many brilliant scholars who caution against overreliance on law or logic, claims of truth or absolute normative priority, legalism and constitutionalism, present challenges I wish to hear. In meeting the goal of true equality—of ending all forms of subordination—I continue to see claims of logic, legality, and justice as both useful and true.

Some critics will find this piece dangerously naive and hopelessly situated in the reform rhetoric of the failed Second Reconstruction.[263] It calls for revitalized interpretation of Title VII in the face of a Supreme Court explicitly embarked on a scaling down of civil rights enforcement,[264] and in the face of a President and a Congress apparently prepared to look on with approval. I write in the face of elections in which appeals to race hatred gain percentage points at the polls.[265] In appealing, still, to the rule of law and the possibility of re-visioning law, I write with full awareness of all the reasons why this is a difficult task.

Throughout I have used the pronoun "we," speaking of "our" ideals. This is the coercive "we" of the political writer.[266] I believe there is a collective national soul salvageable from the laws and amendments passed since the civil war in heroic effort to repair the tears in the fabric of our family. It is a good soul, joyous at life's wonders, fearing, yet needing, the voices difference. I know it is there because I live in a country that produced Frederick Douglass, Mark Twain, Walt Whitman, Langston Hughes, Alice Walker—an unbroken string of writers who celebrate this national soul and write to save it. I keep faith with those writers and look within the law and culture of the United States for a way to the last Reconstruction.

In suggesting a reconstructed interpretation of Title VII that responds to both liberal and radical critiques, I intended to suggest a model of what law can be and what lawyers can do to work toward justice. The great legal historians of our time have said of Americans that they are users of law.[267] They

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263. The term "second reconstruction" is widely used in reference to the civil rights movement of the 1960's and the resultant legislation. *See, e.g.*, D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980). According to Bell,

> Blacks in America seem uniquely burdened with the obligation to repeat history whether or not they earlier have learned its lessons. The first Reconstruction experience, as bitter as it was, did not enable avoidance of what could become a quite similar withdrawal of the rights and opportunities granted during the second Reconstruction of the 1960's.

Id. at 2.

264. *See, e.g.*, Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

265. *See* Applebome, *Racial Politics in South's Contests: Hot Wind of Hate or a Last Gasp?*, N.Y. Times, Nov. 5, 1990, at A1, col. 5.

266. *See* R. ROSALDO, *supra* note 120, at 183, discussing the shifting pronoun use of the social critic E.P. Thompson.

267. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 18-23 (1985):

> [T]he theory of this book is that law moves with its times and is eternally new . . . . The modern idea of law as essentially man-made, as essentially a tool or an instrument, was foreign to the classic common law.

use it, they believe in it, they constructed a nation around it. Law is part of our culture and it is, therefore, a place to begin in making the changes we need to make.

The poet Kenneth Patchen once wrote, after describing a lynching:

> I know that one of my hands is black, and one white. I know that one part of me is being strangled while another part horribly laughs
> Until it changes I shall be forever killing; and be killed.[268]

DuBois wrote of the dualism of African American experience. Patchen, a white man, wrote of the same dualism from a different direction. Both knew intuitively that neither side of the black/white divide could free its fate from the other, though cynics have suggested that, if the men on top could, they would sell everyone else down the biggest river of all.[269]

In our most frightened moments, human beings can act on the wish that the hated others could be made forever gone. I won't count for you the mass graves because I do not want to disturb the dead, but I ask you to think of the ones you know who were disappeared because they were different from someone, someone with human hand and human heart, who chose genocide. A jurisprudence of antisubordination is an attempt to bring home the lost ones, to make them part of the center, to end the soul-killing tyranny of inside/outside thinking. I want to bring home the women who hate their own bodies so much that they would let a surgeon's hand cut fat from it, or a man's hand batter and bruise it. I want to bring home the hungry ones eating from the trashbins; the angry ones who call me names; the little ones in foster care.

I want to bring them home to the place of law, that they may shine and make real the ideals of the United States Constitution. To do this is Reconstruction; it is looking realistically at what our history has laid at our feet, and figuring out what steps we need to take to rectify, to repair, to make whole our scattered family.

These days the angry young are burning flags to express their contempt for the empty promise of American law.[270] I wish they would not, because I still believe we can wash the blood off that flag and wave it proudly. I still believe we can make democracy work and live out the promise of the Constitution and the Bill of Rights. I am not ready to abandon those ideas and principles and I believe we can reconstruct law, make it work against oppression, use it to lift up the lost and the angry, to heal the wounds of our two hundred years.

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268. K. PATCHEN, *Nice Day For Lynching*, in WHAT SHALL WE DO WITHOUT US? (1984).

269. Derrick Bell reports that audiences, Black, white, and other, believe white Americans would sell Blacks' to evil Space Traders if the right terms were offered. Bell, *After We're Gone: Prudent Speculations on America in a Post-Racist Epoch*, 34 ST. LOUIS U.L.J. 393 (1990).

270. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989).

This Article is both despairing and hopeful, as is much of the work of the scholars who have inspired it. It suggests a legal response to a recurring societal conflict over accents. It asks that law work against subordination and not for it, so that we can walk the streets of our cities freely, without feeling the hate our separations now generate.

VIII. EPILOGUE: VOICES OF AMERICA

In the midst of World War II, in France, Ichiro Okada[271] was ordered to attack a German position. An experienced soldier, Okada knew the order was ill-advised—a suicide assignment from a higher up who had neither sufficient knowledge nor sufficient love in his heart for the Nisei soldiers to make such life and death choices. Okada also believed—as both the reality of military life and as his personal creed—that soldiers follow orders. He himself chose the most dangerous, lead position, and walked off into the night, into the fire, remembering the parents of the younger men in his command who had begged him on the day the soldiers left his home island of Kauai, "please take care of our son." Forty years later, as Ichiro Okada recounts the names of those who died to assorted nieces and nephews, his eyes mist over and his voice deepens. His accent is rich with the soft lilt of the Hawaiian Creole of rural Kauai, his enunciation is careful, in the way of those men of his generation who spoke Japanese to their parents at home and English to their teachers at school. His accent is an American accent.

On August 29, 1970, Rubén Salazar,[272] a thirty-two-year-old Chicano reporter, stopped in a café to rest from the heat and turmoil of the then largest demonstration held against the Vietnam War. He discussed the events of the day—the police brutality, the unprecedented politicization of the barrio, the rising death count of Chicano soldiers in Vietnam—in a voice marked by the "ch" substitutions and spanglacized verbs characteristic of the lowrider-nonchalance of male Chicano English. Those who heard him that day heard his last words. While sitting at a table in that café he was killed by a teargas shell fired by the police. Rubén Salazar, lover of *corrido*, domestic casualty of the Vietnam War, spoke with an American accent.

In 1989, in Los Angeles, Liz Fulton[273] was an accomplished radio announcer. Her co-host on a radio program made sexual jokes about her that Fulton found offensive, but which she tolerated in order to keep her job. She heard that her co-host appeared on television with a buxom woman in a bikini who was led off the stage in handcuffs. The woman was introduced to viewers

271. Recollections of Ichiro Okada, as told to Mari Matsuda, his niece.

272. Ruiz, *Rest in Peace, Rubén*, 24 EL POPO, No. 1, Spring 1990 (student newspaper published by Movimiento Estudiantil Chicano de Aztlan (MEChA) and the Chicano Studies Department at California State University at Northridge).

273. *Law Suit Accuses Rick Dees, Radio Station of Sex Bias*, L.A. Times, Oct. 1990, at B3, col. 1.

as Liz Fulton. Fulton was eventually fired from her job. The reason, she believes, is that she did not fit the youthful, sex-object image the station sought. Fulton has filed suit against radio station KIIS, because, in her words, "[n]o woman should have to fit into a sexist and ageist stereotype of a female in order to keep her job."[274] Liz Fulton's voice possesses the clear tone that broadcasts well over the airwaves. Born and raised in the Midwest, her speech has no discernible regional nuances. It conforms perfectly to the standard broadcast accent favored in the electronic news media. She speaks of the hurt she feels over the way she was treated. She speaks in an American accent.

These are just a few of the accents of our nation—a nation of more accents than any other. Each American can trace back to an ancestor who spoke with a different voice. From Africa, from Asia, from Europe, from all ends of the planet, the voices came to us. There were hundreds of North American languages before the newcomers arrived, and hundreds of rich regional dialects blossomed as they settled in.[275] It is a joy of our heritage, not a shame, that in our mixing of language and sound we were ever inventive and changeable. If there is any uniformity that characterizes the American accent, it is only that: its variability.

In recounting the tale of the world's many languages coming to America, I have not forgotten that the journey was often hard. We lost most of our native American languages, as we lost their speakers, in a dark part of our history. Also in darkness, the round sounds of West African languages came to America in the bellies of slave ships. Out of pain and poverty, waves of immigrants came from all corners of the earth. Refugees from war came, survivors of persecution came, all came with their tongues and palates shaping newly-learned English words in ways that echoed their years in other places. That is the American accent, the multiplicity of sound bearing the history of our nation, bearing the struggle of its many-voiced people.

274. Id.

275. M. STIRLIN, INDIANS OF THE AMERICAS 20 (1955) ("North of Mexico alone, at the time of conquest, there were more than 50 unrelated linguistic stocks, and 700 distinct dialects. These dialects were as different from one another as English differs from German or French, and the linguistic stocks have no common vocabulary or grammatical structure.").