

COLOR-BLIND BUT NOT COLOR-DEAF:  
ACCENT DISCRIMINATION IN JURY SELECTION

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ABSTRACT

*Every week brings a new story about racialized linguistic discrimination. It happens in restaurants, on public transportation, and in the street. It also happens behind closed courtroom doors during jury selection. While it is universally recognized that dismissing prospective jurors because they look like racial minorities is prohibited, it is too often deemed acceptable to exclude jurors because they sound like racial minorities. The fact that accent discrimination is commonly racial, ethnic, and national origin discrimination is overlooked. This Article critically examines sociolinguistic scholarship to explain the relationship between accent, race, and racism. It argues that accent discrimination in jury selection violates constitutional and statutory law and focuses on Title VI of the Civil Rights Act of 1964, equal protection under the Fourteenth and Fifth Amendments, and the fair cross-section requirement of the Sixth Amendment. It situates accent discrimination within the broader problems of juror language disenfranchisement and racial subordination in the U.S. courts. Finally, it advocates for inclusive practices, namely juror language accommodation.*

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I. INTRODUCTION.....	310
II. ACCENT, RACE, AND SUBORDINATION.....	316
A. Defining Accent and Situating it in the Structure of Race.....	317
B. Accent as External Markers of Race.....	320
C. Accent as Core to Internal Identity .....	321
D. From Racial Characterization and Identification to Subordination .....	323
E. Critical Race Analysis of Accent and Comprehensibility .....	324
III. STATUTORY AND CONSTITUTIONAL REMEDIATION.....	330
A. Juror Disqualification as Race-based Accent Discrimination .....	331
1. Racial Trait or Proxy .....	331
2. Forms of Accent Discrimination in Jury Selection .....	333
B. Impact of Juror Language Disenfranchisement .....	336
C. Sources of Law Prohibiting Accent Discrimination in Jury Selection .....	337
1. Title VI of the Civil Rights Act of 1964 .....	338
2. Equal Protection .....	340
3. The Sixth Amendment Fair Cross-section Requirement.....	344
IV. STRUCTURAL IMPLICATIONS OF ACCENT DISCRIMINATION AND THE NEED FOR JUROR LANGUAGE ACCOMMODATION.....	346
A. Situating Accent Discrimination into the Structure of Race.....	346
B. Juror Language Accommodation .....	351
V. CONCLUSION.....	353

## I. INTRODUCTION

On a New England autumn day, Ed Figueroa<sup>1</sup> appeared for jury service at the Superior Court of New Britain, Connecticut. As a prospective juror, he was questioned about a variety of matters. He spoke enthusiastically about his career as a machinist, seven years in the union, and how much he enjoyed the varied demands of his work.<sup>2</sup> He answered questions on a breadth of topics, including his experiences with law enforcement and the justice system, as well as his hobbies and family life.<sup>3</sup> When asked his opinion on the most valuable trait to pass along to his children, he responded, to “be honest.”<sup>4</sup> The voir dire questioning went on for more than twenty minutes and was not particularly remarkable, except in one respect: the judge was clearly uncomfortable with Figueroa’s accent. This discomfort would ultimately result in his disqualification.<sup>5</sup>

Despite the lack of any indication that the judge, prosecutor, defense counsel or court recorder had trouble understanding Figueroa (or the reverse), the judge

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1. “Ed Figueroa” is a pseudonym used in place of the redacted name in the record for prospective juror “E.F.”

2. *State v. Gould (Gould I)*, 109 A.3d 968, 970–71 (Conn. App. Ct. 2015).

3. *Id.* at 970–72.

4. *Id.* at 971.

5. *Id.* at 972.

inquired about his English language background. “If I can just interrupt for a moment? [Mr. Figueroa], English is not your first language, is it?”<sup>6</sup> “No,” responded Figueroa, who identified as Puerto Rican.<sup>7</sup> He explained to the judge that he understood English very well.<sup>8</sup> After follow-up questions about his English language background, Figueroa told the judge he understood his point: he has an accent.<sup>9</sup> The judge, apparently embarrassed by this realization, defensively interrupted him, saying, “No, no, I understand—I just want to—whenever anybody talks to me in an accent, and it’s not just Spanish, I often inquire whether they can understand English well enough to be a juror. So, you’re comfortable doing that and that’s fine.”<sup>10</sup> But, it was not fine.

After answering over 100 questions in English appropriately—without counsel or the court asking for clarification, without ellipses in the transcript for incomprehensible statements, without any suggestion that Figueroa’s accent made him difficult to understand—the judge excused him for cause: on the grounds that his “significant language barrier”<sup>11</sup> would prevent him from fully participating as a juror in the case.<sup>12</sup> Although the trial judge conceded that Figueroa certainly understood English,<sup>13</sup> and despite the fact that approximately 45% of the jurisdiction’s residents are Latinx (the vast majority of whom are Puerto Rican like Figueroa),<sup>14</sup> the trial judge determined that his language abilities would hinder his communication with other jurors.<sup>15</sup> This is troubling because accent itself does not indicate a lack of comprehension or communicative ability.<sup>16</sup>

The Connecticut Court of Appeals, in a case styled *Connecticut v. Gould*, would later find Figueroa’s disqualification to be an abuse of discretion because there was no evidence in the record that he lacked the English language abilities needed to serve as a juror.<sup>17</sup> Mr. Figueroa’s disqualification from jury service was

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6. *Id.* at 971.

7. *Id.* at 970–71.

8. *Id.*

9. *Id.* at 972.

10. *Id.*

11. *Id.*

12. *Id.* at 970–73, 975.

13. *Id.* at 972.

14. *American Community Survey Demographic and Housing Estimates: New Britain City, Conn., 2014 1-Year Estimate Data Profile*, U.S. CENSUS BUREAU, [https://data.census.gov/cedsci/table?d=ACS%201-Year%20Estimates%20Data%20Profiles&table=DP05&tid=ACSDP1Y2014.DP05&g=0400000US09\\_1600000US0950370&hidePreview=true&y=2014&vintage=2014](https://data.census.gov/cedsci/table?d=ACS%201-Year%20Estimates%20Data%20Profiles&table=DP05&tid=ACSDP1Y2014.DP05&g=0400000US09_1600000US0950370&hidePreview=true&y=2014&vintage=2014) [https://perma.cc/HM5P-YP6Q] (last visited Apr. 21, 2020).

15. *Gould I*, 109 A.3d at 972.

16. Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 17 (1992) (citing Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991)).

17. *Gould I*, 109 A.3d at 977.

accent discrimination. As the trial judge excused Figueroa from jury service he told him, “[Y]ou’ve not been chosen as a juror. I don’t want you to think any of your answers were inappropriate or wrong. It’s just the way it worked out.”<sup>18</sup> The judge was right—nothing Figueroa said was wrong. However, the way he pronounced it was wrong. He spoke with a Hispanic accent.<sup>19</sup>

Figueroa was disqualified from jury service that day because he spoke with an accent associated with the largest racialized minority population in the United States: Latinxs.<sup>20</sup> This discrimination on the basis of Hispanic accent was not treated as race, ethnicity, or national origin discrimination. Although the appellate court found that the excusal of Figueroa on the basis of his language abilities was unfounded and made in error, the court did not recognize that the excusal was discriminatory.<sup>21</sup> As such, the court refused to grant the defendant a new trial.<sup>22</sup> This reveals a shortcoming in our legal system. While it is impermissible to disqualify jurors because they look like racial minorities, it is too often assumed to be acceptable to disqualify jurors because they sound like racial minorities.

Judges’ and attorneys’ disregard for the fact that accent discrimination in jury selection often amounts to race, ethnic, and national origin discrimination is problematic for several reasons. Accent discrimination in jury selection often violates constitutional and statutory civil rights law. It prevents citizens from participating in the democratic self-governance function of jury service. Exclusion from jury service on the basis of accent relegates people of color that are perceived to be foreign, such as Latinxs, Asian Americans, Middle Eastern Americans, and—ironically—indigenous Americans,<sup>23</sup> to second class citizenship based upon the way they speak or, more accurately, the way that they are heard. The resultant elimination of people of color from juries defeats our legal system’s commitment that

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18. Brief for Defendant-Appellant app. at A72, *Gould I*, 109 A.3d 968 (Conn. 2015) (No. 19471).

19. The terms “Hispanic accent” or “Latinx accent” are used instead of “Spanish accent” because “Spanish accent” relates to accents associated with the country of Spain. Hispanic and Latinx accents reflect the racialized accents commonly associated with Latinx persons, who come from diverse ancestral and ethnic backgrounds, national origins, linguistic usages, identities, and nationalities—including from the United States. It should be noted that just as other racial groups are associated—accurately or inaccurately—with certain accents, such as African Americans having a “Black accent,” native-born American Latinxs may have domestic Latinx or Hispanic accents.

20. In 2019, Hispanic and Latinx people made up 18.3% of the population, with the next largest racialized group (Black Americans) making up 13.4% of the population. *United States Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217> [<https://perma.cc/K4CY-2F9P>] (last updated July 1, 2019).

21. *Gould I*, 109 A.3d at 972.

22. *Id.*

23. Indigenous Americans are often perceived as less “American” than white Americans. *See generally* Thierry Devos, Brian A. Nosek & Mahzarin R. Banaji, *Aliens in Their Own Land? Implicit and Explicit Ascriptions of National Identity to Native Americans and White Americans* (2007) (unpublished manuscript), <https://www.projectimplicit.net/nosek/papers/DNB2007.pdf> [<https://perma.cc/2LXQ-ZHP4>].

juries “be a body truly representative of the community.”<sup>24</sup> When juries are not truly representative of the community, it delegitimizes the verdict and, in turn, the legal system as a whole.<sup>25</sup> Unrepresentative juries present serious implications for criminal defendants and civil litigants, especially those of color. When judges and attorneys facilitate accent discrimination, they act on conscious and unconscious bias against racial, ethnic, and national origin minorities.<sup>26</sup> This affects both the perceived and actual fairness of the courts.<sup>27</sup>

Accent discrimination is just one form of racialized linguistic discrimination experienced in jury selection. Linguistic discrimination is the unfair treatment of interlocutors based upon their use of language.<sup>28</sup> This includes the speaker’s native language, multilingual ability, grammaticality, syntax, and accent. Linguistic discrimination has long been a primary, but largely ignored, method of subordinating Latinxs<sup>29</sup> and other people of color (mis)associated with immigration. As Latinxs have become the largest racialized minority group in the United States,<sup>30</sup> it is imperative that we evaluate our legal system’s capacity to address racial discrimination against this group in particular. Further, as racialized xenophobia is on the rise,<sup>31</sup> our legal system must confront the ways in which discrimination manifests against all Americans perceived as foreign. Linguicism<sup>32</sup> seems to be

24. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

25. See Leslie Ellis & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI. KEN. L. REV. 1033, 1039 (2003) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 361 (1999)).

26. See Meghan Sumner, *The Social Weight of Spoken Words*, 19 TRENDS COGNITIVE SCI. 238, 238 (2015) (“It appears that voice cues activate special representations fast and early during the process of spoken language understanding . . . this early activation [] provides an outlet through which our social biases may modulate the allocation of cognitive resources, influencing the encoding and retention of auditory information.”).

27. Perea, *supra* note 16, at 50.

28. Flavia Albarello & Monica Rubini, *The Role of Reduced Humanity in Producing Linguistic Discrimination*, 41 PERSONALITY & SOCIAL PSYCHOL. BULL. 224, 225 (2015).

29. See Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinxs*, 117 HARV. L. REV. 1420, 1432–34 (2004).

30. Neal Conan, *Hispanics Become America’s New Majority Minority*, NPR (Apr. 18, 2011), <http://www.npr.org/2011/04/18/135517137/hispanics-become-americas-new-majority-minority> [<https://perma.cc/Z2KJ-EYUV>]; *Hispanics in the US Fast Facts*, CNN (Mar. 6 2019) <http://www.cnn.com/2013/09/20/us/hispanics-in-the-u-s-/index.html> [<https://perma.cc/PG4M-VLJ8>].

31. See Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to ‘Go Back’ to the Countries They Came From*, N.Y. TIMES (Jul. 14, 2019), <https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-squad-congress.html> [<https://perma.cc/V3Y7-VTJV>]; News Release, *US Racism on the Rise, UN Experts Warn in Wake of Charlottesville Violence*, UN OFFICE OF THE HIGH COMM’R OF HUMAN RIGHTS (Aug. 16, 2017), <http://www.ohchr.org/EN/NewsEvents/Page.s/DisplayNews.aspx?NewsID=21975&LangID=E> [<https://perma.cc/X5SZ-DJA9>].

32. Linguicism is language-based bias and discrimination on the basis of language. Tove Skutnabb-Kangas, *Linguicism*, in THE ENCYCLOPEDIA OF APPLIED LINGUISTICS (Carol A. Chapelle ed., 2015). More specifically, it refers to “ideologies, structures and practices which are used to

escalating or at least becoming more visible to the general public.<sup>33</sup> Rarely a week goes by without a national news story covering Latinx people being harassed for simply speaking Spanish in public.<sup>34</sup> This should be a cause of great concern since

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legitimate, effectuate, regulate and reproduce an unequal division of power and resources (both material and immaterial) between groups which are defined on the basis of language.” *Id.*

33. See, e.g., *Miami Woman Claims UPS Worker Kicked Her Out for Only Speaking Spanish*, NBC NEWS MIAMI (Jan. 26, 2018), <https://www.nbcmiami.com/news/local/Miami-Woman-Claims-UPS-Worker-Kicked-Her-Out-for-Only-Speaking-Spanish-471254344.html> [<https://perma.cc/3F75-YB42>] (depicting a UPS employee asking Rebecca Prinstein to leave the store and using profanity); Nicole Acevedo, *White Customer at Mexican Restaurant Swears at Spanish-Speaking Manager*, NBC NEWS (Feb. 19, 2019, 1:55 PM), <https://www.nbcnews.com/news/latino/white-customer-mexican-restaurant-swears-spanish-speaking-manager-n973191> [<https://perma.cc/CP86-N5QW>] (depicting a white woman yelling at a restaurant manager for speaking Spanish, calling him a “rapist”); Christian Benavides, *Students Walk Out After Teacher Orders: Speak ‘American,’* NBC NEWS (Oct. 16, 2017), <https://www.nbcnews.com/news/latino/students-walk-out-after-teacher-tells-students-speak-american-n811256> [<https://perma.cc/SN35-JD7W>] (“The teacher told the students that U.S. soldiers are ‘not fighting for your right to speak Spanish – they’re fighting for your right to speak American.’”); Elizabeth Chuck, *‘Speak English, You’re in America,’ Woman Tells Latina Shoppers in Rant Caught on Camera*, NBC NEWS (Dec. 21, 2016), <https://www.nbcnews.com/news/Latinx/speak-english-you-re-america-woman-tells-latina-shoppers-rant-n698776> [<https://perma.cc/5FS6-GJ3Z>] (showing a woman yelling at two Latinas in a checkout line at the Jefferson Mall in Louisville, Kentucky); Paul Foy, *More Workers Claiming Job Discrimination Over Language, Accents*, INS. J. (Dec. 4, 2012), <https://www.insurancejournal.com/news/national/2012/12/04/272632.htm> [<https://perma.cc/RPZ3-N5VZ>]; Jessica Levinson, *Can New York Lawyer Aaron Schlossberg be Disbarred for His Racist Rant?*, NBC NEWS (May 21, 2018), <https://www.nbcnews.com/think/opinion/can-new-york-lawyer-aaron-schlossberg-be-disbarred-his-racist-ncna876001> [<https://perma.cc/XS3S-FTEB>] (describing an incident in which a prominent New York attorney was seen ranting because restaurant workers were speaking to a customer in Spanish); Josh Magness, *He Yelled Racial Slurs at a Woman for ‘Speaking Immigrant,’ Video Shows*, THE SACRAMENTO BEE (Sept. 6, 2017), <https://www.sacbee.com/news/nation-world/national/article171518347.html> [<https://perma.cc/GR8D-7SKX>] (illustrating an incident in which a man shopping at a Goodwill lashed out on a woman speaking Spanish); Mayra Moreno, *Woman Told to Stop Speaking Spanish at Retirement Community*, ABC13 HOUSTON (Feb. 19, 2019), <https://abc13.com/society/woman-told-to-stop-speaking-spanish-at-retirement-community/5146223/> [<https://perma.cc/YS64-6HAF>] (describing an incident where the director of a retirement community director sent a letter to one of the community’s residents, stating, “The United States of America is an English-speaking country and those who come to the United States or are born here should learn to speak the language... It is rude to sit in the lobby and speak Spanish.”); Katie Sartoris, *Eustis Manager Told to ‘Go Back to Mexico’ for speaking Spanish*, DAILY COM. (July 9, 2019, 3:14 PM), <https://www.dailycommercial.com/news/20190709/eustis-manager-told-to-go-back-to-mexico-for-speaking-spanish> [<https://perma.cc/EH6S-XX52>] (showing two women who harassed a Puerto Rican Burger King manager for speaking Spanish and told him to go back to his “Mexican country”); Daniella Silva, *Border Patrol Agent Detains Women for Speaking Spanish at Montana Gas Station*, NBC NEWS (May 21, 2018), <https://www.nbcnews.com/news/latino/border-patrol-agent-detains-women-speaking-spanish-montana-gas-station-n876096> [<https://perma.cc/D5D4-T4WH>] (“When Suda, 37, asked if she and her friend were being racially profiled, the agent responded . . . ‘[i]t has nothing to do with that . . . [i]t’s the fact that it has to do with you guys speaking Spanish in the store, in a state where it’s predominantly English-speaking.’”); Kristine Solomon, *Gas Station Employee Berates Customer for Speaking Spanish in Viral Video Rant*, YAHOO! Lifestyle (Apr. 3, 2019), <https://www.yahoo.com/lifestyle/gas-station-employee-berates-customer-speaking-spanish-viral-video-rant-114548606.html> [<https://perma.cc/TL9P-W2UX>] (showing a gas station employee yelling at a woman for speaking in Spanish and demanding to see proof of her citizenship).

34. See sources cited *supra* note 33.

the United States is home to the second largest population of Spanish-speakers in the world.<sup>35</sup>

Accent discrimination in jury selection is not only an important issue in itself, but also a miner's canary for broader racial injustice. The examination of juror language disenfranchisement elucidates the gravity of problems caused by linguicism. It seeks to defeat the myth that language is merely a mutable race-neutral characteristic, undeserving of legal protection. The promise of assimilation and nativist rhetoric—that one can become fully American by learning English—is challenged by the reality that Latinxs and other people of color are too often barred from jury service on the basis of their language background, even when they are fluent in English.

The fact that perceived-to-be-foreign U.S. citizen Latinxs and other people of color along the entire spectrum of English language abilities<sup>36</sup> can be excluded from jury service on the basis of their perceived English language abilities reveals structural problems with more than jury selection procedures. It reveals the need to take a more realistic view of contemporary race discrimination and the way language plays a role in racism. Judges, prosecutors, and defense counsel should not be able to supplant constitutional and statutory civil rights protections by simply couching their racial preferences or assumptions about who deserves to be full citizens as language concerns.

This Article builds upon my earlier work on “juror language disenfranchisement.”<sup>37</sup> It moves beyond the experience of the approximately 13 million limited-English-proficient U.S. citizens who are denied the right to serve on a jury under English language requirements.<sup>38</sup> It focuses on the many more millions of American citizens who are at risk of disqualification simply because they speak English with minority accents or are perceived as doing so. It also demonstrates the indirect benefits that fluent English-speaking racial minority prospective jurors could gain from juror language accommodation programs in courts.

Part II explores the relationship between accent, race, and racism. This provides a foundation for understanding how accent discrimination in jury selection can amount to racial, ethnic, and national origin discrimination. This exploration first examines sociolinguistic scholarship on accent discrimination through the

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35. Stephen Burgen, *U.S. Now Has More Spanish Speakers than Spain—Only Mexico Has More*, THE GUARDIAN (June 29, 2015), <https://www.theguardian.com/us-news/2015/jun/29/us-second-biggest-spanish-speaking-country> [https://perma.cc/7JE3-MA2R].

36. The spectrum of language abilities here includes limited-English-proficient citizens to fully bilingual or multilingual citizens—whether they have a “foreign” accent or not—and even monolingual English speakers who have minority accents.

37. Jasmine B. Gonzales Rose, *Juror Language Disenfranchisement: A Call for Constitutional Remediation*, 65 HASTINGS L. J. 811 (2014); Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights under the Civil Rights Act of 1964*, 6 ALA. C.R. & C.L. L. REV. 167 (2014); Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497 (2011).

38. Gonzales Rose, 65 HASTINGS L. J. at 814.

lens of critical race theory. Central to this discussion is how accent discrimination implicates both conscious and unconscious bias. Part III examines how accent discrimination in jury selection violates constitutional and statutory law. The focus here is on Title VI of the Civil Rights Act of 1964; equal protection under the Fourteenth and Fifth Amendments; and the fair cross-section requirement of the Sixth Amendment. Part IV scrutinizes the structural implications of accent discrimination in jury selection. It situates accent discrimination into the broader problems of juror language disenfranchisement and racial subordination in U.S. courts. It examines linguistic discrimination in jury service, dispels the assimilation myth, and calls for remediation.

## II.

### ACCENT, RACE, AND SUBORDINATION

While some courts have acknowledged that accent discrimination in jury selection is impermissible because it is race discrimination,<sup>39</sup> it appears that many courts treat accent as disconnected from race and allow racialized accent discrimination to stand without consequences.<sup>40</sup> In the jury selection process, lawyers too often strike potential jurors on the assumption that citizens who possess “heavy” or “thick” accents can be neutrally identified and excluded from jury service because they lack the requisite English language skills.<sup>41</sup> However, a listener’s beliefs about a minority speaker’s accent and corresponding English language ability are frequently a matter of subjective racialized perception rather than objective reality. This Section seeks to explain the relationship between accent, race, and racial subordination. It endeavors to equip jurists, attorneys, scholars, and others to both articulate the connection between accent and race and recognize that accent discrimination is often a form of racial discrimination.

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39. See, e.g., *People v. Morales*, 719 N.E.2d 261, 270–71 (Ill. App. Ct. 1999) (holding that the state’s use of a peremptory challenge to exclude a juror on the basis that his “heavy” Hispanic accent would impair his ability to understand testimony was pretext for race discrimination).

40. See, e.g., *State v. Gonzalez*, 538 A.2d 210, 216 (Conn. 1988) (upholding exclusion of a Latinx prospective juror on the basis of his “highly perceptible accent” despite the juror’s ability to understand all the questions posed in voir dire); *Gould I*, 109 A.3d 968, 972 (Conn. App. Ct. 2015); *Bernabeau v. State*, 271 So.3d 979 (Fla. Dist. Ct. App. 2019) (affirming the trial court’s decision to strike three Afro-Caribbean Americans based upon the heaviness of their accents in the criminal trial of an Afro-Caribbean defendant). See also Farida Ali, *Multilingual Prospective Jurors: Assessing California Standards Twenty Years After Hernandez v. New York*, 8 Nw. J.L. & Soc. POL’Y 236, 253 (2013) (“These California decisions reveal the potential arbitrariness of decisions concerning challenges based on language proficiency. They illustrate that the practice allows courts to accept implausible ‘race-neutral’ explanations for challenges that, in reality, highly correlate with race.”); Perea, *supra* note 16, at 17, 50.

41. See, e.g., *Corona v. Almager*, Civ. No. 07-2117 BTM (NLS), 2008 WL 6926574, at \*6–7 (S.D. Cal. Nov. 3, 2008).



A. *Defining Accent and Situating it in the Structure of Race*

Accent is commonly defined as “a distinctive mode of pronunciation of a language.”<sup>42</sup> Contrary to popular belief, everybody has an accent.<sup>43</sup> The notion that some people are accent-less is a myth.<sup>44</sup> Spoken English<sup>45</sup> is not standardized or uniform.<sup>46</sup> In fact, “[a]ll spoken human language is necessarily and functionally variable.”<sup>47</sup> As linguists recognize, Standard American English (“SAE”) is nothing more than an abstraction or a hypothetical construct more accurately referred to by linguists as “idealized language.”<sup>48</sup> Accent is a structured variation in language pronunciation,<sup>49</sup> and every English speaker in the United States speaks a variation of English.<sup>50</sup> There is no original or objectively “correct” version of the spoken language.<sup>51</sup> Rather, there is a widely recognized version—SAE—associated with the racial majority, and that version is idealized. However, too often, the reality that SAE and SAE-accent are racially stigmatizing constructions is ignored.<sup>52</sup>

Demarcation of accent depends on a variety of factors, such as geography, race, ethnicity, and socioeconomic class.<sup>53</sup> Linguists delineate two primary types of accent classifications: “L1” for native or first language accents and “L2” for foreign or second language accents.<sup>54</sup> L1 U.S. English accents encompass all

42. *Accent*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

43. ROSINA LIPPI-GREEN, *ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY AND DISCRIMINATION IN THE UNITED STATES* 44 (Routledge 2012); *see also* Tracey M. Derwing & Murray Munro, *Putting Accent in its Place: Rethinking Obstacles to Communication*, 42 *LANGUAGE TEACHING* 476, 476 (2009); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1329 (1991).

44. LIPPI-GREEN, *supra* note 43, at 46.

45. Although this Article focuses on English, many of the concepts discussed would be applicable to other languages.

46. LIPPI-GREEN, *supra* note 43, at 59–61.

47. *Id.* at 46.

48. *Id.* at 55.

49. *See, e.g., Id.* at 44–45.

50. WALT WOLFRAM & NATALIE SCHILLING, *AMERICAN ENGLISH: DIALECTS AND VARIATION* 3 (John Wiley & Sons, Inc., 3d ed. 2016) (1998).

51. Moreover, “no accent, native or non-native, is inherently better than any other.” Derwing & Munro, *supra* note 43.

52. Jonathan Rosa & Nelson Flores, *Unsettling Race and Language: Toward a Raciolinguistic Perspective*, 46 *LANGUAGE SOC’Y* 621, 622 (2017) (“Since the project of modernity is premised on the stigmatization of racialized subjects across nation-state and colonial contexts, efforts to legitimize racially stigmatized linguistic practices are fundamentally limited in their capacity to unsettle the inequities that they seek to disrupt.”); *see also id.* at 641 (arguing that by focusing on raciolinguistics, i.e. the co-naturalization of race and language, we are “not simply advocating linguistic pluralism or racial inclusion, but instead [are] interrogating the foundational forms of governance through which such diversity discourses deceptively perpetuate disparities by stipulating the terms on which perceived differences are embraced or abjected.”).

53. LIPPI-GREEN, *supra* note 43, at 44–45.

54. *Id.* at 46.

native varieties of spoken U.S. English,<sup>55</sup> and L2 U.S. English accents “refer to the breakthrough of native language phonology” into the target language, spoken U.S. English.<sup>56</sup> For perceived-to-be-foreign people of color, such as Latinxs and Asian Americans,<sup>57</sup> the differentiation between L1 and L2 accents is blurred. For instance, L1 Latinxs and Asian Americans (and, again, remember that every native-born U.S. English speaker has an L1 accent) may be mistakenly perceived to possess L2 accents.

Separate, but often associated with accent, is grammaticality. Grammaticality is a theoretical construct that “presupposes a native speaker with a linguistic competence, which provides [them] with the linguistic knowledge of being able to (1) differentiate between grammatical sentences and ungrammatical sentences, and (2) to produce and interpret grammatical sentences.”<sup>58</sup> In other words, grammaticality is the perceived accuracy of speech—whether particular spoken sentences are acceptable. Like accent, actual or perceived differences in grammaticality do not equal communicative effectiveness or ineffectiveness.<sup>59</sup> Those with minority grammaticality are equally capable of constructing logical arguments and communicating effectively. However, variation or perceived lack of grammaticality by speakers of color, especially those perceived to be foreign, is often interpreted as a language barrier and an indication of an inability to speak or understand English adequately.<sup>60</sup> Conversely, lack or divergence of grammaticality by white people, while sometimes a class indicator, is more tolerated and not perceived as a barrier to communication.<sup>61</sup>

SAE and non-accent are constructions that reflect and perpetuate racial hierarchy. They refer to manners of speech and pronunciation associated with the racial majority: white people, especially those from the more privileged socioeconomic classes.<sup>62</sup> People in power are perceived as speaking normal, unaccented English. Speech that is different from this constructed norm is considered to be accented.<sup>63</sup> The fact that SAE is not racially neutral is indicated by the fact that

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55. *Id.*

56. *Id.*

57. Ironically, this includes indigenous people of the (expanded) U.S. states, particularly Native Hawaiians and southwestern Native Americans, including Chicanxs of indigenous-descent.

58. ANITA FETZER, RECONTEXTUALIZING CONTEXT: GRAMMATICALITY MEETS APPROPRIATENESS 12–13 (2004).

59. LIPPI-GREEN, *supra* note 43, at 10–11.

60. *See infra* notes 65–71 and accompanying text.

61. *See infra* notes 65–71 and accompanying text.

62. Jairo N. Fuertes, William H. Gottdiener, Helena Martin, Tracey C. Gilbert & Howard Giles, *A Meta-Analysis of the Effects of Speakers' Accents on Interpersonal Evaluations*, 42 EUR. J. SOC. PSYCHOL. 120, 121 (2012); *see also* Howard Giles, Angie Williams, Diane M. Mackie & Francine Rosselli, *Reactions to Anglo- and Hispanic-American-Accented Speakers: Affect, Identity, Persuasion, and the English Only Controversy*, 15 LANGUAGE & COMM. 107, 107 (1995) (“A ubiquitous finding, worldwide, has been prestige-accented speakers are upgraded on traits of socioeconomic success (e.g. intelligence, ambition) relative to their nonstandard-speaking counterparts.”).

63. *E.g.*, Matsuda, *supra* note 43, at 1343–44.

people of color who speak in this idealized manner are sometimes referred to as “sounding white.”<sup>64</sup> Being able to speak “unaccented” SAE is often a prerequisite to employment, higher education, and other opportunities for social and economic mobility.<sup>65</sup> It can also be a de facto juror prerequisite, as was the case for Figueroa.

Not all accents are treated similarly: there are differences along racial lines. Accents associated with people of color who are perceived as foreign are associated with negative evaluations of the speakers’ intelligence, competence, ambition, education, and social class.<sup>66</sup> These accents are perceived as unappealing and unintelligible.<sup>67</sup> They are also perceived as more foreign—in other words, less American.<sup>68</sup> In contrast, accents associated with lower-class white people, while considered less educated and sophisticated than middle- and upper-class majority accents, are nonetheless accepted as fundamentally “American.”<sup>69</sup> While these accents may be belittled as folksy, quaint, and uneducated, and may even bar economic opportunities, they are not perceived to inhibit the speaker’s communicative abilities or the listener’s comprehension, or to be offensive. They are also not considered to make someone less of a citizen. Instead, such accents might be perceived as particularly “American.”<sup>70</sup> Further, European accents generally are not disfavored or considered incomprehensible.<sup>71</sup> Accent is a social and racialized construction. The distinction among accents and the idealization of SAE serve to

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64. See Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation & Guilty Liberalism*, 82 CAL. L. REV. 1053, 1085 (1994) (highlighting the consequences of not sounding white for Asian Americans); Kimberly A. Jones, *Oreos, Coconuts, Apples, and Bananas: The Problem of Racial Self-Identification Amongst Young People of Color*, 7 RUTGERS RACE & L. REV. 149, 160–61 (2005) (describing the advantages and consequences to African American children who grow up in white neighborhoods and “sound white”); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being ‘Regarded As’ Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1312 (2005) (citing Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 URB. AFF. REV. 452, 455 (2001)) (“[I]n the same way that many people of color have changed their names to avoid discrimination, both conscious and unconscious, on the basis of their ethnic-sounding names, many people of color have intentionally used a ‘white-sounding’ voice, either one’s own or a friend’s, as one painful strategy . . . to get around some discrimination.”); Dawn L. Smalls, *Linguistic Profiling and the Law*, 15 STAN. L. & POL’Y REV. 579, 582 (2004) (describing a study in which a person of color had their friend call because she “sound[ed] like a white person”). See generally John Baugh, *Linguistic Profiling*, in BLACK LINGUISTICS: LANGUAGE, SOCIETY, AND POLITICS IN AFRICA AND THE AMERICAS (Sinfree Makoni, Geneva Smitherman, Arnetta F. Ball & Arthur K. Spears eds., 2003).

65. See, e.g., Holly K. Carson & Monica A. McHenry, *Effect of Accent and Dialect on Employability*, 43 J. EMP. COUNS. 70, 80 (2006) (finding that those with “maximally perceived accent or dialect” received low employability ratings by human resources personnel).

66. Fuentes, Gottdiener, Martin, Gilbert & Giles, *supra* note 62, at 121.

67. *Id.*

68. See Terri Yuh-Lin, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 ASIAN L. J. 69, n. 127 (2000) (citing Matsuda, *supra* note 43).

69. *Id.*

70. LIPPI-GREEN, *supra* note 43, at 253.

71. *Id.* at 73.

maintain the racialized social order. In this order, racial insiders dominate, and people of color are excluded from opportunities for socioeconomic advancement and, as will be discussed in more detail, full participation in the civil polity—particularly jury service.

### B. *Accent as External Markers of Race*

Accent and grammaticality are salient features by which people are racially categorized. Studies have demonstrated that listeners can identify a speaker's socially assigned race within seconds by merely hearing them speak.<sup>72</sup> This is equally true for L2 (foreign) and L1 (domestic) accents.<sup>73</sup> A seminal study from 1984 demonstrated that L1 listeners could accurately detect L2 accents when presented with just 30 milliseconds of a certain phonetic sound produced by L2 speakers.<sup>74</sup> Prominent researchers, therefore, frequently highlight the salient nature of accent. One described accent as “[p]erhaps the most salient characteristic of an L2 learner’s speech.”<sup>75</sup> Because accent is so readily and quickly perceived, it becomes an immediate way for listeners to categorize the speaker.

When categorization is salient, an individual will tend to differentiate between in-group and out-group as much as possible on as many dimensions as possible and this maximization of differences will tend to be negative for the out-group and favorable for the in-group. Numerous studies have demonstrated that an accent different from one’s own is an important indicator signaling that someone is different.<sup>76</sup>

Perhaps even more importantly, lay listeners can similarly identify, and ultimately “out group,” the race of L1 speakers. “Research has shown that most people in the United States can identify the race of someone through a brief phone

72. E.g., Jeffrey D. Dillman, *New Strategies for Old Problems: The Fair Housing Act at 40*, 57 CLEV. ST. L. REV. 197, 202 n.26 (citing Thomas Purnell, William Idsardi & John Baugh, *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. LANGUAGE & SOC. PSYCHOL. 10, 10–14 (1999)); Clifford v. Chandler, 333 F.3d 724, 731 (6th Cir. 2003) (discussing Stanford University study of 421 students who correctly identified Black male voices 88% of the time); Julie H. Walton & Robert F. Orlikoff, *Speaker Race Identification from Acoustic Cues in the Vocal Signal*, 37 J. SPEECH & HEARING RES. 738, 738–45 (1994).

73. See sources cited *supra* note 72.

74. James Emil Flege, *The Detection of French Accent by American Listeners*, 76 J. ACOUSTICAL SOC’Y AM. 692, 704 (1984).

75. Tracy M. Derwing, Marrian J. Rossiter & Murray J. Munro, *Teaching Native Speakers to Listen to Foreign-Accented Speech*, 23 J. MULTILINGUAL & MULTICULTURAL DEV. 245, 246 (2010).

76. Mary Jiang Bresnahan, Rie Ohashi, Wen Ying Liu, Reiko Nebashi, & Sachiyo Morinaga Shearman, *Attitudinal and Affective Response Toward Accented English*, 22 LANGUAGE & COMM. 171, 172 (2002); see also Marko Dragojevic, Dana Mastro, Howard Giles & Alexander Sink, *Silencing Nonstandard Speakers: A Content Analysis of Accent Portrayals on American Primetime Television*, 45 LANGUAGE SOC’Y 59, 61 (2016) (“Language attitudes have been theorized to result from two sequential cognitive processes: categorization and stereotyping. First, listeners use linguistic cues, such as a speaker’s accent, to make an inference about speakers’ social group membership(s) (e.g. ethnicity, social class). Second, they attribute to speakers’ stereotypic traits associated with those inferred group memberships. In other words, language attitudes reflect people’s stereotypes about different linguistic groups.” (internal citations omitted)).

conversation, often after hearing only several words.”<sup>77</sup> In fact, it sometimes only takes a second of hearing a syllable or two for the race of the speaker to be identified.<sup>78</sup> For instance, in a study by Julie Walton and Robert Orlikoff, one-second acoustic samples of vowel sounds of Black and white men were played to listeners who were able to “correctly” determine the race of the speaker the majority of the time.<sup>79</sup> Courts recognize the ability of laypeople to identify a person’s race or national origin through voice. The majority of jurisdictions permit witnesses “to testify that an individual’s voice or manner of speech sounded like the speaker was of a particular race [or] ethnic background, [or] geographic area.”<sup>80</sup> Accent is such a well-established and ostensibly reliable racial characteristic and identifier that it is given evidentiary value in our legal system.

### C. *Accent as Core to Internal Identity*

Not only is accent a way that people are racially classified or identified, but accent is also central to one’s internal racial identity and other axes of self-identity. Variation in language is used to “construct ourselves as social beings, to signal who we are, and who we are not and do not want to be.”<sup>81</sup> Social identities are often marked by linguistic variants, including accent.<sup>82</sup> Empirical studies support these linkages.<sup>83</sup>

Further, accent as external and internal markers of identity mutually reinforce each other. For instance, a 2005 study established “a link between the degree of accentedness of learner speech and the way others perceive their ethnic group

77. See sources cited *supra* note 72.

78. See Walton & Orlikoff, *supra* note 72.

79. See *id.*

80. CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *Voice Identification by Lay Witnesses, Jurors and Judges* § 38:11, in *WIRETAPPING AND EAVESDROPPING* (2016); see, e.g., *Clifford v. Chandler*, 333 F.3d 724, 731 (6th Cir. 2003) (rejecting “the notion that mere identification of an individual’s race by his voice will always result in unconstitutional prejudice”).

81. LIPPI-GREEN, *supra* note 43, at 66; see also Matsuda, *supra* note 43, at 1329 (“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. Someone who tells you they don’t like the way you speak is quite likely telling you that they don’t like you.”).

82. LIPPI-GREEN, *supra* note 43, at 45; see also Beatrice Bich-Dao Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CAL. L. REV. 1325, 1326 (1993) (“Every individual has an accent that ‘carries the story’ of who she is and that may identify her race, national origin, profession, and socioeconomic status.” (citing Matsuda, *supra* note 43, at 1329)).

83. See, e.g., Elizabeth Gatbonton, Pavel Trofimovich, & Michael Magid, *Learners’ Ethnic Group Affiliation and L2 Pronunciation Accuracy: A Sociolinguistic Investigation*, 39 TESOL Q. 489, 497 (2005); Pavel Trofimovich & Larisa Turuševa, *Ethnic Identity and Second Language Learning*, 35 ANN. REV. APPLIED LINGUISTICS 234, 237–39 (2015).

affiliation.”<sup>84</sup> The results also shed light upon the resulting tension for language learners and bilingual speakers, who must navigate “the tug and pull of their two reference groups.”<sup>85</sup> This may even lead L2 and bilingual speakers, at times, to aim for “a lower level of . . . pronunciation accuracy . . . recognizing the need to maintain identification with the home group and being aware of the social costs of not doing so.”<sup>86</sup> In other words, some speakers may emphasize their accent as a means to demonstrate their identity, particularly within their own communities. Many people see their accent as a means to maintain their social identity. Several studies have confirmed this phenomenon, in which bi- or multilingual individuals speak in a particular way to assimilate or distance themselves from identifying or being identified with certain groups.<sup>87</sup> L1 monolingual English speakers of color often do the same to signal their “ingroup” relationship with their heritage group.<sup>88</sup> The implications of the link between accent and identity are real, and “[w]hen an individual is asked to reject their own language, we are asking them to drop allegiances to the people and places that define them.”<sup>89</sup>

This appears particularly true for Latinx people. Even though not all Latinxs have Hispanic accents, a Hispanic accent can be central to one’s Latinx race, ethnicity, and national origin. For instance, linguists have observed that “Puerto Ricans are racialized through attention to their ‘linguistic disorder’ [when speaking English]. Use of nonstandard language becomes a sign of nonwhite race.”<sup>90</sup> Specifically, their language and accent “serve as racial markers [even] when racial differences are not readily apparent.”<sup>91</sup> Similarly, it is recognized that for Latinxs of Mexican heritage, language usage and expression are primary markers of Mexican or Chicax identity.<sup>92</sup> This is true for many Spanish-dominant, English-Spanish bilingual, and monolingual English Latinx speakers.<sup>93</sup> The central connection between language (including accent) and racial identity likely similarly applies to many other populations of color.<sup>94</sup> People often express who they are racially and ethnically through their manner of speech.

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84. Gatbonton, Trofimovich & Magid, *supra* note 83, at 497.

85. *Id.* at 505.

86. *Id.*

87. Trofimovich & Turuševa, *supra* note 83, at 237.

88. Jonathan Rosa, *From Mock Spanish to Inverted Spanglish: Language Ideologies and the Racialization of Mexican and Puerto Rican Youth in the United States*, in *RACIOLINGUISTICS: HOW LANGUAGE SHAPES OUR IDEAS ABOUT RACE* 65, 70–73 (H. Samy Alim, John R. Rickford & Arnetta F. Ball, eds., 2016).

89. LIPPI-GREEN, *supra* note 43, at 66.

90. ELIZABETH M. ARANDA, *EMOTIONAL BRIDGES TO PUERTO RICO: MIGRATION, RETURN MIGRATION, AND THE STRUGGLES OF INCORPORATION* 108 (2007) (citing BONNIE URCIUOLI, *EXPOSING PREJUDICE: PUERTO RICANS EXPERIENCES OF LANGUAGE, RACE, AND CLASS* (1996)).

91. *Id.*

92. LIPPI-GREEN, *supra* note 43, at 266.

93. Rosa, *supra* note 88, at 71–72.

94. Alice Bloch & Shirin Hirsch, “*Second Generation*” *Refugees and Multilingualism*:

*D. From Racial Characterization and Identification to Subordination*

Similar to other salient human characteristics, such as skin color, hair color and texture, and other phenotypes, accent is used to classify and group people racially. Moral traits and stereotypes are then attached to the characteristics used to racially categorize people. For example, dark skin pigmentation, dark tightly curled hair, and certain facial features are used to racially classify people as Black.<sup>95</sup> These characteristics are then unjustifiably associated with moral and character traits, such as being dangerous or criminally-inclined.<sup>96</sup> For people of color perceived as foreign, such as Latinxs and Asian Americans, linguistic characteristics are compounded with other external markers like physical appearance. These linguistic characteristics, such as accent, are unfairly burdened with moral and character associations. For instance, for Latinxs, the use of Spanish or Spanglish—even sporadic words<sup>97</sup>—or speaking with a Hispanic accent is perceived to indicate negative qualities, such as being “‘dirty,’ un-American, abusive, foul, threatening, uneducated, or offensive.”<sup>98</sup> Hispanic linguistic traits become the focus and target of assumptions that are symptomatic of anti-Latinx racism.<sup>99</sup> For instance, although U.S. citizens by birth,<sup>100</sup> Puerto Ricans are commonly made to feel like outsiders and discriminated against because of their accent.<sup>101</sup> Chicanxs and other Latinx people born in the United States are also often made to feel like outsiders.<sup>102</sup>

While accent can be a source of racial discrimination against all people of color, such as discrimination against African Americans calling to inquire about housing or advertised jobs, accent of racial minorities perceived to be foreign takes

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*Identity, Race and Language Transmission*, 40 *ETHNIC & RACIAL STUD.* 2444, 2455 (2016) (finding, in a study based on 45 qualitative interviews with groups of second-generation refugees from Sri Lanka, Turkey, and Vietnam, that “the importance of speaking the heritage language was almost always stressed by interviewees . . . [l]anguage was a mechanism through which identity, culture and relationships to family and social networks were claimed and defined.”).

95. Gonzales Rose, 6 *ALA. C.R. & C.L. L. REV.*, *supra* note 37, at 173.

96. *Id.*

97. For instance, Zach Rubio, a native-born U.S. citizen of Mexican heritage was told to “Go back to Mexico” and suspended from high school in Kansas City for saying “no problema” instead of “no problem” to a fellow student in the hallway during a break. *Rubio v. Turner Unified Sch. Dist.* No. 202, 453 F. Supp. 2d 1295, 1298 (D. Kan. 2006); T.R. Reid, *Spanish at School Translates to Suspension*, *WASH. POST*, Dec. 9, 2005, at A3, ProQuest Central, 409921108.

98. Gonzales Rose, 6 *ALA. C.R. & C.L. L. REV.*, *supra* note 37, at 173.

99. Giles, Williams, Mackie & Rosselli, *supra* note 62, at 107.

100. 8 U.S.C. § 1402 (2018).

101. See ARANDA, *supra* note 90, at 108–09, 116, 126, 140; MARÍA E. PÉREZ Y GONZÁLES, *PUERTO RICANS IN THE UNITED STATES* 80 (2000) (describing how Puerto Ricans have faced housing discrimination based on their accent).

102. Rosa, *supra* note 88, at 70–73 (describing how Latinx people’s language practices navigate the complex social and cultural pressures of “hegemonic whiteness and English dominance” in the United States, where “monolingual English speech [was] a sign of deviance . . . or selling out” to their community, but “monolingual Spanish speech was often viewed as uncool or a barrier to full participation in everyday school life.”).

on unique qualities related to presumptions about citizenship.<sup>103</sup> Latinxs' and Asian Americans' actual or perceived accents are often interpreted to indicate lack of English language ability and the presence of communication barriers,<sup>104</sup> as well as alien-ness.<sup>105</sup> This is not surprising considering the prominence of racial stereotypes that characterize these groups as foreign.<sup>106</sup> What is surprising about the racialized perceptions of Latinxs and Asian Americans—as well as other people of color perceived to be foreign—is that reliance on these racial stereotypes and biases can actually make otherwise comprehensible speech seem incomprehensible to listeners.<sup>107</sup>

### E. Critical Race Analysis of Accent and Comprehensibility

The following four observations are well-established in sociolinguistic scholarship: (1) Accent and associated grammaticality are salient characteristics used to categorize people.<sup>108</sup> (2) L2 accents may be mistakenly perceived when the speaker is presumed to be a racial minority.<sup>109</sup> (3) Some native English speakers are resistant to communication with persons whom they perceive to have L2 accents.<sup>110</sup> And finally, (4) even when such speakers' accents do not affect intelligibility, native-English-speaking listeners may actually experience diminished perceived comprehensibility (the subjective perception of understanding the speakers' words).<sup>111</sup> Examination of these linguistic phenomena under the lens of

103. See, e.g., Dillman, *supra* note 77 (reviewing research showing that most people can identify race through a brief phone conversation and that some housing providers use that identification to screen and not return calls of individuals who “sound African American” or “sound foreign”); Patricia Rice, *Linguistic Profiling: The Sound of Your Voice May Determine if You Get That Apartment or Not*, THE SOURCE (Feb. 2, 2006), <https://source.wustl.edu/2006/02/linguistic-profiling-the-sound-of-your-voice-may-determine-if-you-get-that-apartment-or-not/> [https://perma.cc/XG6S-DJFU] (reviewing a study showing that when calling businesses in response to ads, companies “don’t return calls of those whose voices seem to identify them as black or Latino” and that the “[I]lack of response or refusal to offer face-to-face appointments was higher for Latinos than for African-Americans”).

104. See, e.g., Andrew R. Timming, *The Effect of Foreign Accent on Employability: A Study of the Aural Dimensions of Aesthetic Labour in Customer-Facing & Non-Customer-Facing Jobs*, 31 WORK, EMP. & SOC’Y 409, 423 (2017) (discussing the “hierarchy of accents” in employment contexts, with “the English and American voices clustered at the top, the Chinese and Mexican voices clustered at the bottom and the Indian voices hovering in the middle.”).

105. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, ‘Foreignness,’ and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 268–78 (1997); Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1122–24 (1997).

106. Saito, *supra* note 105, at 268–78; Valdes, *supra* note 105, at 1122–24.

107. See Donald L. Rubin, *Nonlanguage Factors Affecting Undergraduates’ Judgments of Nonnative English-Speaking Teaching Assistants*, 33 RES. HIGHER EDUC. 511 (1992).

108. See sources cited *supra* note 72.

109. See, e.g., Rubin, *supra* note 107.

110. See, e.g., Derwing, Rossiter & Munro, *supra* note 75, at 247–48.

111. See generally Murray J. Munro & Tracey M. Derwing, *Foreign Accent, Comprehensibility, and Intelligibility in the Speech of Second Language Learners*, 49 LANGUAGE LEARNING 285



critical race theory reveals the relationship between race, racism, and accent. Specifically, it evinces three points. First, whether a person is perceived to have an accent is closely related to race. Second, a speaker's race impacts whether a listener finds them comprehensible. Third, accent discrimination is a result of insider racial bias and ultimately furthers white supremacy.

Although accent is often treated as an objective characteristic, by the courts and laypeople alike, whether a person is perceived as having an L2 or "foreign" accent and the extent of that accent is subjective and related to the speaker's race. This was strikingly demonstrated by a study conducted by Donald Rubin in 1992.<sup>112</sup> In this study, undergraduate native English speakers listened to recorded lectures of a native English speaker raised in Ohio.<sup>113</sup> During the lecture a photograph was projected to represent the female lecturer.<sup>114</sup> There were two possible photographs. To avoid confounding ethnicity with other variables, each was similar in size, hair, dress, setting, pose, and other characteristics.<sup>115</sup> The difference was that one woman was Caucasian and the other woman was of Chinese descent.<sup>116</sup> Although the lecture was recorded by the same Midwestern native English speaker, students who thought the lecture was delivered by the woman who looked Asian were more likely to conclude that the lecturer spoke with a foreign accent.<sup>117</sup> Merely thinking that the speaker was Asian caused the listener to erroneously hear a foreign accent. This is not simply a mistake; this is a manifestation of how racialization and racism play out against Asian Americans and Latinxs, as well as other people of color associated with immigration.<sup>118</sup>

For Latinxs and Asian Americans, their racialized experience of "othering" and subordination centers on notions of foreignness and language, including accent.<sup>119</sup> Asian Americans and Latinxs are perceived to be foreign, irrespective of

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(1999).

112. Rubin, *supra* note 107; LIPPI-GREEN, *supra* note 43, at 92–94 (citing Rubin, *supra* note 107); Alejandrina Cristia, Amanda Seidl, Charlotte Vaughn, Rachel Schmale, Ann Bradlow & Caroline Floccia, *Linguistic Processing of Accented Speech Across the Lifespan*, 3 FRONTIERS PSYCHOL. 479 (2012) (citing Rubin, *supra* note 107); Kristina D. Curkovic, *Accent and the University: Accent as Pretext for National Origin Discrimination in Tenure Decisions*, 26 J.C. & U.L. 727, 743–44 (2000) (citing Rubin, *supra* note 107).

113. Rubin, *supra* note 107, at 514–16.

114. *Id.* at 514–15.

115. *Id.*

116. *Id.* at 514.

117. *Id.* at 519.

118. Other matched-guise studies show that Latinx accents tend to affect employment decisions and perceptions in the workplace. *See, e.g.*, Megumi Hosoda, Lam T. Nguyen, & Eugene F. Stone-Romero, *The Effect of Hispanic Accents on Employment Decisions*, 27 J. MANAGERIAL PSYCHOL. 347, 356 (2012) ("[C]ompared to an applicant with a Standard American-English accent, one with a Mexican-Spanish accent was at a disadvantage when applying for a high-status job (i.e. software engineer).").

119. ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 122 (1998); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1402, 1408 (1997) ("foreignness is used as a proxy for exclusion from the national

whether they are native-born or immigrants.<sup>120</sup> No matter how many generations an Asian American's family has lived in the United States,<sup>121</sup> or even if a Chicano's ancestors were indigenous to the Southwest prior to 1848 when the Treaty of Guadalupe Hidalgo made it part of the United States,<sup>122</sup> or if they are from Puerto Rico which has been a U.S. territory since 1898,<sup>123</sup> they will continue to be considered foreigners. Part of the native-foreign dichotomy is that those deemed foreigners not only look different, but they also sound different. Thus, it is not surprising that students in the Rubin study who thought the lecturer was Asian—and thus foreign—assumed that she also sounded foreign. Although linguists make clear distinctions between L1 and L2 accents as native (first-language) and foreign (second-language) accents respectively, the truth is that for racial groups perceived to be foreign, L1 accents can be mistaken as L2 accents.<sup>124</sup> Thus, the Linguistics literature concerning native English-speaking listeners' communicative treatment of people with L2 accents should be understood to apply to U.S. citizen native-English-speaking Latinxs and Asian Americans.

A speaker's race not only prompts listeners to perceive nonexistent accents, but can also result in listeners finding the speaker incomprehensible. In the Rubin study, students shown the photograph of the Asian American woman did not simply perceive a foreign accent; they also found the speech to be less understandable and experienced diminished comprehension.<sup>125</sup> Students shown the photograph of an Asian American woman scored lower on the comprehension test than students shown the photo of the white woman.<sup>126</sup> This demonstrates that a speaker of color's race coupled with implicit racial bias can result in the listener perceiving the speaker to have a foreign accent. From that (mis)perception, the listener

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community" since "the identification of American [is] with White") (citation omitted) (quoting Walter Benn Michaels, *The Souls of White Folk*, in *LITERATURE AND THE BODY: ESSAYS ON POPULATIONS AND PERSONS* 185, 188 (Elaine Scarry ed., 1988)); Richard Delgado, *Derrick Bell's Toolkit-Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 302 (2000); Gonzales Rose, 6 ALA. C.R. & C.L. L. REV., *supra* note 37, at 172.

120. See LIPPI-GREEN, *supra* note 43, at 287–88; Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 489–90 (2004).

121. Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as 'Foreigners,' and Social Change: Is the Law the Way to Go?*, 76 OR. L. REV. 347, 355 (1997).

122. *Id.*; LIPPI-GREEN, *supra* note 43, at 287–88.

123. See Howard Jordan, *Immigrant Rights: A Puerto Rican Issue*, N. AM. CONG. ON LATIN AM. (Sept. 25, 2007), <https://nacla.org/article/immigrant-rights-puerto-rican-issue> [https://perma.cc/8WH8-G63Z] (explaining that although Puerto Ricans have legally been U.S. citizens since 1917, many face perceptions of "illegality" along with other Latinx populations).

124. See, e.g., LIPPI-GREEN, *supra* note 43, 45–46; Derwing, Rossiter & Munro *supra* note 75, at 248; see generally Derwing & Munro, *supra* note 43 (using the distinctions L1 and L2); Sara Kennedy & Pavel Trofimovich, *Intelligibility, Comprehensibility, and Accentedness of L2 Speech: The Role of Listener Experience and Semantic Context*, 64 CAN. MOD. LANGUAGE REV. 459 (2008) (using the distinctions L1 and L2).

125. Rubin, *supra* note 107, at 527.

126. *Id.* at 518–19.

becomes resistant to listening and—due to this unconscious resistance—less motivated and thereby less likely to understand the speaker as well as if the speaker were white.

Sociolinguists have demonstrated that listeners are “particularly susceptible to the cultural stereotypes [they] have absorbed” in terms of speech evaluation: “[l]ow-status accents will sound foreign and unintelligible [while] [h]igh-status accents will sound clear and competent.”<sup>127</sup> Whether an accent is of low or high status mirrors society’s racial hierarchy. Hispanic and Asian accents are considered low status,<sup>128</sup> while European accents, such as French or German, are considered high status.<sup>129</sup> And remember, “[t]he degree of accent is not necessarily relevant to [discriminatory] behaviors; where no accent exists, stereotype and discrimination can sometimes manufacture one in the mind of the listener.”<sup>130</sup>

The failure to understand people of color with perceived or actual L2 accents is due, in large part, to three related issues: (1) the listener’s refusal to carry their own communicative burden; (2) racial stereotypes; and (3) racial bias. The failure to understand is often not due to the speaker’s actual English language abilities or linguistic difference. Minority accents and grammaticality do not necessarily determine whether speakers are comprehensible.<sup>131</sup> Rather, the majority listener’s own attitudes about race and communication with people of color perceived to be foreign are actually determinative of whether the listener will understand the minority speaker.<sup>132</sup>

Studies, such as Derwing and Munro’s 1999 inquiry into links between accent and intelligibility, have broken down long-held assumptions that native-like pronunciation is necessary for effective and intelligible communication.<sup>133</sup> This erroneous assumption is perpetuated despite “there [being] no indication that reduction

127. Matsuda, *supra* note 43, at 1355.

128. LIPPI-GREEN, *supra* note 43, at 85.

129. “For the majority of Americans, French accents are positive ones[.] Many have strong pejorative reactions to Asian accents[.]” LIPPI-GREEN, *supra* note 43, at 73 (discussing studies showing that Black, white, and Latinx students all found Spanish-accented English to be lacking in prestige and inappropriate for a classroom setting).

130. LIPPI-GREEN, *supra* note 43, at 251.

131. *Id.* at 251.

132. *Id.* (“[W]here no accent exists, stereotype and discrimination can sometimes manufacture one in the mind of the listener.”); Ulrik Lyngs, Emma Cohen, Wallisen Tadashi Hattori, Martha Newson & Daniel T. Levin, *Hearing in Color: How Expectations Distort Perception of Skin Tone*, J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE, Oct. 13, 2016 (finding that individual faces were perceived to be darker in skin tone when paired with an accent associated with low socioeconomic status); Yi Zheng & Arthur G. Samuel, *Does Seeing an Asian Face Make Speech Sound More Accented?*, 79 ATTENTION, PERCEPTION, & PSYCHOPHYSICS 1841 (2017) (finding that listeners had more difficulty interpreting speech when it was paired with a photo of an Asian face rather than a white face, although the effect was less pronounced when listeners watched dubbed videos).

133. See generally Munro & Derwing, *supra* note 111.

of accent necessarily entails increased intelligibility.”<sup>134</sup> In fact, research shows that perceived accentedness is largely distinct from—and thus does not necessarily correlate with—comprehensibility and intelligibility.<sup>135</sup> One study established that, generally speaking, native English listeners “found the nonnative [speech] to be highly intelligible, [and] more than half of the transcriptions [of nonnative speech] received intelligibility scores of 100%,” even where listeners scored the speech as “heavily accented.”<sup>136</sup> Otherwise stated, even heavy accents do not translate into unintelligible communication. Rather, closed minds result in closed ears.

Despite the fact that accent does not necessarily translate into decreased intelligibility, listeners will often erroneously report that it does. This expectation-matching is likely due to the phenomenon of confirmation bias.<sup>137</sup> The fault often lies with the “intolerant, often monolingual interlocutors [who] fail to understand even the clearest L2 speaker, simply because they have made up their minds that they can’t understand accented speech.”<sup>138</sup> Regularly, when confronted by perceived or actual L2 accented English, native speakers of U.S. English “often feel perfectly empowered to reject their [communicative] responsibility, and to demand that [the L2 speaker] carry the burden in the communicative act.”<sup>139</sup>

For instance, one study showed that “if listeners merely thought that a person might be from a different language background, they understood less of what was said.”<sup>140</sup> Based on this finding, researchers urge that the “responsibility for successful communication should be shared across interlocutors,”<sup>141</sup> since a listener’s assumptions may have a significant effect on comprehension of someone with an L2 or perceived L2 accent. In other words, although the L2 speaker can communicate sufficiently in English, the native English speaker is not willing to work toward mutual comprehension.<sup>142</sup> Such listeners overstate the lack of comprehensibility of those with L2-accented speech<sup>143</sup> and find the attempt to understand not worth the investment of time or effort. “In many cases . . . breakdown of

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134. *Id.* at 287 (emphasis removed).

135. Derwing & Munro, *supra* note 43, at 479.

136. Munro & Derwing, *supra* note 111, at 302.

137. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998) (“Confirmation bias . . . connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis at hand.”); see also Patreese D. Ingram, *Are Accents One of the Last Acceptable Areas for Discrimination?*, 47 J. EXTENSION, 1, 2 (2009) (“[W]e are so conditioned to expect an accent that we sometimes hear one when none is present. People who look different are expected to sound different, even if they are monolingual native English speakers.”).

138. Derwing & Munro, *supra* note 43, at 486.

139. LIPPI-GREEN, *supra* note 43, at 72.

140. Derwing & Munro, *supra* note 43, at 486 (citing Rubin, *supra* note 107).

141. *Id.*

142. LIPPI-GREEN, *supra* note 43, at 72.

143. Derwing & Munro, *supra* note 43, at 479–80.

communication is due not so much to accent as it is to negative social evaluation of the accent in question, and a rejection of the communicative burden.”<sup>144</sup> Moreover, studies show “listeners and speakers will work harder to find a communicative middle ground and foster mutual intelligibility when they are motivated, socially and psychologically, to do so.”<sup>145</sup> Race and unconscious racial bias play a role in whether the listener and speaker are motivated to communicate.

Often, majority speakers do not understand “accented” people of color because they are reluctant to communicate with people they perceive to have L2 accents. Majority-accented persons’ unwillingness to try to communicate with minority-accented people is due, at least in part, to racial bias—much of which is implicit—about who can communicate effectively and who is worth communicating with. Due to racial hierarchy in the United States, people of color with actual or perceived minority accents are less valued, and accordingly majority persons may be less motivated, socially or otherwise, to fully communicate with them. Further, racial stereotypes about Latinxs and Asian Americans are that they are foreigners who do not speak English well or at all.<sup>146</sup> Conversely, white people are presumed to be English speakers and, even if they are not native speakers, to be able to speak English sufficiently. Here, belief makes reality. If the listener believes that the speaker is worthy and capable of communication, then they will make the effort to make that a reality.

Failure to comprehend minority-accented people of color could also be related to racism in other ways. In cases of overt or aversive racism, the minority accent itself may cause discomfort in the listener or make them less likely to value the conversation and listen. This leads to a lack of familiarity with people who look and sound different.

Research indicates that “familiarity with L2 speech improves comprehension.”<sup>147</sup> For example, participants in one study were more confident in communicating with L2 accented speech after limited exposure and explanation of some of the phonological differences of Vietnamese-accented speech.<sup>148</sup> Similarly, separate studies demonstrated that undergraduates who perceived a difficulty in understanding L2 accented instructors were “used to the foreign faculty’s accent” by “the second or third class session.”<sup>149</sup> Simple means, such as sitting close to and talking about misunderstandings with individuals with perceived L2 accents, may

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144. LIPPI-GREEN, *supra* note 43, at 73.

145. *Id.* at 72–73.

146. See Aaron Castelán Cargile, Eriko Maeda & Marc Rich, ‘Oh, You Speak English So Well!’: U.S. American Listeners’ Perceptions of ‘Foreignness’ Among Nonnative Speakers, 13 J. ASIAN AM. STUD. 59, 60–61 (2010) (explaining that listeners often respond with surprise when Asian or Latinx Americans speak English).

147. Derwing & Munro, *supra* note 43, at 486.

148. *Id.* at 487.

149. Aysel Kavas & Alican Kavas, *An Exploratory Study of Undergraduate College Students’ Perceptions and Attitudes Toward Foreign Accented Faculty*, 42 C. STUDENT J. 879, 887 (2008).

possibly improve the comprehension of the listeners.<sup>150</sup> In short, “listeners with greater experience with L2 speech find it more intelligible.”<sup>151</sup>

In terms of systemic racism, the United States is highly segregated. White social groups are the most homogenous of any racial group.<sup>152</sup> Racial segregation limits exposure to a variety of accents. Through exposure and interaction with linguistic and racial minorities, majority persons’ comprehension can improve. Early exposure to diverse accents can be particularly beneficial to broad comprehension.<sup>153</sup> Yet, as the aforementioned studies indicate, integrated exposure as an adult is helpful as well.<sup>154</sup> In this way, racially and linguistically diverse juries could serve, at least in a limited way, to help mitigate comprehension limitations experienced by many majority persons.

It is important to recognize the role that racial segregation plays in the perpetuation of language barriers between racial groups, as racial bias—restricting who lives, works, studies, and socializes together—can actually contribute to accent incomprehensibility. In many instances, implicit bias and structural racism might be more to blame for incomprehensibility than a speaker’s actual pronunciation.

Understanding the relationship between accent, race, and racism is imperative for recognizing how accent discrimination in jury selection can amount to racial, ethnic, and national origin discrimination, which ultimately violates statutory and constitutional law.

### III.

#### STATUTORY AND CONSTITUTIONAL REMEDIATION

Accent discrimination in jury selection manifests in different ways. It can be initiated by the trial court or an attorney—often a prosecutor. The prospective juror might ultimately be stricken for cause for their supposed lack of English language abilities or under a party’s peremptory challenges. Due to the lack of awareness of how linguistic discrimination relates to race discrimination, defense (and other) attorneys fail to make proper objections, and judges fail to issue proper rulings. The preceding Section explained the connection between race, racism, and

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150. *Id.*

151. Kennedy & Trofimovich, *supra* note 124, at 478. Interestingly, this study showed that even though experienced listeners demonstrated high actual comprehension of L2 accented speech (i.e. their transcribed sentences of L2 speech were nearly 100% accurate), these experienced listeners still reported low comprehensibility. *Id.* at 478–79.

152. See Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2293 (2017); Robert P. Jones, *Self-Segregation: Why It’s So Hard for Whites to Understand Ferguson*, THE ATLANTIC (Aug. 21, 2014), <https://www.theatlantic.com/national/archive/2014/08/self-segregation-why-its-hard-for-whites-to-understand-ferguson/378928> [<https://perma.cc/7J2U-L5WE>].

153. See Rachel Schmale, Alejandrina Cristia & Amanda Seidl, *Toddlers Recognize Words in an Unfamiliar Accent After Brief Exposure*, 15 DEV. SCI. 732–38 (2012) (for instance, “. . . 24-month-olds successfully accommodate an unfamiliar accent in rapid word learning after less than 2 minutes of accent exposure.”).

154. See *supra* notes 145–151.

accent discrimination. The current Section looks at how accent can be understood as a racial characteristic per se or, alternatively, as a proxy for race. It describes the two primary types of accent discrimination in jury selection; notes the impact of such discrimination; and, most importantly, outlines the federal laws violated by accent discrimination in jury selection.

*A. Juror Disqualification as Race-based Accent Discrimination*

*1. Racial Trait or Proxy*

Part II of this Article sought, among other things, to establish that accent is a racial characteristic for at least six reasons. First, accent is a characteristic used to racially categorize other people. Second, one's own accent is a source of internal racial identification and expressive racial identity. Third, accent is a characteristic used to identify people's race both in the law and in everyday life. Fourth, accent is a characteristic that is targeted by overt racism, conveyed through intolerance, anger, frustration, and aggression. Fifth, listeners' unconscious racial biases can be aroused by accent, triggering assumptions about the speaker's lack of comprehensibility and worth as an interlocutor, which then leads to avoidance. Finally, the fact that foreign accent is mistakenly perceived to exist for people of color but not for white people provides further evidence that accent is a racial characteristic.

As accent is both a salient characteristic that assigns, identifies, and expresses race and is a trigger or target for implicit and explicit racism, it would be most sensible for the law to directly recognize accent-based discrimination as race discrimination. This approach is not unprecedented. Title VII of the Civil Rights Act can be used to challenge accent-based discrimination in the workplace as direct discrimination on the basis of national origin.<sup>155</sup> There is no need for a proxy analysis or determination whether accent is a pretext for a prohibited form of discrimination. This makes sense because accent itself does not indicate an inability to communicate effectively in the English language. Further, aside from certain acting roles, few jobs would require a person speak with a particular accent. In the jury context, there could never be a legitimate reason to require a juror speak with a majority or other accent. Juries are supposed to be representative of the community, not just the majority. When an attorney strikes or a judge dismisses a prospective juror of color on the basis of their accent, they are directly discriminating on the basis of the individual's race.

Some jurisdictions, however, might be more receptive to viewing accent or linguistic difference as a proxy for race discrimination. Accent discrimination can also be explained by viewing accent as a proxy or stand-in racial trait. A stand-in racial or national origin trait is a trait that is central to the minority group's racial identity and classification and is used as a proxy for race or national origin

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155. See, e.g., *Fragante v. Honolulu*, 888 F.2d 591, 595 (9th Cir. 1989) (recognizing that accent discrimination is a form of national origin discrimination); *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815 (10th Cir. 1984); *Berke v. Ohio Dep't of Pub. Welfare*, 628 F.2d 980 (6th Cir. 1980).

discrimination.<sup>156</sup> For example, skin color is a common racial stand-in trait for African Americans.<sup>157</sup> The law recognizes that it is racially discriminatory to exclude African Americans on the basis of their skin color. Having dark skin is central to one's race as African American or Black, even though not all African Americans have dark skin and some people who are not African American have dark skin. The same is true for the accent of certain racial groups, such as Latinxs. A Hispanic accent is a stand-in trait for their race, ethnicity, and national origin, and discrimination on the basis of their accent should be treated as racial, ethnic, and national origin discrimination, despite the fact that not all Latinx people have a Hispanic accent.

Antidiscrimination law tends to prohibit discrimination on the basis of stand-in racial traits or proxies that are immutable.<sup>158</sup> For groups like Latinxs, accent is not only a stand-in trait for race, ethnicity, and national origin. It can also be a rather immutable characteristic for jurors.<sup>159</sup> Once a person is an adult—age-eligible to serve on a jury—accent is rarely mutable. Some linguists have gone so far as to say that a person “can no more . . . lose his native phonology—his accent—than he could . . . change the color of his skin.”<sup>160</sup> While accent can change during childhood, in an adult accent is often fixed, irrespective of a domestic education and the speaker's own efforts.<sup>161</sup> While there may be adjustments to pronunciation which could increase the intelligibility of speech, accentedness—as distinct from intelligibility—often remains.<sup>162</sup> Therefore, when analyzing accent discrimination in jury selection under civil rights laws, accent should be recognized as akin to an immutable characteristic.

From a legal positivist perspective, English language inability could be a lawful basis to exclude a prospective juror irrespective of whether accent discrimination is a racial trait in itself or a proxy for race. This is due to widespread juror language requirements. However, asseverations of a lack of English language ability may also be a pretext for accent-based race discrimination. If the prospective juror is able to answer voir dire questions and communicate with court personnel and attorneys in the English language, that should be sufficient to satisfy the English language requirement. Bald assertions that counsel or the judge had difficulty

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156. See Matsuda, *supra* note 43, at 1348; Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 424 (2006).

157. See generally Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

158. See Yuracko, *supra* note 156, at 374 (“Current antidiscrimination doctrine allows employers to engage in job irrational trait discrimination unless...[t]he trait at issue [is] immutable.”).

159. Matsuda, *supra* note 43, at 1391–92.

160. LIPPI-GREEN, *supra* note 43, at 157.

161. *Id.* at 251. In fact, due to the immutability of accent, many sociolinguists generally agree that “accent improvement or reduction programs” are problematic, unhelpful, and actually based on stereotypes. See, e.g., Derwing & Munro, *supra* note 43, at 476, 483 (“[A]ccent reduction/elimination’ programs . . . may do more harm than good.”).

162. Derwing & Munro, *supra* note 43, at 480–81.



understanding a prospective juror, or concerns that others might have such difficulties, without evidence in the record—as occurred in the *Gould* case—should be rejected as pretextual accent-based race discrimination.

## 2. *Forms of Accent Discrimination in Jury Selection*

Accent discrimination in jury selection most often manifests in two ways. Prospective jurors of color are either (1) struck for cause on the grounds that they did not meet the jurisdiction's English language juror requirements; or (2) struck after a peremptory challenge. The *Gould* case—where prospective juror Figueroa was unjustifiably struck for cause despite a record that clearly demonstrated he could speak English sufficiently—is an example of the former. Typically, in these situations, counsel or trial judges (whether sincerely or disingenuously) assume or purport that the prospective juror of color's English language abilities are deficient or that the juror's accent impedes communication. The prospective jurors themselves believe that their English language abilities are adequate, and there is no basis in the record to support an excusal for cause, except for the subjective and racialized perceptions of counsel or the judge. Too often, when such prospective jurors are challenged for cause, opposing counsel fails to object that the exclusion is impermissible race (or ethnic or national origin) discrimination because language and accent are wrongly treated as race-neutral characteristics.

Despite judges' and counsels' lack of explicit acknowledgment of the race-accent connection in a legal context, transcripts and excerpts from voir dire often indicate an implicit understanding of the reality that race and accent are closely related. However, the significance of race is often defensively and hastily rejected. An example of this can be found in the following exchange between the trial judge and prospective juror, Figueroa, in the *Gould* case:

The Court: ...Do you feel like you'll be able to understand everything that's said in the courtroom?

[E.F.]: I think so.

The Court: Okay, you don't anticipate any problems understanding what people are saying?

[E.F.]: No, no, in fact I understand what's your point. I got a big accent.

The Court: Okay.

[E.F.]: That when I talk, I know sometimes they tell me—

The Court: No, no, I understand—I just want to—whenever anybody talks to me in an accent, and it's not just Spanish, I often inquire whether they can understand English well enough to be a juror. So you're comfortable doing that and that's fine.<sup>163</sup>

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163. *Gould I*, 109 A.3d 968, 979 (2015) (emphasis added).

Here, the trial judge seems to recognize that repeatedly questioning a Latinx U.S. citizen about his English language abilities is racially inappropriate and defensively clarifies that “it’s not just Spanish,” meaning it is not just Latinx people who he probes about their English language abilities.

Accent discrimination in jury selection also occurs when counsel (usually prosecutors) use peremptory strikes to exclude prospective jurors of color. Striking jurors on the basis of their race has been deemed impermissible, so counsel are allowed to challenge the strike of a juror that seems to be in violation of the Equal Protection Clause.<sup>164</sup> Astute opposing counsel may suspect that race was the motivation for striking a potential juror with an accent, but this motivation may not be fully revealed until the prosecutor responds to a *Batson* challenge. Here, the prosecutor might state that the juror was excluded not on the basis of their race but due to their accent or difficulty communicating in English. This is demonstrated in the case of *Corona v. Almager*:

The Judge stated as follows . . . “The impression I got from [the juror] was—just based upon what I perceived to be a very thick accent, I, at times, had some difficulty understanding him. He probably immigrated to this country and—is of African descent and immigrated to this country. Not the fact that he’s black or immigrated, but the difficulty I had in understanding him, notwithstanding the responses, would, in my mind, probably make him not the appropriate juror for this particular case . . . There are a series of, from what I recall, some relatively complex issues that the jury is going to have to resolve in the matter with regard to the sales of the cars and people coming over and what they were doing. I thought there was a basis for [striking the juror] . . .” The prosecutor stated that the primary reason he struck juror 28 was because the prosecutor inferred a lack of English proficiency from the juror’s strong accent. The Court found that, “[d]ifficulty with the English language has been held to be a valid race neutral reason to exercise a peremptory strike.”<sup>165</sup>

In *Corona*, the prosecutor and trial judge advanced accent as a purportedly race-neutral basis for exclusion, and emphasized—reflecting a defensive awareness of possible racial implications—that the peremptory challenge and disqualification was not due to the prospective juror’s Blackness or immigrant roots.<sup>166</sup>

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164. A *Batson* challenge is an opposing party’s objection to a peremptory challenge on the grounds that the strike was used to exclude the prospective juror on the basis of a protected characteristic such as race, ethnicity, national origin, or sex. *See generally* *Batson v. Kentucky*, 476 U.S. 79, 79 (1986) (“[T]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.”).

165. *Corona v. Almager*, Civ. No. 07-2117 BTM (NLS), 2008 WL 6926574, at \*6–7 (S.D. Cal. Nov. 3, 2008) (emphasis added), *aff’d* 449 F. App’x 672 (9th Cir. 2011).

166. *Id.*

Despite the reality that accent is a racial characteristic and that majority listeners' accent-related inability to comprehend is related to racially biased perceptions, courts and attorneys unquestionably accept and advance the accent of people of color as a race-neutral basis for juror exclusion. This "practice allows courts to accept implausible 'race-neutral' explanations for challenges that, in reality, highly correlate with race. These decisions also show that the *Batson* standard is a perilous instrument that can be turned into 'a mere exercise in thinking up any rational basis' for disqualifying linguistic minorities."<sup>167</sup> Accent discrimination in these circumstances is a form of race, ethnicity, and national origin discrimination.

While this Article focuses on accent discrimination against Latinxs, Asian Americans, and other people of color perceived as foreign, it should be noted that accent discrimination in jury selection can also affect non-immigrant African Americans who generally are not considered foreign. For instance, in *Young v. Florida*, Mr. Bayonne, an African American man, was struck from the jury on the basis that he had "an extremely thick accent."<sup>168</sup>

Due to Bayonne's alleged heavy accent, the court questioned: "[w]hether he [was] capable of understanding English, I think because of the very strong accent, I see that as a race neutral reason anyway for the State striking at this point, because it does raise some questions about his ability, not only to communicate with other jurors but also to understand what is happening. I will take him out."<sup>169</sup>

Despite the fact that there was no question that Bayonne was a native English speaker, the Florida Court of Appeals found that "[h]aving an accent is not limited to one particular racial or ethnic group [and] . . . may signal some difficulty with the English language which might hinder a potential juror's ability to understand

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167. Ali, *supra* note 40, at 254 (discussing linguistic discrimination in California state court jury selection). For instance:

In *People v. Jurado*, [131 P.3d 400 (Cal. 2006)] the prosecutor challenged the juror's language ability because the juror indicated that she was born in the Philippines, suggesting that English was not her first language and that she would have difficulty understanding spoken English. In *People v. Vargas*, [No. B207146, 2010 WL 119930 (Cal. Ct. App. Jan. 14, 2010), cert. denied (2010)] the Court of Appeals affirmed a lower court's denial of a *Batson* objection by a Latin[x] defendant, where the prosecutor used a peremptory strike based on the juror's ability to speak Spanish, even though the juror believed his English was good enough to fully engage in deliberations. In *Vasquez v. Runnels* [No. C 05-4669 MMC PR, 2011 WL 1496040 (N.D. Cal. Apr. 20, 2011)], juror Liang possessed a level of proficiency in English sufficient to allow her to participate on the jury. However, the District Court held that trial courts have great leeway in deciding these issues and, as such, it could not say whether the state court was unreasonable in allowing juror Liang's exclusion or whether it violated petitioner's Sixth Amendment rights.

*Id.*

168. *Young v. Florida*, 744 So.2d 1077, 1083 (Fla. Dist. Ct. App. 1999).

169. *Id.*

the testimony at trial and to communicate with other jurors during deliberations. [Accordingly the court held that accent was] . . . a facially race-neutral [reason] for a peremptory strike.”<sup>170</sup> The Florida Court of Appeals upheld the trial court’s exclusion of Bayonne from jury service.<sup>171</sup> Thus, while accent discrimination in jury selection is primarily a problem for people of color associated with immigration, it can affect all people of color. This is due to the fact that accent discrimination usually is more than linguicism: it is a type of race discrimination.

### B. Impact of Juror Language Disenfranchisement

Accent discrimination in jury selection is an important justice issue because it infringes on parties’—particularly criminal defendants’—right to a fair trial. It also infringes on prospective jurors’ right to serve on a jury and thus be full citizens. It also affects the actual and perceived fairness of the courts. It has long been recognized that juries should be representative of the communities from which they are derived.<sup>172</sup> However, jury pools and petit juries continually fail to reflect their communities in terms of race.<sup>173</sup> In comparison to their numbers in the population, white people are overrepresented on juries, while people of color are overrepresented as criminal defendants.<sup>174</sup> This is a cause for “concern because majority-white juries generally spend less time deliberating, consider fewer diverse perspectives, commit more errors, and exhibit more racism than racially diverse juries, which deliberate more thoroughly, commit fewer errors, diminish the expression of racism, and consider more varied perspectives.”<sup>175</sup>

Accent and other forms of linguistic discrimination are often overlooked causes of the lack of racial diversity on juries. While it is difficult to accurately

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170. *Id.*

171. *Id.* at 1084.

172. *See generally* *Norris v. Alabama*, 294 U.S. 587, 590–91 (1935).

173. Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AMERICAN BAR ASSOCIATION (Sept. 1, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/> [<https://perma.cc/8SX4-YKJD>].

174. HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 65, 39–40 (1993); *see* Montré D. Carodine, ‘The Mis-Characterization of the Negro’: A Race Critique of the Prior Conviction Impeachment, 84 IND. L. J. 521, 548 (2009); *see also* Ashley Nellis, *The Color of Justice: Racial & Ethnic Disparity in State Prisons*, SENTENCINGPROJECT.ORG (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/#III.%20The%20Scale%20of%20Disparity> [<https://perma.cc/G2RG-X5DU>] (“Latinos are imprisoned at a rate that is 1.4 times the rate of whites . . . disparities are particularly high in states such as Massachusetts (4.3:1), Connecticut (3.9:1), Pennsylvania (3.3:1), and New York (3.1:1).”).

175. Gonzales Rose, 65 HASTINGS L.J., *supra* note 37, at 812 (citing EDIE GREENE & KIRK HEILBRUN, WRIGHTSMAN’S PSYCHOLOGY AND THE LEGAL SYSTEM 305 (6th ed. 2007); BRUCE EVAN BLAINE, UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY 101–04 (2d ed. 2013) (summarizing racial bias in jury deliberations and verdicts when juries are not sufficiently diverse); Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive and Procedural Fairness in Death Penalty Litigation*, 97 IOWA L. REV. 1969, 1980 (2012)).

assess the impact of juror language disenfranchisement,<sup>176</sup> approximately 13 million U.S. citizens, 11 million of which are people of color, are excluded from jury service on the basis that they are limited-English proficient.<sup>177</sup> Undoubtedly, many more U.S. citizens of color are at risk of exclusion on the basis of their accent. The number of people vulnerable to accent discrimination is difficult to estimate because accent is a relative construct, and comprehensibility of accents is highly subjective.<sup>178</sup>

In 2013, 27.2 million U.S.-born citizens spoke a language other than English at home. This number has been steadily rising.<sup>179</sup> Most of the non-English languages spoken at home are not European languages,<sup>180</sup> and thus it is likely that the majority of these U.S. citizens are people of color. Not all persons who speak a non-English language at home speak English with an L2 accent, but these numbers provide a glimpse into the breadth of the problem.

Additionally, the population of people of color from groups perceived to be foreign provides a ballpark gauge of the extent of potential accent discrimination. Latinxs and Asian Americans comprise approximately 18.3 percent and 5.9 percent of the U.S. population, respectively.<sup>181</sup> Since linguistic and racial majority listeners often misperceive Latinxs and Asian Americans as having foreign accents, there is clearly a significant number of Latinxs and Asian Americans who are, at a minimum, at risk of being perceived to have an accent which might exclude them from jury service.

### C. Sources of Law Prohibiting Accent Discrimination in Jury Selection

The lack of awareness or disregard for the intrinsic relationship between accent and race means that attorneys frequently fail to object to trial courts' for-

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176. *But cf.* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 202 (2001) (“[G]iven that Whites are the dominant group in the United States, both in number and in power, and that criminal defendants in this country continue to be disproportionately non-White, White juror bias is more consequential and dangerous than bias demonstrated by Black jurors or jurors of other minority groups.”).

177. Gonzales Rose, 65 HASTINGS L.J., *supra* note 37, at 813–14, n.4.

178. LIPPI-GREEN, *supra* note 43, at 251.

179. Camille Ryan, *Language Use in the United States: 2011*, AM. COMTY. SURVEY (Aug. 2013) <https://www.census.gov/library/publications/2013/acs/acs-22.html> [<https://perma.cc/W922-ZN5T>].

180. *See New American Community Survey Statistics for Income, Poverty & Health Insurance Available for States & Local Areas*, U.S. CENSUS BUREAU (Sept. 14, 2017) <https://www.census.gov/newsroom/press-releases/2017/acs-single-year.html?CID=CBSM+ACS16> [<https://perma.cc/L8JT-WWDG>] (“Data shows the percentage of the nation’s population age 5 and older speaking a language other than English at home was 21.6 percent in 2016. New language data shows Spanish was by far the largest non-English language in 2016, spoken at home by 40.5 million people, or 13.3 percent of the population age 5 or older, followed by Chinese with nearly 3.4 million speakers at home and Tagalog with 1.7 million speakers at home.”).

181. *United States Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quick-facts/fact/table/US/PST045216> [<https://perma.cc/93AK-UBJ9>] (last updated July 1, 2018).

cause disqualifications or prosecutors' peremptory strikes, even when these disqualifications amount to racial discrimination against prospective jurors of color. There are three primary sources of law that should be recognized to prohibit accent discrimination in jury selection in both state and federal courts: Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment and component of the Fifth Amendment, and the fair cross-section requirement of the Sixth Amendment.

1. *Title VI of the Civil Rights Act of 1964*

Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>182</sup> Although neither the text of Title VI nor its legislative history mentions language or accent, courts have recognized that linguistic discrimination is prohibited under Title VI on the grounds that it is a form of national origin discrimination.<sup>183</sup> "[A]ccent and national origin are obviously inextricably intertwined . . ." <sup>184</sup> So, too, are accent and race.<sup>185</sup>

As accent is a central racial characteristic, Title VI should be interpreted to recognize that linguistic discrimination is also a form of race discrimination. Restricting accent discrimination challenges to national origin discrimination under Title VI is concerning. As I have argued elsewhere:

By recognizing language discrimination primarily under the national origin provisions of the Act rather than its race provisions, the Act perpetuates th[e] perceived-foreignness problem. It ignores the fact that many targets of language discrimination are native born, multigenerational, and even indigenous Americans. In doing so, the Act seems to signal that language discrimination is an immigrant problem or a problem that relates to one's foreign ancestry. It ignores the reality that, for many [populations of color such as] Latin[x]s, language discrimination is race discrimination.<sup>186</sup>

When prospective jurors of color are unduly excluded from participation in jury service because of their accent, it can amount to a violation of Title VI. All federal courts and most state courts receive federal funding; thus, virtually all

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182. 42 U.S.C. § 2000d (2012 & Supp. V 2018).

183. *See* *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974) (holding that linguistic minority students had been denied a federally funded educational benefits on the basis of their national origin or race in violation of Title VI); *Gonzales Rose*, 6 ALA. C.R. & C.L. L. REV., *supra* note 37, at 188.

184. *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 601 (9th Cir. 1993).

185. *See supra* Part II.

186. *Gonzales Rose*, 6 ALA. C.R. & C.L. L. REV., *supra* note 37 at 210.

courts fall under the purview of Title VI of the Civil Rights Act.<sup>187</sup> Moreover, prospective jurors are “participants” within the meaning of Title VI.<sup>188</sup> When courts unwarrantedly exclude prospective jurors of color on the basis of their accent, they are excluding them from a program receiving federal funding on the basis of their race and national origin in violation of Title VI.

While Title VI has not been directly utilized to address accent discrimination, Title VII has, albeit with limited success.<sup>189</sup> Like Title VI, Title VII (which prohibits employment discrimination based on race, color, religion, sex, and national origin) is silent on linguistic discrimination but has long been recognized to forbid it.<sup>190</sup> The Equal Employment Opportunity Commission (EEOC) has explained that national origin discrimination includes “the denial of equal employment opportunity because . . . an individual has the physical, cultural or linguistic characteristics of a national origin group.”<sup>191</sup> Accent is a recognized linguistic characteristic protected under Title VII.<sup>192</sup> This is not to imply that Title VII protection against accent discrimination is perfect.

The recognition that accent discrimination is a type of linguistic discrimination, and thus prohibited under Title VII, should be extended to the Title VI context. Under Title VII, the failure to hire or retain employees on the basis of their “foreign” accent establishes a *prima facie* case of national origin discrimination.<sup>193</sup> Job applicants may only be denied a position on the basis of their accent if it impedes their ability to perform the essential employment duties; otherwise, concerns about communicative ability are merely pretexts for discrimination.<sup>194</sup> Similarly, disqualification of prospective jurors on the basis of their accent,

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187. See STATE JUSTICE INSTITUTE, CELEBRATING 30 YEARS OF IMPROVING THE ADMINISTRATION OF JUSTICE IN OUR STATE COURTS 9 (2014), <http://www.sji.gov/wp/wp-content/uploads/SJI-30th-Anniversary-Report.pdf> [<https://perma.cc/PT93-LUJF>] (“Over the past 30 years, SJU has awarded grants to state courts in every state, the District of Columbia, and the U.S. territories.”); see also American Bar Association, *Federal Court Funding*, AMERICANBAR.ORG, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_judiciary/federal-court-funding/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding/) [<https://perma.cc/W2RC-GYMB>] (last updated on Oct. 9, 2019).

188. Gonzales Rose, 6 ALA. C.R. & C.L. L. REV., *supra* note 37, at 192 (arguing that prospective jurors are “participants” in court programs under Title VI by analogizing the similarly worded states of the Rehabilitation Act of 1973 and Americans with Disabilities Act of 1990, under which prospective jurors have been recognized as participants).

189. 42 U.S.C. § 2000a(a) (2012 & Supp. V 2018).

190. 42 U.S.C. § 2000e (2012 & Supp. V 2018); see, e.g., EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000); Saucedo v. Bros. Well Serv., Inc., 464 F. Supp. 919, 920–22 (S.D. Tex. 1979).

191. 29 C.F.R. § 1606.1 (1980) (emphasis added).

192. *Id.* at § 1606.6.

193. See, e.g., *Fragante v. City and County of Honolulu*, 888 F.2d 591, 595–96 (9th Cir. 1989); *Berke v. Ohio Dep’t of Pub. Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam).

194. *Fragante*, 888 F.2d at 596, 599; *Carino v. Univ. of Oklahoma Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984).

despite their abilities to perform the essential duties of jury service, can amount to race and national origin discrimination.<sup>195</sup>

Citizens should not be excused from jury service when their accent or linguistic difference does not impede their ability to understand court proceedings, communicate with fellow jurors, or otherwise serve on a jury. This type of disqualification violates Title VI of the Civil Rights Act, as well as the Constitution.

## 2. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part, that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>196</sup> There is an implied equal protection component to the Fifth Amendment that imposes the same obligation on the federal government.<sup>197</sup> Exclusion of prospective jurors on the basis of their race, ethnicity, or national origin violates equal protection.<sup>198</sup>

As explored above, for many people of color, such as Latinxs and Asian Americans, accent is a racial characteristic (or alternatively, used as a proxy for race, ethnicity, and national origin discrimination). There are some English language learners whose English language abilities are not adequate to serve on a jury without language accommodation. However, the trial judge’s or counsel’s perceptions or claims of incomprehensibility of accent are often the result of racial bias, whether conscious or unconscious. Moreover, accent itself is a racial characteristic. Thus, when prospective jurors can speak and understand English sufficiently to serve on a jury, their exclusion on the basis of accent or unsubstantiated allegations of English language deficiency may violate the jurors’ right to equal protection. In criminal cases, the defendant can raise a third-party equal protection claim on behalf of excluded prospective jurors.<sup>199</sup>

For-cause dismissals from jury service on the basis of accent or related linguistic difference are particularly concerning due to courts’ direct involvement in excluding prospective jurors. This is exemplified in the *Gould* case, where the trial judge was the first to question Figueroa’s accent and English language abilities.<sup>200</sup> Then, on the judge’s initiation, the prospective juror was excluded by the court on

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195. See, e.g., *People v. Morales*, 719 N.E.2d 261 (Ill. App. Ct. 1999) (holding that excluding a Hispanic juror due to his Spanish accent was pretext for race discrimination). See generally Tom McArthur, *Worried About Something Else*, 60 INT’L J. SOC. LANGUAGE 87, 90–91 (1986) (arguing that rules with an adverse effect on individuals with accents or non-English speakers may be a pretext for national origin or ethnicity discrimination).

196. U.S. CONST. amend. XIV, § 1.

197. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

198. *Batson v. Kentucky*, 476 U.S. 79, 79–81 (1986).

199. *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

200. *Gould I*, 109 A.3d 968, 972 (Conn. App. Ct. 2015).



the basis of an unfounded perception that he would be unable to deliberate with other jurors in English.<sup>201</sup>

Even when a trial court discriminates against a prospective juror on the basis of accent, appellate courts frequently fail to provide any remedy. In *Gould*, the Connecticut Court of Appeals found, and the Connecticut Supreme Court affirmed, that there was no reasonable basis in the record to support a finding that Figueroa's English language abilities were insufficient.<sup>202</sup> Still, the Connecticut Court of Appeals and the Connecticut Supreme Court did not find it to be a fundamental error requiring a new trial, even though Figueroa had been found to have been excluded improperly.<sup>203</sup> If the judge had excluded a prospective juror of color because he looked like a racial minority, it would have been considered a fundamental error likely requiring a new trial.<sup>204</sup> The "Constitution forbids striking even a single prospective juror for a discriminatory purpose."<sup>205</sup> However, the exclusion of a prospective juror because he sounded like a racial minority was treated differently. This is an injustice that is too often overlooked in our legal system.

Equal protection is one of the most important constraints on racial discrimination in jury selection. The use of facially neutral statutes to exclude racial minorities from the jury box has long been found to violate equal protection. An early example of this comes from the 1935 case of *Norris v. Alabama*, which challenged a facially race-neutral statute concerning the jury commission's selection of names of male citizens on the basis of their good moral character, sound judgment, reputation in the community, and English language literacy.<sup>206</sup> Purported reliance on this statute resulted in the failure to select a single Black man to serve on a jury in

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201. *Id.*

202. *Connecticut v. Gould (Gould II)*, 142 A.3d 253, 256 (2016).

203. *Id.* at 257.

204. In the comparable context of peremptory challenges, the error of a judge permitting a peremptory strike on a discriminatory basis such as race requires reversal for a new trial. *Foster v. Chatman*, 1136 S. Ct. 1737, 1747 (2016); *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 328–29 (2003)).

205. *Snyder*, 552 U.S. at 478 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)).

206. *Norris v. Alabama*, 294 U.S. 587, 590–91 (1935). The relevant statute stated:

The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.

ALA. CODE § 8603 (1923).

the county.<sup>207</sup> The Supreme Court found this to violate the Fourteenth Amendment's Equal Protection Clause.<sup>208</sup>

Similarly, in *Smith v. Texas*, the Supreme Court found that, although Black residents comprised more than twenty percent of the Harris County, Texas population, and despite the fact that up to six thousand Black residents were qualified to serve as jurors, only three served on grand juries in the preceding seven years.<sup>209</sup> The court found that the wide discretion permissible under the county's jury selection statute and implementation plan allowed for discriminatory application.<sup>210</sup> The Court famously directed that:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.<sup>211</sup>

Today, courts' inappropriate and overreaching application of English language juror requirements results in exclusion of people of color and thwarts "the use of juries as instruments of public justice . . . as bod[ies] truly representative of the community."<sup>212</sup> Most state courts and all federal courts have English language juror requirements.<sup>213</sup> These requirements vary greatly in scope, stringency, and enforcement. Some jurisdictions require only that jurors understand or speak English, while others require reading and writing abilities.<sup>214</sup> Further, enforcement and application of English language requirements by courts can be stricter—and thus more exclusionary—in practice than required by law.<sup>215</sup>

Despite variations in English language juror requirements, none require that prospective jurors speak English with a majority accent or speak Standard American English—which is essentially code for the variety of spoken English associated with the racial majority. However, in practice, there are judges who impose such a requirement. Since overtly requiring that jurors speak with a majority accent would clearly constitute unconstitutional discrimination, judges express

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207. *Norris*, 294 U.S. at 599.

208. *Id.* at 587.

209. *Smith v. Texas*, 311 U.S. 128, 128–29 (1940).

210. *Id.* at 131.

211. *Id.* at 130.

212. *Id.*

213. Gonzales Rose, 65 HASTINGS L.J., *supra* note 37, at 815–20 (providing a comprehensive overview of state and federal English language requirements).

214. *Id.* at 819–20.

215. For instance, a state court's juror language requirement statute might only require that jurors "understand" English, but in practice the court requires jurors also read and write in English. *Id.* at 821.

accent exclusion in terms of their own subjective comprehension or perceptions of comprehensibility. Either they do not understand the prospective juror, or, as in the *Gould* case, they fear other jurors will not be able to understand the juror or that the juror will not understand the proceedings.<sup>216</sup> These courts' determinations of whether someone's accent is too "thick" or "heavy" or otherwise inhibits comprehension are often not based on evidence or proper considerations, but rather due to unsubstantiated, race-laden, subjective, and inattentive decision-making.

"The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race ... or on the false assumption that members of his race as a group are not qualified to serve as jurors."<sup>217</sup> Here, racialized preconceptions that certain groups of people of color—such as Latinxs and Asian Americans—cannot speak English sufficiently or have unintelligible accents that hinder their ability to serve on juries are, arguably, based on the false assumption that members of these races as a group are not qualified for jury service. This violates the guarantee of equal protection.

In addition to for-cause disqualifications, accent discrimination in jury selection occurs through peremptory challenges. In both criminal and civil proceedings, each party is permitted a certain number of strikes of prospective jurors without providing a reason.<sup>218</sup> Although the party or counsel need not provide a reason for their objection to the juror, they are not constitutionally permitted to strike prospective jurors on the basis of certain protected characteristics.<sup>219</sup> Striking a juror on the basis of their race, ethnicity, or national origin violates equal protection in both criminal<sup>220</sup> and civil<sup>221</sup> cases.

Accent-based exclusions violate both the party's and the prospective juror's rights. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection, because it denies him the protection that a trial by jury is intended to secure."<sup>222</sup> Irrespective of the defendant's race, like in the for-cause context, a criminal defendant can raise a third-party equal protection claim.<sup>223</sup> In a civil case, a private litigant exercising peremptory challenges qualifies as a state actor and the opposing party has standing to bring a race-based equal protection claim on a juror's behalf.<sup>224</sup>

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216. *Gould I*, 109 A.3d 968, 972 (Conn. App. Ct. 2015).

217. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (internal citations omitted).

218. *Swain v. Alabama*, 380 U.S. 202, 217 (1965).

219. *See Batson*, 476 U.S. at 79–80 (1986).

220. *Id.*

221. *J.E.B. v. Alabama ex rel. T.B.* 511 U.S. 127, 128 (1994) ("[W]hether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.").

222. *Batson*, 476 U.S. at 86.

223. *See Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that a white defendant had standing to challenge prosecutor's dismissal of Black jurors).

224. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 617 (1991).

A *Batson* challenge can be used to object to the use of a peremptory challenge to strike a prospective juror for a discriminatory purpose in violation of equal protection. To establish a prima facie *Batson* violation, the party asserting the challenge must show that the facts and circumstances create an inference that the opposing party struck the prospective juror because of race, ethnicity, national origin, or gender.<sup>225</sup> The burden then shifts to the opposing party to advance a neutral reason for the strike.<sup>226</sup> The court must consider the totality of the evidence to evaluate whether the moving party has proved purposeful discrimination.<sup>227</sup>

Defense counsel should assert *Batson* challenges when prospective jurors of color are peremptorily struck when accent or other linguistic discrimination might have played a role. Often, accent discrimination will not be revealed until the opposing party offers its purportedly race-neutral reasoning. This is where English language abilities, heavy accent, or concerns about communication barriers might be articulated for the first time. Unfortunately, many courts still accept accent as a race-neutral reason, despite the reality that accent is often not race-neutral. This is where the moving party must be prepared to explain the connection between accent, race, and racial discrimination (or alternatively ethnic or national origin discrimination). Attorneys, particularly defense counsel, should begin to regularly challenge the notion that accent or linguistic difference are race-neutral bases for disqualification from jury service.

### 3. *The Sixth Amendment Fair Cross-section Requirement*

The Impartiality Clause of the Sixth Amendment has been interpreted to require that juries be selected from a fair cross-section of the community.<sup>228</sup> This is not a new concept. It is related to the notion of a “jury of one’s peers,” which appears in the Magna Carta from the early 13th century.<sup>229</sup> In modern times, this principle is advanced by the requirement that the jury pool from which grand and petit juries are selected must be drawn from a fair and representative cross-section of the community.<sup>230</sup> In *Duren v. Missouri*, in 1979, the Supreme Court articulated

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225. *J.E.B.*, 511 U.S. at 128–29; *Hernandez v. New York*, 500 U.S. 352, 358 (1991); *State v. Rigual*, 771 A.2d 939, 946 (Conn. 2001).

226. *Purkett v. Elem*, 514 U.S. 765, 767 (1995).

227. *Hernandez*, 500 U.S. at 359.

228. U.S. CONST. amend. VI (providing in relevant part that a defendant has a right to an “impartial jury of the State and district wherein the crime shall have been committed”); *see, e.g., Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment.”).

229. *Magna Carta Text*, CONST. RIGHTS FOUND., <https://www.crf-usa.org/foundations-of-our-constitution/magna-carta-text.html> [<https://perma.cc/DHT6-QMP9>] (last visited Feb. 14, 2020) (“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.”).

230. *See Lockhart v. McCree*, 476 U.S. 162, 173 (1986).

the test to establish a prima facie violation of the fair cross-section requirement.<sup>231</sup> *Duren* dealt with challenges to a statute allowing women, upon their request, an automatic exemption from jury service.<sup>232</sup> The Court found that the statute resulted in an underrepresentation of women, which violated the impartiality standard imposed by the Constitution's fair cross-section requirement.<sup>233</sup>

To prove a prima facie violation of the fair cross-section requirement the defendant must show:

- (1) that the group alleged to be excluded is a "distinctive" group in the community;
- (2) that the representation of this group in venues from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process.<sup>234</sup>

Unlike an equal protection claim or *Batson* challenge, a Sixth Amendment fair cross-section claim does not require a showing of discriminatory intent. The focus is on systemic exclusion.

The overuse of English language juror requirements, or peremptory challenges based on accent or unsubstantiated allegations of language barriers, may rise to a violation of the fair cross-section requirement. For instance, in the *Gould* case, the jurisdiction from which the jury pool was derived was approximately 40% Puerto Rican, with an additional 5% of the residents being non-Puerto Rican Latinx.<sup>235</sup> The assumption that jurors would be so unfamiliar with a Puerto Rican accent that deliberations would be hindered provides insights into the jury pool and selection process. It indicates that, in the trial judge's experience, Puerto Ricans and other Latinxs are not represented on juries and that persons who interact with Puerto Ricans and Latinxs are not represented on juries in this jurisdiction. This reflects a racialized judgment about who deserves to be a juror and stand in judgment of their fellow citizen.

The exclusion of Figueroa on the grounds that fellow jurors might not understand him appears to have been an act of judicial deference to the racially-driven communicative preferences of majority jurors. That is not a legitimate concern. The record reflects that the judge, prosecutor, defense counsel, and court reporter had no real difficulty understanding Figueroa.<sup>236</sup> Moreover, deliberations are not

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231. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

232. *Id.* at 360.

233. *Id.*

234. *Id.* at 364.

235. *American Community Survey Demographic and Housing Estimates: New Britain City, Conn., 2014 1-Year Estimate Data Profile*, U.S. CENSUS BUREAU, [https://data.census.gov/cedsci/table?d=ACS%201-Year%20Estimates%20Data%20Profiles&table=DP05&tid=ACSDP1Y2014.DP05&g=0400000US09\\_1600000US0950370&hidePreview=true&y=2014&vintage=2014](https://data.census.gov/cedsci/table?d=ACS%201-Year%20Estimates%20Data%20Profiles&table=DP05&tid=ACSDP1Y2014.DP05&g=0400000US09_1600000US0950370&hidePreview=true&y=2014&vintage=2014) [<https://perma.cc/HM5P-YP6Q>] (last visited Apr. 21, 2020).

236. See *supra* notes 6–12 and accompanying text.

immediate. During the course of a trial and before jury deliberations, the jurors are not supposed to talk about the case. Instead, they talk about weather, sports, family, current events, and daily life. Through these conversations they would learn to understand each other's accents.<sup>237</sup> If they did not understand something, they could simply ask the person to repeat or clarify.<sup>238</sup>

In the *Gould* case, one wonders if actual and de facto English language requirements were being used in the jurisdiction to systematically exclude Latinxs from the jury pool and petit juries. Attorneys, especially defense counsel, should become aware of the exclusionary trends of the jurisdictions in which they practice. Attorneys need to understand that accent is a racial trait and that perceived intelligibility of accent is often a race problem rather than a linguistic problem. Members of the bench and bar need to stop taking claims of English language deficiency and incomprehensible accent at face (facially neutral) value.

In addition to the legal challenges set forth above, internal reforms of the court system are necessary to address accent discrimination in jury selection. As demonstrated in the *Gould* case, judges can perpetuate accent discrimination. These reforms—which are beyond the scope of this Article—could include increased education about racialized linguistic difference, implicit bias training on linguicism, and development of evidence-based best practices concerning accent discrimination. Further, the problem of accent discrimination in jury selection demonstrates the need for juror language accommodation.

#### IV.

##### STRUCTURAL IMPLICATIONS OF ACCENT DISCRIMINATION AND THE NEED FOR JUROR LANGUAGE ACCOMMODATION

Accent discrimination in jury selection is an important issue in itself; however, it also reveals broader concerns about who is considered and permitted to be a full citizen in the United States. This section situates accent discrimination into the larger racial justice problems posed by juror language disenfranchisement. It exposes the breadth of linguistic discrimination in jury selection and remedial potential of juror language accommodation.

##### A. *Situating Accent Discrimination into the Structure of Race*

The narrative of the American Dream is one where all persons, irrespective of their immigrant heritage or race, can become fully “American.” The English language is touted as the mechanism to achieve full citizenship. It is considered the great equalizer.<sup>239</sup> However, the rewards of language assimilation are often a

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237. See *supra* notes 147–151 and accompanying text.

238. See Kavas & Kavas, *supra* note 149, at 887 (explaining that students not only got used to an instructor's L2 accent by class session 2 or 3, but also students were able to improve comprehension by discussing misunderstandings with the instructor or simply asking her or him to slow down).

239. Sean Kennedy, *Learning English should be part of American experience*, CNN OPINION (Sep. 17, 2015, 3:13 P.M.), <https://www.cnn.com/2015/09/17/opinions/kennedy-english-language->

fiction. The fallacy that English language attainment guarantees full citizenship is exposed by the fact that perceived-to-be-foreign people of color from all linguistic backgrounds are at risk of being rejected from jury service on the purported basis of language. This includes limited-English proficient speakers; fluent English speakers who have minority accents; fluent English speakers who have majority accents but are mistakenly perceived to have minority accents; and fully bilingual (or multilingual) individuals irrespective of their accents.

In the current legal landscape, English language juror prerequisites could be applied to disenfranchise people of color across the entire spectrum of linguistic ability. English language juror requirements outright exclude approximately 11 million limited-English proficient U.S. citizens of color—the majority of whom are Latinx—from the jury box, even though they would be able to serve with juror language accommodation. Even when prospective jurors speak English fluently, they are sometimes excluded on the basis of their accent, as exemplified by the *Gould* case.<sup>240</sup> Further, since perceptions about accent are highly subjective and racialized, even native English speakers might be misperceived to have heavy foreign accents and consequently excluded or discouraged from jury service.<sup>241</sup>

Questioning or targeting Latinxs, Asian Americans, or other groups considered foreign for English language screening is problematic in itself. It could encourage these individuals to opt out of jury service even when they are fully qualified to serve. Policies that permit or indirectly encourage underrepresented groups to opt out of jury service can violate the Constitution.<sup>242</sup> For instance, in *Duren*, the Supreme Court held that a Missouri statute allowing women to request an automatic exemption from jury service resulted in a systematic underrepresentation of women on jury venires in violation of the impartiality standard implied by the Sixth Amendment fair cross-section requirement.<sup>243</sup>

The juror language disenfranchisement of people of color extends beyond those who are English language learners or perceived to have a minority accent. Bilingual English-Spanish Latinxs have been struck from juries on the basis of their bilingualism, irrespective of their accent or English language communication abilities.

In *Hernandez v. New York*, the Supreme Court, in a plurality opinion, upheld a prosecutor's use of peremptory challenges to exclude Latinx jurors on the basis of their bilingual abilities.<sup>244</sup> The *Hernandez* case dealt with the criminal trial of a Latinx defendant from a heavily Spanish-speaking Latinx jurisdiction.<sup>245</sup>

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immigration/index.html [https://perma.cc/6NDU-2UTA] (“The most productive way to counter [racist and xenophobic] sentiments is to make a serious effort to help immigrants assimilate through school and work. . . . English is the fastest path to that goal . . .”).

240. *Gould I*, 109 A.3d 968 (Conn. App. Ct. 2015).

241. See discussion *supra* Part II.E.

242. *Duren v. Missouri*, 439 U.S. 357, 364, 366–67 (1979).

243. *Id.*

244. *Hernandez v. New York*, 500 U.S. 352, 353 (1991) (plurality opinion).

245. Anthony Fassano, *The Rashomon Effect, Jury Instructions, and Peremptory Challenges*:

Evidence at trial was to include Spanish-language testimony.<sup>246</sup> The prosecutor used peremptory challenges to exclude all of the Latinx prospective jurors.<sup>247</sup> In response to defense counsel's *Batson* challenge, the prosecutor claimed that he struck two of the Latinx jurors, not due to their race, but because they were English-Spanish bilingual.<sup>248</sup> The prosecutor maintained that he was not certain these prospective jurors would follow the English language translation of the Spanish language evidence.<sup>249</sup> The prosecutor acknowledged that he "believe[d] that in their heart[s]" the prospective Latinx jurors would try to follow the English language translation, but he supposedly felt there was still uncertainty if they could, in actuality, accept the translation.<sup>250</sup>

For Latinxs, and other people of color associated with immigration, being fluent in the English language is not enough to ensure that you are deemed linguistically sufficient or appropriate to serve on a jury. English fluency cannot remove the perceptions of foreignness that prevent full citizenship. English is not an equalizer, but instead a color-blind shield used by litigants, attorneys, and judges to conceal racial, ethnic, and national origin discrimination. While outright discrimination on the grounds that an individual looks "different" than the white majority is proscribed, the same discrimination justified on the basis that the individual sounds "different"—even when they do not—is too frequently tolerated in our courts.

The *Hernandez* case reveals the extent of juror language disenfranchisement and the unsettled state of the law in recognizing how linguistic discrimination can be a form of race discrimination. The individual opinions in the *Hernandez* case reflect a variety of perspectives on the relationship between race and language. Justice Stevens, joined by Justice Marshall, dissented in *Hernandez* and recognized the complex relationship between language and race.<sup>251</sup> Justice Stevens found the prosecutor's purported reason for striking the bilingual Latinx prospective jurors was "insufficient to dispel the existing inference of racial animus" because, amongst other reasons, the justification "would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons."<sup>252</sup> He noted that "[a]n explanation that is 'race-neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice."<sup>253</sup> Here, English-Spanish bilingualism was a proxy, or perhaps—more accurately—a pretext, for

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*Rethinking Hernandez v. New York*, 41 RUTGERS L.J. 783, 791–92 (2010).

246. *Hernandez*, 500 U.S. at 356–57.

247. *Id.* at 356, 358.

248. *Id.* at 356–57.

249. *Id.*

250. *Id.* at 356.

251. *See id.* at 379 (Stevens, J., dissenting) ("Each of these reasons considered alone might not render insufficient the prosecutor's facially neutral explanation. In combination, however, they persuade me that his explanation should have been rejected as a matter of law.").

252. *Id.*

253. *Id.*



discrimination. This is particularly apparent, when only Latinx prospective jurors were questioned and excluded on the basis of their bilingualism when non-Latinx prospective jurors might have understood the Spanish language as well.<sup>254</sup>

On the other hand, the concurring opinion by Justice O'Connor, joined by Justice Scalia, took a traditionalist perspective that “[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race.”<sup>255</sup>

The *Hernandez* plurality opinion by Justice Kennedy took a middle ground. Justice Kennedy recognized that linguistic discrimination can be linked to race or ethnicity so as to implicate a violation of equal protection, but ultimately upheld the use of peremptory strikes of bilingual prospective jurors.<sup>256</sup> Although Justice Kennedy did not find a sufficient link between race or ethnicity and language in that instance, he observed that “[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.”<sup>257</sup> Justice Kennedy noted that a “locality” might exist where a “significant percentage of the Latin[x] population speaks fluent Spanish” and prefers communicating in Spanish over English.<sup>258</sup> In such a locality, “[a] prosecutor’s persistence in the desire to exclude Spanish-speaking jurors . . . could be taken into account in determining whether to accept a race-neutral explanation for the challenge.”<sup>259</sup>

The lack of recognition that linguistic discrimination in jury selection is often race discrimination is particularly disconcerting because, after voting, jury service is arguably the most important responsibility of citizenship.<sup>260</sup> Participation in juries and the administration of justice “reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to

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254. Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 53–54 (1993) (noting that only Latinx jurors were asked about their fluency in Spanish). One in five K-12 students are enrolled in foreign language courses, and of those students almost 70% are learning Spanish. Corey Mitchell, *Just 20 Percent of K-12 Students Are Learning a Foreign Language*, EDUC. WK. (June 20, 2017), <https://www.edweek.org/ew/articles/2017/06/21/just-20-percent-of-k-12-students-are.html> [<https://perma.cc/9N5T-HFM8>]. Additionally, the vast majority of universities in the country offer Spanish courses, and close to 800,000 students each year are enrolled in such courses. MANEL LACORTE & JESÚS SUÁREZ-GARCÍA, *TEACHING SPANISH AT THE UNIVERSITY LEVEL IN THE UNITED STATES* 5–6 (2016), [http://cervantes-observatorio.fas.harvard.edu/sites/default/files/018\\_report\\_teaching\\_spanish\\_university\\_us.pdf](http://cervantes-observatorio.fas.harvard.edu/sites/default/files/018_report_teaching_spanish_university_us.pdf) [<https://perma.cc/475U-ANQ7>].

255. *Hernandez*, 500 U.S. at 375 (O’Connor, J., concurring).

256. Justice Kennedy observed that a person’s language can elicit a variety of responses from others, ranging from “distance and alienation, to ridicule and scorn. . . . [T]he latter type all too often result[s] from or initiate[s] racial hostility.” *Id.* at 371.

257. *Id.* at 371.

258. *Id.* at 363–64.

259. *Id.* at 364.

260. *Powers v. Ohio*, 499 U.S. 400, 407 (1991); *Gonzales Rose*, 65 HASTINGS L.J., *supra* note 37, at 829.

take part directly in our democracy.”<sup>261</sup> While our law formally forbids the exclusion of citizens from jury service on the basis of race, ethnicity, and national origin, racial exclusions can be achieved simply by couching the exclusion in terms of language ability, whether that is English language proficiency, accent, or multilingualism. As reflected in the *Hernandez* opinions, aside from the formalistic traditionalist perspective, moderate and liberal justices recognize that language can be a racial characteristic, and linguistic discrimination can be a pretext for race discrimination.

English language is both a formal and de facto requirement for American citizenship. For instance, to become a naturalized citizen of the United States, a person needs to demonstrate an “understanding of the English language, including the ability to read, write, and speak” English.<sup>262</sup> Although there is no official federal language, English is the dominant language of education, commerce, and government.<sup>263</sup> Aside from its practical significance, the English language in the United States has tremendous symbolic importance. In a crude vernacular, speaking English is referred to as “speaking American,” implying that those who speak English in a way that deviates from white Americans are foreign. Speaking English is promulgated as the key to full citizenship and success, especially by political conservatives.<sup>264</sup> However, even when a Latinx or Asian American speaks English fluently, they can still be foreclosed from jury service on the basis of language because of an actual or perceived accent or bilingual ability.

Juror language disenfranchisement and the lack of legal remediation also reveal how our legal system and civil rights laws are not fully equipped to deal with changing racial demographics. Latinxs are the largest racial and linguistic minority group in the United States.<sup>265</sup> Our civil rights law must be interpreted and crafted to address the ways that racial discrimination materializes against Latinxs in the United States. After Mexico, the United States has the largest number of Spanish-speaking people in the world.<sup>266</sup> The vast majority of these Spanish-speaking persons are Latinx. English language requirements and policies often target Latinxs.<sup>267</sup> Hispanic accents are considered inferior, offensive, and

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261. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (citing *Powers*, 499 U.S. at 407).

262. Immigration and Nationality Act of 1965 § 312(1), 8 U.S.C.A. § 1423(a)(1) (2018).

263. See, e.g., Bryan Lufkin, *What is the future of English in the US?*, BBC (Aug. 8, 2018), <https://www.bbc.com/worklife/article/20180808-what-is-the-future-of-english-in-the-us> [<https://perma.cc/77XA-MZWW>].

264. JUAN F. PEREA, RICHARD DELGADO, ANGELA HARRIS & STEPHANIE WILDMAN, *RACE AND RACES: CASES & RESOURCES FOR A DIVERSE AMERICA*, 781–91 (3d ed. 2015); Jeffrey M. Jones, *Most in U.S. Say It's Essential That Immigrants Learn English*, GALLUP (Aug. 9, 2013), <https://news.gallup.com/poll/163895/say-essential-immigrants-learn-english.aspx> [<https://perma.cc/DY3M-7N9U>].

265. Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 188 (2001).

266. See Burgen, *supra* note 35.

267. See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 356–57 (1992); Gonzales Rose, 65

inappropriate,<sup>268</sup> reflecting how racism morphs into accent preference. Linguistic discrimination has been a primary way that Latinxs have experienced racial discrimination. Further, with increasing leniency towards racism and xenophobia in the Trump era,<sup>269</sup> all people of color perceived as foreign are at increased risk of being subject to linguistic discrimination.

### B. Juror Language Accommodation

The problem of accent discrimination in jury selection, coupled with the fact that all persons of color perceived to be foreign are at risk of potential juror language disenfranchisement, bespeaks the need for juror language accommodation.<sup>270</sup> Juror language accommodation is language assistance through interpretation and translation services provided to individuals who need these services to fully participate as jurors. Juror language accommodation is not a new idea. It has a long history in the Anglo-American legal system. In the common law, mixed linguistic juries were utilized for several centuries.<sup>271</sup> In the Southwestern United States, from the 19th through the early 20th centuries, monolingual Spanish speakers frequently served on juries through the assistance of interpreters.<sup>272</sup>

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HASTINGS L. J., *supra* note 37, at 818; *see also id.* (“Often the popular movements that prompt legislative action are undeniably racist and anti-Latin[x]. These actions are motivated by a ‘fear of a Hispanic takeover’ and ‘questions about the intelligence and values of Latin American immigrants,’ and are pursued to further ‘missions of “race betterment.””) (quoting Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 NEV. L. J. 895 (2007); Philip C. Aka & Lucinda M. Deason, *Culturally Competent Public Services and English-Only Laws*, 53 HOW. L. J. 53, 85 n. 207 (2009)).

268. LIPPI-GREEN, *supra* note 43, at 73, 85.

269. *See, e.g., US Racism on the Rise, UN Experts Warn in Wake of Charlottesville Violence*, OFF. HIGH COMMISSIONER FOR HUM. RTS. (Aug. 16, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21975> [<https://perma.cc/CKK3-HTKE>]; Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, PEW RES. CTR. (Apr. 9, 2019), <https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/> [<https://perma.cc/XZ8L-ZFBM>]; Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What Do the Data Say?*, BROOKINGS INST. (Aug. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/> [<https://perma.cc/A7X2-PN27>].

270. For a more detailed discussion of “juror language accommodation,” *see* Gonzales Rose, 6 ALA. C.R. & C.L. L. REV., *supra* note 37, at 191; *see also* Gonzales Rose, 65 HASTINGS L. J., *supra* note 37, at 857–64; Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497, 546–549 (2011).

271. Gonzales Rose, 65 HASTINGS L. J., *supra* note 37, at 857–58 (citing Deborah A. Ramirez, *A Brief Historical Overview of the Use of the Mixed Jury*, 31 AM. CRIM. L. REV. 1213, 1214 (1994); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 790 (1994)).

272. *Town of Trinidad v. Simpson*, 5 Colo. 65, 68 (1879) (holding it was “fully within the power of the court to appoint an interpreter . . . to interpret the testimony of witnesses and the arguments of counsel” for a non-English-speaking juror); Gonzales Rose, 65 HASTINGS L. J., *supra* note 37, at 858 (citing Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 L. & SOC’Y REV. 1129, 1166, 1172–73 (2000); Douglas A. Kibbee, *Minority Language Rights: Historical and Comparative Perspectives*, 3 INTERCULTURAL HUM. RTS. L. REV. 79, 90 (2008); Colin A. Kisor, *Using Interpreters to Assist*

Currently, juror language accommodation is a state constitutional right in the state courts of New Mexico.<sup>273</sup> New Mexico has developed detailed procedures for juror language accommodation over the past 150 years.<sup>274</sup> Certified court interpreters are governed by the New Mexico courts' Non-English-Speaking Juror Guidelines.<sup>275</sup> Under these guidelines, all parties and jurors are informed of the interpreters' role, and the interpreters take an oath in open court that they "will only provide translation services to the non-English-speaking juror and will not otherwise participate in the trial or jury deliberations."<sup>276</sup> Throughout the trial and jury deliberations, the interpreter provides simultaneous, consecutive interpretation, as well as translation services.<sup>277</sup>

A parallel juror language accommodation service is mandated for all federal and state courts for hard of hearing and deaf jurors.<sup>278</sup> Sign language interpretation for these jurors is mandated by the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973.<sup>279</sup> Hard of hearing and deaf jurors, as well as non-English speaking jurors in New Mexico, have successfully served as jurors.<sup>280</sup> There are current models that could be followed to implement juror language accommodation programs in courts throughout the United States.

In some respects, discussing juror language accommodation in the same breath as accent discrimination is not appropriate. By definition, accent discrimination is discrimination on the basis of (perceived) pronunciation and not actual language (in)ability. In other words, victims of accent discrimination do not need language accommodation. They need racially tolerant and open ears, minds, and hearts. However, there may be some instances on the margins where concerns about an English-language learners' linguistic abilities are legitimate, and the juror may require assistance to serve. Just as importantly, the option of juror language accommodation could foreclose accent discrimination. Judges and counsel, who

*Jurors: A Plea for Consistency*, 22 CHICANO-LATINO L. REV. 37, 41–43 (2001)).

273. N.M. CONST. art. VII, § 3 (2019) ("The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages . . .").

274. Edward L. Chávez, *New Mexico's Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303, 305 (2008).

275. *Id.* at 308.

276. *Id.*

277. *Id.* at 309.

278. Kisor, *supra* note 272, at 38–39.

279. 42 U.S.C. § 12132 (2012 & Supp. V 2018); 29 U.S.C. § 794(a) (2012 & Supp. V 2018); *Effective Communication for Persons Who Are Deaf or Hard of Hearing*, DEP'T HEALTH & HUM. SERVICES (June 16, 2017), <https://www.hhs.gov/civil-rights/for-individuals/disability/effective-communication/index.html> [<https://perma.cc/MMH7-TCFD>] (explaining that both deaf and hard of hearing individuals can be covered under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act).

280. For more information on juror language accommodation and how and why it works, see Gonzales Rose, 46 HARV. C.R.-C.L. L. REV., *supra* note 37, at 546–49; Gonzales Rose, 6 ALA. C.R. & C.L. L. REV., *supra* note 37, at 190–97; Gonzales Rose, 65 HASTINGS L. J., *supra* note 37, at 857–64.

believed that a potential juror's accent is too "thick" or that their way of speaking English indicates a lack of requisite fluency, would be tasked with offering juror language accommodation services rather than disqualification and exclusion. The availability of such services may also deter judges and counsel from using accent or language ability as a pretextual means to make race-based for-cause or peremptory challenges during jury selection.

Juror language accommodation would mitigate juror language disenfranchisement and serve the purpose of inclusion. Juries are vital to our legal system. Thomas Jefferson considered juries to be "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."<sup>281</sup> Alexis de Tocqueville observed that "[a]ll of the privileges of a complete and free society are guaranteed and reinforced [in the United States] by the fact that all citizens have a right, no matter who their opposition, to have their rights heard before a jury of their peers. This secures to America its unique form of democratic government and the freedoms that abound."<sup>282</sup> The Supreme Court has declared that juries must be "a body truly representative of the community"<sup>283</sup> so that the "common sense judgment of the community" can guard against arbitrary abuses of power.<sup>284</sup>

In this nation of immigrants, comprised of people of diverse races, ethnicities, and national origins, our courts and legislatures need to take action to ensure that juries represent the communities from which they are derived. This should entail both enforcing current law and policies that prohibit linguistic discrimination in jury selection, as well as enacting new laws and policies—such as universal juror language accommodation—which value diversity and inclusion in the jury system.

## V.

### CONCLUSION

Juror language disenfranchisement bars millions of U.S. citizens of color from the jury box. Accent discrimination in jury selection is one of the most pernicious and unjustifiable forms of this exclusion. Yet, very few judges, lawyers, scholars, and others are even aware of this problem. The innate connection between accent, race, and racism is also overlooked. Accent discrimination in jury selection harms litigants, criminal defendants, prospective jurors, and the perceived and actual fairness and legitimacy of the courts. Juries are central to democratic self-governance<sup>285</sup> and must be representative of the community.<sup>286</sup> At a

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281. See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 16 (2007) (quoting Thomas Jefferson).

282. George Burnett, *President's Perspective*, 77 WIS. LAW. 5 (May 1, 2004), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=77&Issue=5&ArticleID=770> [<https://perma.cc/HM83-VKCS>].

283. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

284. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

285. *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

286. *Glasser v. United States*, 315 U.S. 60, 86 (1942).

time in our nation's history when racism and xenophobia are increasingly blatant,<sup>287</sup> there might be an inclination to let pass seemingly color-blind—or, more accurately, color-deaf—discrimination. Ultimately, racial discrimination by the ears is just as injurious and unjust as racial discrimination by the eyes. It is imperative that our legal system recognizes and remediates accent and all other forms of linguistic discrimination in the jury selection process.

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287. See Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, PEW. RES. CTR. 6 (Apr. 9, 2019), <https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/> [<https://perma.cc/9ERG-6GD6>] (The majority of Americans report that it is currently more common for people to express racist views than before Donald Trump was elected.).