Notes

No Mere “Matter of Choice”: The Harm of Accent Preferences and English-Only Rules*

Introduction

Native-born members of democracies—perhaps driven by fears of economic and cultural usurpation—have long resented and felt threatened by immigrants. Even the United States, a country famously built by immigrants, has a history of hostility towards immigrants that stretches back centuries. Despite that widespread opposition, the number of immigrants to the United States is increasing all the time. Each year, hundreds of thousands of immigrants move to the United States hoping to take advantage of the economic, societal, and educational opportunities this country has to offer. With more immigrants, more contact between native English speakers and those who speak English as a second language is inevitable. That contact has spurred a number of conflicts between native-born Americans and immigrants and their children. This Note will focus on the conflicts caused by the differences in languages of those two groups, particularly the problems caused by accent preferences and English-only rules.

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2. Id.
3. See Randall Monger & James Yankay, U.S. Legal Permanent Residents: 2011, U.S. DEP’T HOMELAND SEC. ANN. FLOW REP. 1, 1 fig.1 (2011) (finding that the number of people becoming legal permanent residents is increasing).
4. Id. at 4 tbl.3; see Michael Hoefer et al., Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011, U.S. DEP’T HOMELAND SEC. POPULATION ESTIMATES 1, 5 tbl.3 (2012) (stating that the average annual change in unauthorized immigrant population from 2000 to 2011 was 280,000).
5. I would like to note at the outset that, particularly in the context of English-only rules, much of this Note will deal with Latino national origin and the Spanish language. That focus is not deliberate, but is instead a function of Latinos being the largest immigrant group to the United States. Monger & Yankay, supra note 3, at 4 tbl.3; Hoefer et al., supra note 4, at 5 tbl.3. Other national origin groups certainly bring lawsuits against employers because of English-only rules. See, e.g., Kania v. Archdiocese of Phila., 14 F. Supp. 2d 730, 731 (E.D. Pa. 1998) (denying the defendant’s motion to dismiss a claim against an English-only rule brought by a Polish speaker); Edward M. Chen, Garcia v. Spun Steak Co.: Speak-English-Only Rules and the Demise of Workplace Pluralism, 1 ASIAN L.J. 155, 159 n.22 (1994) (listing challenges to English-only rules brought by Asian Pacific Islanders). I intend for this analysis to apply to all foreign national origin groups.
Many employers have enacted “English-only rules” that prohibit the speaking of any languages other than English at work. Other employers have passed over immigrants for employment opportunities because of their accents. These employers generally feel that they are justified in taking these actions based on the needs of their businesses, but since the 1980s, immigrants have regularly filed lawsuits challenging these policies and decisions. Title VII of the Civil Rights Act of 1964 protects immigrants and their descendants from discrimination on the basis of national origin. Immigrants who have been denied jobs because of their foreign accents have sued employers, alleging national origin discrimination. They have also used Title VII to sue employers who institute English-only rules, claiming that the negative effect the rules have on them as non-native English speakers amounts to national origin discrimination. Despite the strong links between national origin, language, and accents, courts have been reluctant to rule for plaintiffs on these claims. Courts generally find either that there is not significant harm to the plaintiff, or that the employer has sufficient business reasons to justify its decision or policy.

Part I of this Note lays out the legal framework for these national origin discrimination claims. In Part II, this Note tells the stories of several plaintiffs who challenged English-only rules and accent-based hiring decisions. Part III argues that many courts are doing a great disservice to the goals of Title VII in the way they treat these claims. Part IV explores the harm caused by English-only rules and accent preferences based on the link between language and accent and one’s national origin. To many immigrants, language and accent are very much a part of who they are and are not as mutable as courts generally assume. Kenji Yoshino argues that much of the discrimination that goes unchecked today involves forcing minorities to hide, or “cover,” traits linked to their minority status, which does serious harm to the identities of members of those groups. By forcing employees to cover their accents and native languages, employers are attacking the national origin identities of those employees. Part V argues that after recognizing the severity of those attacks, courts should analyze claims against English-only rules and accent discrimination differently and scrutinize employers’ business justifications more closely.

6. For the sake of convenience, I will often use the term “immigrants” to refer to the employees of non-U.S. national origin who are affected by these rules. However, as will be explained below, first-generation immigrants, naturalized citizens, and the children of those immigrants are all protected equally under Title VII’s definition of “national origin.”
7. See infra Part II.
10. See infra subpart II(B).
11. See infra subpart II(A).
12. See infra subpart III(B).
I. The Framework of Lawsuits Against English-Only Rules and Accent Discrimination

Title VII provides that:

It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . national origin.14

National origin is not formally defined in Title VII,15 and did not get as much attention as the other protected categories during the legislative debates about Title VII.16 However, since the passage of Title VII, national origin has been interpreted broadly by the Equal Employment Opportunity Commission (EEOC), which issues interpretive guidelines on employment discrimination issues, and by the Supreme Court. In Espinoza v. Farah Manufacturing Co.,17 the Supreme Court examined the “quite meager” portion of Title VII’s legislative history that dealt with national origin.18 The Court found that national origin “on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”19 The EEOC later issued its Guidelines on Discrimination Because of National Origin, which define national origin discrimination as “the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin.”20 Some commentators complain about the vagueness of this definition21 and attempt to reformulate the language to better protect people from discrimination on the basis of their national origin groups.22 However,

15. Id. § 2000e.
18. Id. at 88–89.
19. Id. at 88.
21. See, e.g., Mark Colon, Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees, 20 YALE L. & POL’Y REV. 227, 231–32 (2002) (finding that the legislative history of Title VII and the Supreme Court’s definition of “national origin” “offer[] no guidance regarding employment practices aimed at underlying personal characteristics, including language, that are often closely associated with national origin”).
taken at its plain meaning, this definition should provide protection against language and accent discrimination.

Plaintiffs use Title VII to bring several types of claims against employers for accent preferences and English-only rules. Plaintiffs who allege accent discrimination are mostly limited to claiming disparate treatment. To succeed in a disparate treatment suit, a plaintiff must show that (1) he was a member of a protected class; (2) he was qualified for a position; (3) an adverse employment action was taken against him; and (4) that adverse employment action “occurred under circumstances giving rise to an inference of discrimination.”

To rebut that showing, the employer must establish that it actually took the adverse action because of some “legitimate, nondiscriminatory reason.” For an employer to have an acceptable business reason for discriminating against a plaintiff because of his accent, it must show that the accent “interferes materially with job performance.” If the employer establishes a legitimate nondiscriminatory reason, the plaintiff can attempt to show that the stated reason was actually a pretext for a prohibited motivation. The plaintiff can also claim disparate treatment under a mixed-motive framework, although his remedies could be limited. Under this framework, the employee would have to show that even if the employer had legitimate reasons for taking an adverse action against the employee, the employee’s protected trait was still impermissibly considered.

Immigrants who file suit against employers because of their English-only rules can bring claims for disparate impact, hostile work environment, and possibly, as Part V will argue, systemic disparate treatment. In a disparate impact case, plaintiffs allege that an employer has a policy or practice that is facially neutral, but whose effect disproportionately burdens a protected class. A plaintiff does not have to show that the employer had a discriminatory intent to prevail on a disparate impact claim. Disparate impact claims against English-only rules generally fall under 42 U.S.C. § 2000e-2(a)(1), so a plaintiff must show that the rule’s uneven burden

23. See In re Rodriguez, 487 F.3d 1001, 1008 (6th Cir. 2007) (adapting the original claim structure laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
25. Fragante v. City of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989).
27. See 42 U.S.C. § 2000e-5(g)(2)(B) (2006) (limiting plaintiffs to declaratory and injunctive relief but not allowing damages for mixed-motive claims in which the employer shows it would have “taken the same action in the absence of the impermissible motivating factor”).
28. See Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (laying out this framework for mixed-motive cases); Fragante, 888 F.2d at 598 (examining an accent-discrimination plaintiff’s claim for signs of an employer’s mixed motive).
30. Id.
affects the “terms, conditions, or privileges of employment.” The Supreme Court has held that “[t]he phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment,” and that Title VII “covers more than ‘‘terms’’ and ‘‘conditions’’ in the narrow contractual sense.” Courts have acknowledged that “policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and . . . may be considered ‘discriminatory.’” If a plaintiff can show that a policy has that effect, the burden shifts to the employer to prove that its policy is “consistent with business necessity.” Finally, if an employer can establish business necessity, the plaintiff must prove that there is an “alternative employment practice” that can accomplish the employer’s business goals with a less discriminatory effect.

To bring a hostile work environment claim, a plaintiff must show that his “workplace is permeated with ‘discriminatory intimidation, ridicule, and insult,’ . . . that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” “Conditions” here has the same broad meaning that it does under disparate impact analysis. For the plaintiff to prevail, he must establish that the harassing circumstances are “severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.” Hostile work environment claims can be brought as disparate treatment claims, in which the plaintiff needs to prove discriminatory intent, or as a type of disparate impact claim, which is more common in suits against English-only rules.

34. E.g., Garcia, 998 F.2d at 1485.
38. Cf. Garcia, 998 F.2d at 1485–86 (applying the broad definition of “conditions” that the Supreme Court used in Meritor Savings Bank to a disparate impact claim predicated on burdensome conditions).
40. Maldonado v. City of Altus, 433 F.3d 1294, 1304 (10th Cir. 2006). Though it is not relevant to the purposes of this Note, it should be noted that the remedies for disparate impact claims are less extensive than those for disparate treatment claims. Id.
The EEOC issued guidelines about disparate impact and hostile work environment claims concerning English-only rules in 1980.\(^{41}\) The guidelines differentiate between blanket English-only rules that apply at all times and those that better conform to the necessities of the job by having a more limited application. The EEOC presumes that a blanket rule is “a burdensome term and condition of employment,” meaning that a plaintiff who sues an employer because of that rule will have automatically made out a prima facie case of disparate impact.\(^{42}\) The guidelines also acknowledge that English-only rules that apply at all times may create a hostile work environment for employees of non-U.S. national origin.\(^{43}\) The EEOC is less critical of rules that do not apply at all times, but still advises courts that employers should have to show that even these policies are justified by business necessity.\(^{44}\) Courts have varied in the value they place on these EEOC guidelines.\(^{45}\)

Beyond the disparate impact and hostile work environment claims endorsed by the EEOC guidelines, plaintiffs may be able to claim that English-only rules constitute overt systemic disparate treatment.\(^{46}\) An overt systemic disparate treatment claim can be brought against a policy that facially discriminates against a protected class and has widespread effects.\(^{47}\) If a plaintiff can show that an employer’s policy is facially discriminatory, the only way for an employer to avoid liability is to establish that the discrimination relates to a bona fide occupational qualification (BFOQ).\(^{48}\) The Supreme Court interprets the BFOQ defense very narrowly.\(^{49}\) In order to carry its burden, an employer must show that the discriminated-against trait “relate[s] to the ‘essence’ . . . or to the ‘central mission of the employer’s business.’”\(^{50}\) That task is significantly more difficult than establishing business necessity under the disparate impact framework.\(^{51}\)

\(^{41}\) 29 C.F.R. § 1606.7 (2012).
\(^{42}\) Id. § 1606.7(a).
\(^{43}\) Id.
\(^{44}\) 29 C.F.R. § 1606.7(b).
\(^{45}\) Compare Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993) (declining to follow the guidelines), with EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999) (showing significant deference to the guidelines).
\(^{46}\) I learned this apt term in Professor Joseph Fishkin’s employment discrimination course and was surprised to find it had not been adopted elsewhere.
\(^{47}\) Michael J. Zimmer et al., Cases and Materials on Employment Discrimination 115–16 (7th ed. 2008).
\(^{49}\) See Johnson Controls, 499 U.S. at 201 (noting that “[t]he BFOQ defense is written narrowly, and this Court has read it narrowly”).
\(^{50}\) Id. at 203 (internal citations omitted).
\(^{51}\) Id. at 198.
II. Stories of English-Only Rules and Accent Discrimination

Most lawsuits concerning English-only rules and accent discrimination are personal stories of struggles to feel accepted in the workplace. Below is a selection of a few of these stories, some of which courts found to be compelling enough to warrant relief, some of which they did not.

A. English-Only Rules

Jessie Kania was a Polish immigrant who worked as a housekeeper for a church. She was bilingual and mostly spoke English on the job, but she would occasionally speak in Polish. After Kania had been working at the church for five years, it enacted a rule making English the “official language” of the church and banning employees from speaking Polish during business hours. Kania objected to the rule and maintained that the church “did not have the right to prevent her from speaking her native language at work,” and she was fired a few weeks later. In her lawsuit for national origin discrimination, the court did not address her allegation that “the English-only policy was a blanket rule that applied at all times during business hours, including when the Church’s employees were at lunch, on break, and in non-public areas.” Instead, the court was content to credit the church’s justification that “it is offensive and derisive to speak a language which others do not understand,” and that an English-only rule was necessary “to improve interpersonal relations at the Church, and to prevent Polish-speaking employees from alienating other employees, and perhaps church members.”

Priscilla Garcia and Maricela Buitrago worked at Spun Steak, a poultry- and meat-product distributor that employed primarily bilingual Hispanic workers. These employees generally spoke to each other in Spanish, until management received a complaint that they were harassing non-Spanish-speaking employees in Spanish. Spun Steak then issued a rule that only English could be spoken while working (although Spanish could still be spoken during lunch and breaks), as well as a rule forbidding all offensive remarks. Spun Steak explained that the English-only rule was enacted partly to “enhance worker safety because some employees who did not understand Spanish claimed that the use of Spanish distracted them while

53. Id.
54. Id.
55. Id. at 732.
56. Id. at 731.
57. Id.
58. Id. at 736.
60. Id.
61. Id.
they were operating machinery." 62 After Garcia and Buitrago received warnings for speaking Spanish at work, they filed a lawsuit alleging that the rule had a disparate impact against them on the basis of their national origin.63 The court emphasized that the employees did not have a protected right to “express their cultural heritage at the workplace,” and that they could “readily comply with the English-only rule.” 64 It also disregarded the employees’ allegation that they might involuntarily violate the English-only rule because of uncontrollable code-switching between Spanish and English.65 Lastly, the court did not credit the employees’ claim—supported by the EEOC guidelines—that such a rule inherently creates a hostile work environment for them because of their national origin.66 The court instead demanded to see specific proof of this matter, which it found lacking in the plaintiffs’ case.67

Tommy Sanchez was one of twenty-nine bilingual Spanish- and English-speaking employees employed by the city of Altus, Oklahoma.68 When Sanchez heard that the city was going to pass an English-only rule, he raised concerns about the rule with the city’s Street Commissioner.69 The commissioner dismissed Sanchez’s complaint and argued that Sanchez “would feel uncomfortable if another race would speak their native language in front of [him].”70 Sanchez wrote a letter responding that:

[W]e Hispanics are proud of our heritage and do not feel that our ability to communicate in a bilingual manner is a hindrance or an embarrassment. There has never been a time that because I spoke Spanish to another Spanish speaking individual, I was unable to perform our job duties and requirements.71

The city continued with its plans and passed a rule that “all work related and business communications during the work day shall be conducted in the English language.” 72 The policy made two exceptions, one for “strictly private communications between co-workers” (but only during breaks, and only “if City property is not being used for the communication”), and the other for “strictly private communication between an employee and a family member” (but only if “the communications are limited in time and are not disruptive to the work environment”).73 The employees stated that the effect

62. Id.
63. Id. at 1483–85.
64. Id. at 1487.
65. Id. at 1488. For a discussion of code-switching, see infra subpart IV(B).
66. Garcia, 998 F.2d at 1488–89.
67. Id. at 1489.
68. Maldonado v. City of Altus, 433 F.3d 1294, 1298 (10th Cir. 2006).
69. Id. at 1299.
70. Id. (alteration in original) (internal quotation marks omitted).
71. Id.
72. Id. (emphasis omitted).
73. Id. (emphasis omitted).
of the rule was such that they could never speak Spanish around non-Spanish speakers, even during phone calls with family members. 74 In suing the city over its English-only policy, each plaintiff stated that the rule “reminds me every day that I am second-class and subject to rules for my employment that the Anglo employees are not subject to.” 75 The plaintiffs also introduced evidence that they were consistently mocked by non-Hispanic employees because of this policy, and frequently reminded that they were forbidden from speaking Spanish. 76 The district court granted summary judgment against the plaintiffs’ claims that the English-only rule caused a disparate impact and created a hostile work environment, 77 but the Tenth Circuit found that there were genuine issues of material fact and overturned the lower court’s decision. 78

Albert Estrada and Francisco Gracia were among a group of bilingual workers hired by Premier Operator Services to serve as telephone operators specifically because of their Spanish-speaking abilities. 79 However, to control the use of that Spanish, Premier posted a sign on the door of the building that read:

> Absolutely No Guns, Knives or Weapons of any kind are allowed on these Premises at any time! English is the official language of Premier Operator Services, Inc. All conversations on these premises are to be in English. Other languages may be spoken to customers who cannot speak English. 80

The policy banned employees from speaking Spanish at all times, including during lunch and breaks. 81 For personal calls in Spanish, the employer installed a pay phone outside of the building. 82 The company president was also quoted as referring to his Hispanic employees as “wetbacks” multiple times. 83 Estrada and Gracia filed a complaint with the EEOC after Premier forced them to sign a memo stating that they agreed to the English-only policy. 84 Premier fired six employees who refused to sign the memo, and then fired Estrada and Gracia after they filed their complaint. 85 In a lawsuit brought by the EEOC on behalf of these employees, the court agreed that the

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74. Id. at 1300.
75. Id. at 1301.
76. Id.
77. Id. at 1302.
78. Id. at 1316.
80. Id. at 1069. The court noted that it was “conspicuous[ ]” that the sign coupled the English-only policy with a prohibition on weapons. Id. at 1068–69.
81. Id. at 1069.
82. Id. at 1071.
83. Id.
84. Id. at 1069.
85. Id.
plaintiffs had shown that the employer enacted the rule with a discriminatory intent and awarded damages to the employees.

B. Accent Discrimination

Manuel Fragante grew up in the Philippines, where he learned English from an early age. He served in the U.S. military during the Vietnam War. After the war, he continued his military training in Indiana and Kansas. Fragante repeatedly earned “excellent” English language ratings from his superiors and never received complaints about his accent. At the age of 60, he emigrated to Hawaii and, though he was old enough to retire, began looking for a job. He applied to be a clerk at the City of Honolulu’s Division of Motor Vehicles and Licensing, which required that he take an exam that tested “among other things, word usage, grammar and spelling.” Out of 721 test takers, Fragante’s score was the highest. But when he was interviewed for the position, his interviewers stated that they had a hard time understanding him because of his Filipino accent, and concluded that his accent “would interfere with his performance of certain aspects of the job.” At the trial for his disparate treatment claim against the DMV, two expert witnesses testified that even though Fragante had a heavy accent, his speech was comprehensible, but that because of a history of discrimination against foreign accents like his, listeners may “turn off” and not understand him. However, in affirming the trial judge’s decision to dismiss Fragante’s complaint, the court explained that there was nothing wrong with making an “honest assessment” of a candidate’s “oral communication skills,” and credited the district court’s finding that Fragante “had a difficult manner of pronunciation,” even though there was only one occasion during the trial when the judge had to ask Fragante to clarify a statement.

Ramzy Salem was an immigrant from Palestine who had worked at La Salle High School for thirteen years, eleven of which as the chairperson of...
the school’s mathematics department. However, when the school’s administration changed before what would have been his fourteenth year at the school, the new principal told Salem that, in addition to alleged insufficiencies in his teaching abilities, “[l]anguage difficulties . . . hinder[ed] [his] ability to function” to the point that the principal had decided not to offer him a new contract. In its defense against Salem’s lawsuit for disparate treatment on the basis of national origin, the school presented several reasons aside from Salem’s accent that caused it not to offer him a new contract, but it also argued that Salem should have taken steps to lessen the effects of his accent. The court credited these as legitimate, nondiscriminatory reasons for the school’s actions, and found that Salem had not shown that he was discriminated against because of his Palestinian nationality, meaning that he could not establish that the school’s proffered reasons were a pretext.

Patricia Lee was born in China and received her medical degree from the National Taiwan University College of Medicine, then moved to the United States and practiced medicine at the Veterans Administration Medical Center in Pennsylvania. She worked there as a physician for fifteen years, during which time she regularly requested, but was denied, promotion. Her superiors frequently complained about her foreign accent. One supervisor would get angry with her because he could not understand her, and another supervisor would not talk to her unless she was with someone who could act as an interpreter for her. When Lee sued the hospital for race and national origin discrimination, the hospital claimed that she did not receive a promotion because her credentials from the Taiwanese medical school were not adequate. The court determined that this explanation was a pretext for national origin discrimination, as degrees from the school Lee attended qualify its graduates to sit for licensing exams in the U.S. The court also emphasized that Lee’s accent—while “quite noticeable”—did not hinder her ability to communicate and should not have been considered in decisions about Lee’s promotion.
Casserene Cassells, a woman of Jamaican ancestry, worked as a nurse at a hospital.111 Cassells claimed she was subjected to frequent abuse at the hands of her supervisor. Along with several racially charged remarks, Cassells’ supervisor told her that she “did not like Jamaicans,” and that “she had previously beaten a Jamaican woman and would do the same to [Cassells] if she did not follow orders.”112 The supervisor also ordered Cassells to “get rid of her Jamaican accent.”113 Cassells sued the hospital for disparate treatment on the basis of her race and national origin, and the court found that her claims were sufficient to survive the hospital’s motion for summary judgment.114

III. The Shortcomings of the Courts’ Decisions

The above cases expose a set of common mistakes that courts make in their reasoning in English-only rule and accent discrimination cases. First, it is quite likely that some of these courts simply do not place much value on foreign languages and accents. This is admittedly a somewhat inflammatory argument, but there is a good deal of evidence to support it. Regardless of whether they fall prey to devaluing foreign languages and accents or not, courts certainly underestimate the harm done to employees when they are denied jobs because of their accents or told they cannot speak their native languages any time they are working.

A. Devaluing Other Languages and Accents

It is quite possible that courts so often rule against plaintiffs in English-only rule and accent discrimination cases because—perhaps on a subconscious level—they do not place much value on foreign languages and accents. There is a long history of American hostility to foreign immigration.115 In more recent years, this hostility has been particularly strong against Hispanics, which has led to an aversion to the Spanish

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112. Id. at 146.
113. Id.
114. Id. at 148.
115. See Paxton & Mughan, supra note 1, at 549–50 (“Even the United States, itself perhaps the archetypal immigrant society, has a long history of prejudice against newcomers to its shores.”).
language. Many English-only rules appear to have been the result of that sentiment.

Through their questionable choice of language and lack of scrutiny of employers’ stated business reasons for these policies, courts show that perhaps they too think that Spanish and other foreign languages are not worth protecting. Alfredo Mirandé observes that courts sometimes use problematic language in discussing English-only policies. He points out that in English-only rule cases, courts often refer to employees being “caught” or “overheard” speaking Spanish, and “voluntarily” speaking Spanish even though “they were ‘capable’ of speaking English.” This choice of language—as opposed to simply stating that “the employee spoke Spanish in violation of the policy”—indicates that courts may sometimes feel that there is something inherently wrong with speaking Spanish at work. Mirandé also argues that many English-only rules are effectively just “no Spanish” rules. By crediting employers’ flimsy business-necessity justifications for such rules, courts show that they do not place much value on employees’ interest in being able to speak Spanish in the workplace.

Other business justifications accepted by courts expose their possible bias against foreign languages more generally. The court in *Kania v. Archdiocese of Philadelphia* accepted the employer’s statement that “it is offensive and derisive to speak a language which others do not understand.” Note that the employer here did not say anything about the content of that speech—just that the foreign language itself was offensive. In another case, an employer justified an English-only policy by stating that speaking Spanish was “very rude,” and that refraining from speaking a language in front of someone who does not understand it was a matter of

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116. See, e.g., JAMES CRAWFORD, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF “ENGLISH ONLY” 150–51 (1992) (discussing the hostility of the chairman of the U.S. English movement to Hispanics and the Spanish language); Alfredo Mirandé, “En la Tierra del Ciego, El Tuerto es Rey” (“In the Land of the Blind, the One Eyed Person is King”): Bilingualism as a Disability, 26 N.M. L. REV. 75, 102–03 (1996) (observing that “speaking Spanish in the United States has been devalued historically” and illustrating that by pointing to the historical prevalence of “No Spanish” rules in schools throughout the Southwest and the punishment of “Spanish detention”).

117. See, e.g., Saucedo v. Bros. Well Serv., Inc., 464 F. Supp. 919, 921–22 (S.D. Tex. 1979) (holding against an employer who had a rule prohibiting any “Mexican talk” at work and who assaulted a Mexican employee when he tried to defend a coworker who was fired for speaking Spanish); Maldonado v. City of Altus, 433 F.3d 1294, 1301 (10th Cir. 2006) (recounting that the mayor of a town that instituted an English-only rule for municipal employees was quoted as calling Spanish “garbage”; the mayor later “claim[ed] that he used the word garble and was misquoted”); EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1069 (N.D. Tex. 2000) (noting the stigmatizing effect of including an English-only rule directly following and on the same sign as a prohibition on weapons).

118. Mirandé, supra note 116, at 103.

119. Id. at 85–86.


121. Id. at 731.
“common courtesy.” 122 The trial court found no problem with that justification.123 The court in Garcia v. Spun Steak124 did not address the questionable reasoning behind the employer’s justification that hearing Spanish was “distract[ing].”125 That courts would not scrutinize employers’ claims that speaking a foreign language is “offensive,” “rude,” and “distracting” says a great deal about their opinions of foreign languages.

Judicial treatment of accent discrimination cases also reveals a possible tendency to hold foreign accents in low esteem. For instance, even though the district court judge only had to ask Manuel Fragante to clarify one of his statements in the entire trial,126 the judge stated that Fragante had a “difficult manner of pronunciation.”127 Furthermore, there is substantial evidence that listeners are vulnerable to being influenced by their biases in evaluating the speech of someone with a different manner of speaking than they have.128 As one of Fragante’s experts testified, people with biases against Filipinos would be likely to “turn off” when listening to someone like Fragante talk, and thus not be able to understand him.129 There are marked differences in how people comprehend speech based on the perceived status of an accent. Those who speak with a low-status accent are forced by societal necessity to understand high-status accents, but those with high-status accents often cannot understand lower-status accents.130 In this case, foreign accents hold this lower status, so many Anglo-Americans who speak with a so-called higher-status accent have trouble understanding foreign accents.131 By not addressing these phenomena, there is a danger that judges are themselves falling victim to this sort of unconscious bias.

B. Underestimating the Harm

Even if courts are not biased against foreign languages and accents, their decisions show that many of them do not appreciate the harm that English-only rules and accent discrimination cause. In English-only cases,
plaintiffs are almost always told that speaking English instead of Spanish is simply a “matter of choice,” so the rules do them no harm. In accent cases, courts generally find that limiting immigrants’ employment opportunities because of their accents is not a serious harm, because they feel that immigrants can simply work to get rid of their accents. Even when courts do acknowledge that accent-based hiring decisions or English-only rules harm the plaintiffs, they are still very deferential to employers’ claims that these hiring decisions and language policies are justified by business necessity and thus rule against the plaintiffs. Courts normally assume that these decisions were not made with any harmful discriminatory intent unless that intent is blatantly obvious from the facts of the case.

In *Garcia v. Spun Steak*, the court found that Spun Steak’s English-only rule did not have an adverse impact on the Spanish-speaking employees because “the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.” The court also held that in order to show that the rule created a hostile work environment, the employees would have to make a specific factual showing of the hostile circumstances. In doing so, the court dismissed as “conclusory” the plaintiffs’ allegations that “the policy has contributed to an atmosphere of ‘isolation, inferiority or intimidation,’” essentially ignoring the possibility that the existence of the English-only rule itself had a harmful impact. The court in *Long v. First Union* took a similar approach. It framed the issue as a dispute over the “privilege” of speaking in one’s “native tongue” at work, the denial of which did not amount to an adverse impact. In *Kania v. Archdiocese of Philadelphia*, the court also emphasized that since the bilingual plaintiff “could have readily complied with the English-only rule,”
it did not cause her any harm. All of these courts dismissed the idea of some right of employees to “express their cultural heritage” at work.

There are similar problems in accent discrimination cases. For instance, in Salem v. La Salle High School, the court did not recognize that being unnecessarily criticized for one’s foreign accent could itself be harmful. It focused its inquiry on finding concealed discriminatory intent behind the school’s reasons for not renewing Salem’s contract instead of seeing that the school’s negative opinion of the plaintiff’s accent could itself be discriminatory if it was not supported by business necessity.

In addition to underestimating the harm caused by English-only rules and accent discrimination, courts tend to ignore the risk that these rules and decisions are being made with the intent to inflict harmful discrimination on employees because of their foreign origin. Granted, courts should not start from the assumption that employers have a discriminatory intent in enacting English-only rules or making employment decisions based on accents. But courts should also not limit their inquiries into the possibility of discriminatory intent only to cases of blatant discrimination like that in EEOC v. Premier Operator Services and Cassells v. University Hospital at Stony Brook. Prior to its decision in Garcia v. Spun Steak, the Ninth Circuit recognized the threat of national origin discrimination lurking behind English-only rules and accent preferences. In Gutierrez v. Municipal Court, the court stated that “[b]ecause language and accents are identifying characteristics, rules which have a negative effect on bilinguals, individuals with accents, or non-English speakers, may be mere pretexts for intentional national origin discrimination.”

Courts have ignored this risk in deferring completely to employers’ proffered business justifications for English-only rules and accent-based employment decisions. In Garcia v. Spun Steak, the court accepted Spun Steak’s assertion that its English-only rule was put in place because Spanish-speaking employees had insulted other employees, and neglected to analyze the significance of a second rule that Spun Steak issued that prohibited all offensive remarks. That rule alone could have resolved the employee

143. Id.; Garcia, 998 F.2d at 1487; Long, 894 F. Supp. at 941.
145. See id. at *10–11 (finding that the plaintiff had failed to establish national origin discrimination in not having his contract renewed, but failing to recognize any ties between national origin and accent).
146. Id. at *3–4.
147. 113 F. Supp. 2d 1066 (N.D. Tex. 2000).
148. 740 F. Supp. 143 (E.D.N.Y. 1990); see supra notes 79–87, 111–14 and accompanying text.
149. 838 F.2d 1031 (9th Cir. 1988), vacated as moot 490 U.S. 1016 (1989).
150. Id. at 1039 (citing Tom McArthur, Comment, Worried About Something Else, 60 INT’L J. SOC. LANGUAGE 87, 90–91 (1986)).
conflicts, and it applied equally to everyone at the company, thus avoiding the harm caused by the English-only rule singling out Spanish-speaking employees.152 The Kania court was similarly lenient in assessing the validity of the employer’s business necessity justification that the English-only rule was needed “to improve interpersonal relations at the Church, and to prevent Polish-speaking employees from alienating other employees, and perhaps church members themselves.”153 By not making the slightest inquiry into why the church felt that Kania’s Polish was hurting interpersonal relations or “alienating other employees,” the court ignored the possibility that those justifications were pretexts for harmful discrimination.

IV. The Harm of English-Only Rules and Accent Preferences to National Origin Groups

In order to correct the mistakes discussed in the previous Part, courts must understand the damage that English-only rules and accent discrimination can inflict upon workers of foreign national origin. Explaining that harm requires illustrating the link between an employee’s national origin and his language and accent, and the importance of that language and accent to the employee’s identity. To understand that harm, courts must also reexamine their treatment of foreign languages and accents as mutable. Once a court appreciates the significance that accent and language can have to a foreign employee’s sense of self, it is easy to see how detrimental it can be when employers force employees to cover those aspects of their identities.

A. The Significance of Language and Accent to Identity

1. The Connection Between National Origin, Language and Accent.— In the first major decision concerning an English-only rule, Garcia v. Gloor, 154 the court found that “[n]either [Title VII] nor common understanding equates national origin with the language that one chooses to speak.”155 Perhaps common understanding has changed, but it is now hard to dispute that language, as well as accent, is directly connected to national origin.

Since Garcia v. Gloor, courts have recognized the link between national origin and language. The Gutierrez court acknowledged that “language is an important aspect of national origin.”156 The court went on to state that “[t]he
mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin.” The Ninth Circuit later reiterated this sentiment, finding that “language is a close and meaningful proxy for national origin.” Courts have also accepted that accent is tied to national origin. In Fragante v. City & County of Honolulu, the court found that “[a]ccent and national origin are obviously inextricably intertwined in many cases.”

Commentators have provided additional support for these connections. As Professor Perea put it, “[p]rimary language, like accent, is closely correlated and inextricably linked with national origin.” Janet Ainsworth summed up this retort to Garcia v. Gloor nicely, writing that “it is beyond dispute that, for many individuals, their mother tongue is a function of their ethnic background.”

2. The Importance of Language and Accent to One’s Sense of Self.— Furthermore, a person’s language and accent have a close connection to his national origin identity, or his sense of self that derives from his national origin. Therefore, any limitations placed on a person because of his accent or native language harm his national origin identity, placing an impermissible burden on him because of his national origin.

Both courts and commentators have recognized the importance of language to identity. In Gutierrez v. Municipal Court, the Ninth Circuit found that “[t]he cultural identity of certain minority groups is tied to the use of their primary tongue.” In his dissent from the denial to rehear Garcia v. Spun Steak en banc, Judge Reinhardt recognized that an immigrant’s “native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture.” Commentators have observed that language “touches the sense of belonging, and undoubtedly that sense is vital to every person’s identity and self-esteem,” and that

157. Id. (citing Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. REV. 303, 351–57 (1986)).
159. Fragante v. City of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989). The Ninth Circuit reaffirmed its recognition of this connection fifteen years later. See Fonseca v. Sysco Food Servs. of Az., Inc., 374 F.3d 840, 849 n.4 (9th Cir. 2004).
164. See Karst, supra note 157, at 356 (discussing language in the context of bilingual education).
“deprivations in relation to language deeply affect identity.” The close tie between language and identity has been studied by anthropologists, sociologists, and sociolinguists.

There is a particularly strong scholarship linking the Spanish language to Latino identity. Spanish has been deemed “an intractable part of the Latino culture, representing one of the ties of Spanish-speaking persons to their ancestors’ or their own place of origin.” In exploring the importance of Spanish to Latino professionals, Maria Chávez observes that embracing one’s national origin identity, to which language is essential, is “critical to survival.” Through survey work, she found that over a third of Latino lawyers still speak Spanish “on social occasions,” and feel that the language is very important to their identity. Alfredo Mirandé discusses his personal experiences with the bond that Spanish creates between Mexican-Americans, which “transcend[s] educational and class differences.” The Supreme Court even weighed in on the subject, observing that the Spanish language is used by many Latinos “to define the self.”

Accent is also tied to our sense of self. Mari Matsuda describes how our accents carry the stories of who we are, and asserts that “[t]he way in which we speak reflects self, personhood, identity.” She relates the story of how during a discussion about accent discrimination cases, a student’s comment that “I don’t see how they can come to our place and tell us we can’t talk the way we talk” brought her to tears. It made her recognize that


166. See Ainsworth, supra note 161, at 245 n.50 (listing sources from various disciplines that have explored the subject).

167. Christian A. Garza, Case Note, Measuring Language Rights Along a Spectrum, 110 YALE L.J. 379, 382 (2000). Garza goes on to point out that “[t]his experience is not limited to Latinos; the connection is equally strong among other language minority groups.” Id.


169. Id. at 41. This number is more significant when one realizes that most of that one third probably belonged to the 50% of survey respondents who spoke English as a second language. See id. at 50 (“Almost half of the Latino attorneys in this study spoke English as a second language. Close to 40 percent of these Latino lawyers still speak Spanish, and language is a key link to culture and community.”).

170. Mirandé, supra note 116, at 92 n.147.


172. Matsuda, supra note 88, at 1329.

173. Id. at 1388.

174. Id. at 1391 (internal quotation marks omitted). It is not clear from Matsuda’s article, but I assume that the student was referring to the case Kahakua v. Friday, 876 F.2d. 896, 1989 WL61762, at *5 (9th Cir. 1989) (unpublished table decision), in which a court found that a news station had not discriminated when it chose not to hire the best qualified meteorologist for a weather forecaster
our accents reside in “the sacred places of the self.” Others have observed that when someone learns a new language, he must “give up part of [his] culture,” of which “the last vestige” may be his accent.

Recognizing the value of language and accent to one’s sense of self, and their connection to national origin, establishes that actions that harm someone because of his foreign language or accent should be considered national origin discrimination under Title VII. The way in which English-only rules and accent preferences harm immigrant employees on the basis of their accents and native languages will be further explained in subpart IV(C), but first it is necessary to address the problematic issue of the immutability of these traits.

B. Immutability

There is considerable debate about whether Title VII should only protect immutable traits. I do not intend to enter that debate here. Instead, I would like to briefly point out that even if Title VII should only protect immutable traits, language and accents are not as mutable as courts frequently assume. For instance, in Garcia v. Spun Steak, the court stated that “[i]t is axiomatic that ‘the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice.’” This is a slightly absurd statement for a Ninth Circuit court to make, given that only a few years earlier, the Ninth Circuit in Gutierrez had recognized the inextricable link between language and a person’s national origin identity and found that complying with an English-only rule was not “a matter of personal preference.” However, taking it at its word, there is a great deal of evidence that shows that the court’s opinion about language, far from being “axiomatic,” is likely not even true. The previous suppart described the integral—and perhaps immutable—connection between language, accent, and identity. This subpart will address the more scientific links that a person has to his accent and native language that make them essentially immutable.

opening because it felt that his Hawaiian Creole accent would hinder him from performing the job well.

175. Matsuda, supra note 88, at 1391.
177. Compare Sharona Hoffman, The Importance of Immutability in Employment Discrimination Law, 52 WM. & MARY L. REV. 1483, 1488 (2011) (arguing for immutability but acknowledging its flaws), with Perea, supra note 22, at 866–67 (stating that the “presence or absence of mutability should not be relevant in fundamental matters of individual identity, such as ethnicity”), and Peter Brandon Bayer, Mutable Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. DAVIS L. REV. 769, 839 (1987) (taking issue with the presumption that the importance of a trait is dependent upon how easily someone can change it).
178. Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1993) (quoting Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980)).
There are various psychological and psycholinguistic ties between a person and his native language that make his use of that language effectively immutable. When a person learns a language when he is young, “it forms an immutable perspective and understanding,” of which he likely cannot “consciously purge [himself].” A person cannot change the “neurological processes” controlling that language “that [have] been set in place from a very early age.” The most significant result of these neurological phenomena is code-switching. Code-switching refers to the involuntary use of one’s native language when speaking English. It can happen to bilingual speakers quite frequently, even if they have a negative attitude toward inadvertently shifting into their native language. The court in \textit{EEOC v. Premier Operator Services} recognized the legitimacy of the science behind code-switching and endorsed the testimony of an expert who stated that because of code-switching, the use of Spanish could not simply be “turned off.”

Scientific factors also affect the mutability of foreign accents. Mari Matsuda states that in issuing a guideline about accent discrimination, the EEOC relied on “evidence that it is nearly impossible for an adult to eliminate their natural accent.” She cites linguistic studies showing that when people learn second languages after childhood, they can almost never learn to speak those languages without an accent, and that when non-native English speakers do try to speak without an accent, they often overcorrect and speak in a way that would be unnatural to a native speaker. Matsuda also examines some rigorous techniques for teaching non-native English speakers to speak without an accent, which she finds “daunting and degrading.”

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181. \textit{Id.}
185. \textit{Premier Operator Servs., Inc.}, 113 F. Supp. 2d at 1069–70.
189. \textit{Id.} at 1349 n.74 (citing Coates & Regdon, \textit{supra} note 176, at 363).
Thus, even if a court insists that Title VII only offers protection to immutable traits, a non-native English speaker can make a strong argument that his accent and the use of his native language are immutable. Even if a court disregarded the above findings, it should still be sympathetic to the serious harm caused to employees who are forced to cover these central aspects of their national origin identities.

C. Enforced Covering of National Origin Identity

In his seminal article, Covering, Kenji Yoshino introduced a new framework for evaluating the harm caused by discrimination. Yoshino linked the effect that forced covering, or “coerced assimilation,” has on gays and lesbians to similar harms inflicted upon women and racial minorities. In Yoshino’s terminology, to cover is to hide or mute a quality of one’s personality. In the gay context, covering refers to the fact that “it is now permissible both to be gay and to say that one is gay, as long as one does not flaunt one’s homosexuality.” The pressure to cover can force a person into “explicitly making a compromise about” an element of his or her identity that is tied to a protected trait. In this way, covering can be a “severe burden.” Yoshino illustrates the “seriousness of the harm the covering demand inflicts” by pointing out that in the gay context, “certain acts denominated as covering, such as abstention from same-sex sodomy, might be constitutive of gay identity.” He also lists “muting linguistic difference” as race-based and “muting a pregnancy” as sex-based examples of covering that are “constitutive of identity.” Yoshino warns that “the contemporary forms of discrimination to which racial minorities and women are most vulnerable often take the guise of enforced covering.”

Yoshino mentions that “lapsing into Spanish” when an employer has an English-only rule and “speaking with an accent” are examples of failing to cover, but he does not explore those examples in detail, and he analyzes them as race-based covering in his article and as ethnicity-based covering in his book. He does not discuss the idea of forced covering of national origin

190. Yoshino, supra note 13, at 781.
191. Id. at 772.
192. Id. at 838.
193. Id.
194. Id. at 837.
195. Id. at 781.
196. Id.
197. Id.
198. Id.; see also KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 137–39 (2006) (describing language as “an important aspect of ethnic identity” and asserting that “English-only statutes punish individuals not for knowing too little, but for knowing too much”). So far, other authors have only very briefly discussed English-only rules through the framework of covering. See Cristina M. Rodriguez, Language Diversity in the Workplace, 100 NW. U. L. REV. 1689, 1727 (2006) (referring to Yoshino’s claim that enforced covering affects racial minorities and women when addressing the “assimilationist expectations” inherent in English-only cases);
characteristics. I argue that covering analysis provides an effective framework for appreciating the harms imposed by English-only rules and accent preferences upon the national origin identities of immigrant workers. These rules and decisions force people to cover certain traits that can be “constitutive” of their national origin identities.

The English-only rule and accent discrimination cases and associated scholarship illustrate that these rules and decisions are, in effect, demands to cover national origin traits. When Cassarene Cassells’s supervisor told her to get rid of her Jamaican accent and Patricia Lee’s superiors scolded her about her Chinese accent, they were ordering them to cover an aspect of their national origin identities. All English-only rules force employees who speak foreign languages to cover a major element of who they are that is tied to their national origins. Rules that apply at all times, like those in EEOC v. Premier Operator Services and Maldonado v. City of Altus, force the most severe covering, since employees are made to feel that a part of their identities is so devalued that it must be hidden at all times.

The sources also show the consequences of these commands to cover. The testimony in Maldonado v. City of Altus that the city’s English-only rule “reminds me every day that I am second-class and subject to rules for my employment that the Anglo employees are not subject to” illustrates the harm felt by employees from having to cover their national origin identities. The reaction of one Hispanic man to legislation that made English the official language of California is illustrative of the impact of forced covering: “You don’t feel as free when you perceive this language limitation. This is the language in which we express ourselves. You have to hold part of you back. You feel less free than the rest of the people in this society.”

English-only rules can be perceived as telling Hispanics that “to be included into the structures of this society they have to relinquish a part of their culture.” The effect of forced covering of foreign accents is equally harmful. Being forced to cover can make immigrants feel like they are “somehow unworthy because of the way [they] talk.” Forced covering of accents can also have the extreme effect of making those with foreign accents feel that they should not speak at all: “To tell people they cannot

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201. Maldonado v. City of Altus, 433 F.3d 1294, 1301 (10th Cir. 2006).
203. Id.
express themselves in the way that comes naturally to them is to tell them they cannot speak.”

Granted, all members of modern societies are forced to cover certain personality traits that they consider to be components of who they are. The difference here is the depth of the connection between these aspects of identity and one’s national origin, and the increased harm that comes from having to hide a part of that identity. Congress made a decision to protect people from employment discrimination on the basis of their national origin, and that protection should extend to the kind of personal harm that is done when employers force employees to cover their natural language or accents. Statements that Title VII does not grant an employee a “right to speak his or her native tongue while on the job”206 miss the point entirely. The issue is not one of protecting a right to “express [one’s] cultural heritage” on the job,207 but of prohibiting employers from inflicting harm upon people by devaluing a protected trait—their national origin. English-only rules and accent discrimination force immigrant employees to have, in the language of Brown v. Board of Education,208 “a feeling of inferiority as to their status in the community” by telling them they need to hide their national origin.209 Thus, the forced covering caused by English-only rules and accent preferences results in significant burdens being placed upon immigrants purely on the basis of their national origins, meaning that those policies and decisions should be considered forbidden national origin discrimination under Title VII unless employers have a legitimate business justification.

Some commentators, most notably Richard Thompson Ford, may object to this reasoning on the grounds that it reduces a group to certain essential qualities, and then assigns those qualities to all members of the group.210 Ford illustrates the pitfalls of this approach with an example of a newspaper op-ed that called Anita Hill “disingenuous” for complaining about Clarence Thomas’s alleged sexual harassment.211 The columnist wrote that because Hill was from a black, working-class, Southern background, she “perfectly understood” the context of Thomas’s conduct and that it was not meant to harass her.212

While Ford does raise an important concern, connecting foreign language and accents to national origin is distinguishable from the

205. Id. at 1388.
207. Id.
209. Id. at 494.
210. See Richard Thompson Ford, Racial Culture: A Critique 74 (2005) (criticizing the potential for group-recognition claims to “decide for all members of the group what is to be deemed fundamental to the identity of the group”).
211. Id.
212. Id.
problematic essentialization he describes. First-generation immigrants do, essentially by definition, speak a foreign language, and unless they had access to a particularly exceptional education, they speak English with a foreign accent. In that way, language and accent are inextricably linked with national origin, reducing the danger that those qualities will be unfairly assigned to members of the group. Furthermore, those immigrants, and more likely descendants of immigrants, who do not speak a foreign language or speak English with an accent are free to not place value on a native language or accent. The goal is not to essentialize and prescribe identity for all members of national origin minorities, but to recognize that for a significant number of them, language and accent are in fact an integral part of their identities because of their national origins, and forcing them not to express that identity does very real harm. 213 Those members of foreign national origin groups who do not consider language or accent to be an important part of their identities should not feel that banning discrimination of those traits is a prescription for what traits should be important to them or a statement that they are covering if they do not embrace those traits, but instead see that ban as simply a protection for the many members of their group who do feel a connection to those traits. Yoshino recognized this response to Ford’s concerns when he wrote that:

[W]e must not assume that individuals behaving in ‘mainstream’ ways are necessarily covering. My ultimate commitment is to autonomy as a means of achieving authenticity, rather than to a fixed conception of what authenticity might be. . . . [T]he demand[s] to conform to the mainstream . . . are the demands that most threaten our authenticity.214 Thus, what matters most is that members of these groups be protected from being forced to cover these aspects of their national origin identities, not that they all necessarily embrace those aspects.

V. The Necessary Changes to the Adjudication of Accent Discrimination and English-Only Rule Lawsuits

A better understanding of the harm that employers inflict with English-only rules and accent preferences should change the way that courts evaluate Title VII claims brought against these policies and decisions. In lawsuits against English-only rules, courts should accept the existence of the English-only rule as proving a prima facie case for disparate impact and, in many cases, for hostile work environment and overt systemic disparate impact claims. Courts should also scrutinize employers’ business necessity justifications more closely. In accent-discrimination cases, courts should

213. A comparison could be drawn to sexual harassment law—just because some women are not offended by sexually harassing conduct does not mean that it should not be protected, and the harm that sexual harassment causes outweighs the danger that some women who are not offended by sexually harassing conduct might feel they are being told that they should find it offensive.

214. YOSHINO, supra note 198, at 190–91.
more carefully evaluate employers’ proffered reasons for considering an employee’s accent in making an employment decision.

A. Changes to the Treatment of Claims Against English-Only Rules

1. Disparate Impact Claims.—If courts still find that English-only rules are facially neutral, then plaintiffs will be restricted to bringing disparate impact claims. The EEOC guidelines state that English-only rules that apply at all times trigger an automatic presumption of disparate impact. While the impact of blanket rules is more severe than that of rules that do not apply during breaks—of which the EEOC guidelines are not as critical—an appreciation of the inherent harm caused by English-only rules should expand the EEOC’s presumption about blanket rules to also apply to rules that do not extend to breaks. Meritor Savings Bank, FSB v. Vinson established that terms and conditions of employment are to be interpreted broadly. A rule that forces an employee to hide an important aspect of his national origin identity, even if it does not apply at all times, has a significant enough impact to affect that employee’s terms and conditions of employment. Thus, when an employee challenges an English-only rule, the burden should automatically fall to the employer to give a compelling business justification for the rule.

Courts should also be stricter in their evaluation of employers’ business justifications for the rules. They should not allow employers to force employees to hide their connection to their native languages without scrutinizing questionable justifications, such as other workers being distracted by hearing Spanish, respect for customers to whom the employee is not even speaking, the assertion that speaking a language that bystanders do not understand is “offensive and derisive,” improving the

215. 29 C.F.R. § 1606.7(a) (2012).
216. Id. § 1606.7(b).
218. Id. at 64; see supra Part I.
219. See Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir. 1993) (failing to scrutinize an employer’s statement that an English-only policy “would enhance worker safety because some employees who did not understand Spanish claimed that the use of Spanish distracted them while they were operating machinery”).
220. See EEOC v. Sephora USA, LLC, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005) (holding, without citing any evidence, that “[w]hen salespeople speak in a language customers do not understand, the effects on helpfulness, politeness and approachability are real and are not a matter of abstract preference”).
221. See Kania v. Archdiocese of Phila., 14 F. Supp. 2d 730, 731, 736 (E.D. Pa. 1998) (accepting the defendant’s justification that an English-only rule would “prevent Polish-speaking employees from alienating other employees, and perhaps church members themselves” without considering whether that idea was itself discriminatory).
English skills of employees,\textsuperscript{222} and the general discomfort of employees at hearing coworkers speak Spanish.\textsuperscript{223} Courts should also inquire more deeply into whether there was a nondiscriminatory alternative to the English-only rule, as there was with the “no offensive remarks” policy in \textit{Garcia v. Spun Steak}.\textsuperscript{224}

Despite the harm that English-only rules cause, employers should be able to show that they are justified by business necessity in certain circumstances. For instance, in one EEOC decision,\textsuperscript{225} the EEOC determined that an oil refinery employer was justified in having an English-only rule that only applied in processing and laboratory areas and during emergencies. That policy is narrowly tailored to compelling workplace safety needs, and should survive the close scrutiny that courts should apply when taking covering harm into account. It is possible that the only claims that will be justified by business necessity are those that can be proved to be necessary for communication-based (as opposed to anti-distraction)\textsuperscript{226} safety. That justification may be the only truly neutral reason for having an English-only rule, as it does not needlessly force minorities to conform to the native-English-speaking majority in the way that justifications such as “promot\[ing\] racial harmony,”\textsuperscript{227} and not “alienating”\textsuperscript{228} others do.\textsuperscript{229}

2. \textit{Hostile Work Environment Claims}.—Recognizing the greater harm that English-only rules cause non-native English speakers should make courts more likely to credit plaintiffs’ assertions that the rules create hostile work environments. The EEOC guidelines establish that these should be viable claims against English-only rules.\textsuperscript{230} A better understanding of the harm caused by enforced covering reinforces the EEOC’s guidelines. It should also lead courts to accept more than just the claims against blanket rules endorsed by the EEOC, since this perception clarifies that there is still

\begin{itemize}
\item \textsuperscript{222} See Garcia v. Gloor, 618 F.2d 264, 267, 270 (5th Cir. 1980) (affirming, without scrutiny, the district court’s holding that the employer’s proffered justification that requiring only English would help employees improve their English constituted a valid justification of the rule).
\item \textsuperscript{223} See Barber v. Lovelace Sandia Health Sys., 409 F. Supp. 2d 1313, 1337–38 (D.N.M. 2005) (accepting employee discomfort at other employees speaking Spanish as a legitimate nondiscriminatory justification for an English-only policy without analyzing whether that actually constituted a discriminatory reason).
\item \textsuperscript{224} 998 F.2d at 1483. Granted, an employer may be able to show that a no-offensive-remark policy would not be an effective alternative if no supervisors speak the same foreign language as their employees and thus cannot monitor the employees’ speech.
\item \textsuperscript{225} EEOC Decision No. 83-7, 31 Fair Empl. Prac. Cas. (BNA) 1861 (1983).
\item \textsuperscript{226} Garcia, 998 F.2d at 1483.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} See Kania v. Archdiocese of Phila., 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998).
\item \textsuperscript{229} There could be rare circumstances where racial harmony could justify an English-only rule, as in a workplace hostil\[ely\] divided into two language minorities, where speaking English is actually a neutral ground for those groups and not just a way to force minorities to conform their identities to the majority.
\item \textsuperscript{230} 29 C.F.R. § 1606.7(a) (2012); see supra note 43 and accompanying text.
\end{itemize}
serious harm even when a rule only applies during work hours. Courts should recognize, as the court in *Maldonado v. City of Altus* did, that “the very fact that [an employer] would forbid Hispanics from using their preferred language could reasonably be construed as an expression of hostility to Hispanics” that can create a hostile work environment, especially if the employer cannot offer a good business justification for why the rule was necessary.\(^{231}\) That understanding would change the result in cases like *Kania v. Archdiocese of Philadelphia*, where the court demanded that the plaintiff present specific evidence of how the rule created a hostile environment.\(^{232}\) If the court appreciated the harm caused by the existence of the rule, it should have scrutinized whether the employer had a good reason for enacting the rule, and if not, inferred that its enactment expressed hostility towards the plaintiff and created a hostile work environment.

3. **Overt Systemic Disparate Treatment Claims.**—Lastly, if courts appreciate the full extent of the harm caused by English-only rules, plaintiffs should be able to attack the rules for causing overt systemic disparate treatment. This charge would go beyond even what the EEOC guidelines advise about claims against English-only rules. For a plaintiff to successfully bring an overt systemic disparate treatment claim, he would have to show that the employer’s policy was discriminatory on its face. That the policy applies only to certain groups based on national origin supports a claim that the rule is facially discriminatory.\(^{233}\) However, the plaintiff would also have to establish that the rule was enacted in a workplace where the only employees affected are national origin minorities; otherwise, it could not be said that the rule explicitly burdens this protected group. Showing that the policy was a blanket rule that was not tailored to the needs of the business would support finding that the rule discriminated against foreign national origin groups on its face. If plaintiffs could bring these claims, employers would have a heightened burden of proving business necessity, in that they would have to show that speaking only English on the job was a BFOQ. That would effectively mean that employers would almost always lose these cases, as an employer could rarely show that speaking only English was essential to the essence of a business.\(^{234}\)

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\(^{231}\) *Maldonado v. City of Altus*, 433 F.3d 1294, 1305 (10th Cir. 2006).

\(^{232}\) *Kania*, 14 F. Supp. 2d at 735–36.

\(^{233}\) See *Perea*, supra note 160, at 293 (equating “[d]iscrimination on the basis of primary language” with “discrimination on the basis of national origin . . . because of the very close correlation between primary language and national origin and the exclusive adverse impact of restrictions upon the use of primary languages other than English” and arguing that “[t]he intent necessary to show disparate treatment can be inferred from the existence of such exclusive adverse effects”).

\(^{234}\) For example, a BFOQ could exist for an English-only rule that prohibited speaking foreign languages on the air in an English-language broadcast, even if it only affected certain employees of foreign national origin.
EEOC v. Premier Operator Services provides a good example of a case where this sort of claim would be available, since the only employees affected were Hispanic, and the employer’s policy was written in a way that evinced a discriminatory intent. The outcome of the case would not change under the new framework, since in the actual case the court recognized a discriminatory intent on the part of the employer in enacting the rule, but the analysis would be different. Instead of evaluating whether the employer could show a business necessity for its English-only rule, the court would hold the employer to the stricter BFOQ standard. Since an aspect of the employer’s business required employees to speak Spanish to customers on the telephone, the employer could clearly not show that speaking only English was a BFOQ.

B. Changes to the Treatment of Accent Discrimination Claims

The difference that a court’s recognition of the full extent of the harm of accent discrimination would make is less clear, since the framework for disparate treatment claims is different than that for disparate impact and hostile work environment claims. However, this understanding should lead courts to inquire more deeply into employers’ stated reasons for why they took the accent of an employee into account in making an employment decision. Even though an employer’s burden to show a legitimate nondiscriminatory reason is not high, courts should place employers’ proffered reasons under some scrutiny. Customers’ preferences to not interact with employees who have foreign accents should not outweigh the interest of workers in not having to cover their accents. Thus, customer preference should not be accepted as a legitimate nondiscriminatory reason unless customers truly cannot understand an accent. In recognizing the harm that accent discrimination can do to employees, courts should also more carefully inquire into whether employers’ legitimate nondiscriminatory reasons are actually pretexts for discrimination.

Employers should still be able to justify basing employment decisions on accents in some situations. For instance, in Mejia v. New York Sheraton Hotel, the plaintiff alleged that she had been denied a promotion from housekeeping to the front desk of a hotel because she was Spanish. Her

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235. See supra Part I.
236. See Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254–55 (1981) (finding that a defendant need only “raise[] a genuine issue of fact” about the alleged discrimination, but that to do so, it must use admissible evidence to “clearly set forth” a reason for its adverse employment action that would “justify a judgment” in its favor).
237. See Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 799 (8th Cir. 1993) (rejecting customer preference as a justification for a policy requiring deliverymen to be clean-shaven that had a disparate impact on black men, since being clean-shaven did not relate to how well the deliverymen could do their jobs).
239. Id. at 376.
employer asserted that she had been denied the promotion because of her very limited English ability. The court scrutinized that reason for itself at trial, and determined that she had an “English language deficiency that made it quite difficult for the Court, the reporter and counsel to understand what she was saying in her testimonial responses.” In holding against the plaintiff, the court emphasized the “inability on the plaintiff’s part to articulate clearly or coherently.” That sort of evaluation—that an employee would simply not be understood by customers—should still be able to justify an employer’s accent-based adverse employment decision.

Conclusion

Currently, the jurisprudence surrounding English-only rules and accent discrimination does not do justice to Title VII’s prohibition of discrimination on the basis of national origin. Courts generally do not find a significant discriminatory impact in forcing an employee to comply with an English-only rule or passing him over for a job because of his foreign accent, possibly because the judges themselves do not place much value on other languages or manners of speech. These courts fail to appreciate how language and accent are connected to one’s sense of national origin identity. Through the framework of forced covering, it may be possible to illustrate to the courts the severity of the harm that English-only rules and accent discrimination cause to the identities of non-native English speakers on the basis of their national origins. If courts appreciate that impact, they should approach English-only rule and accent discrimination lawsuits differently, and more often find that these policies and employment decisions discriminate against workers on the basis of their national origins.

—Braden Beard

240. Id.
241. Id. at 377.
242. Id.