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Note

*727 ACCENT AND THE UNIVERSITY: ACCENT AS PRETEXT FOR NATIONAL ORIGIN DISCRIMINATION IN TENURE DECISIONS

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INTRODUCTION

Diversity and multiculturalism are among the goals of most academic institutions, especially as we enter a century that opens a door to a "global village." [FN1] Some colleges and universities that are committed to diversity have found that it may be difficult to balance the goal of diversity with some aspects of their core mission of education. For instance, accented faculty often raise protests among some students, who then make the claim that it is too difficult to understand an instructor's accented speech. [FN2] In deciding whether to award tenure to faculty, the academic institution carefully scrutinizes the accent, not so much as a factor that could add to the diversity of the institution's faculty and community, but more as a factor that may hamper effective classroom discourse.

Under current case law, universities and colleges in the United States are essentially free to use a professor's accent as a negative factor when determining whether tenure should be granted or denied, in part because of judicial deference to academic decisions and in part because courts often equate accent with communicative ability. [FN3] If two candidates are equal in all other respects, but one has an accent and the other does not, a university is free to choose the candidate whose speech sounds most American, regardless of the degree of accent or teaching ability as a whole. [FN4] The danger of this practice is that the close nexus between accent and national origin raises the possibility that accent is being used as a pretext for national origin-based discrimination. This is especially disturbing in the face of socio-linguistic evidence that many people have inherent biases against certain accents. [FN5]

***728** This is in sharp contrast to the cases of non-academic employment candidates, who have found relief in the courts by arguing either that excellent communication skills are not necessary for the job or that an accent was not such that it would impede effective communication. [FN6] Deference to academic institutions has led courts to apply different standards and procedures to the two types of cases. The line drawn between academic and non- academic cases raises concern in a broader context regarding why minorities have a difficult time contesting decisions made in high-level employment, while in lower-level employment they have fewer barriers.

This Note argues that when a university decides that an accent prevents a tenure candidate from participating effectively in classroom discourse, and thereby from getting tenure, judicial deference to such a claim may lead to an unjust result. The close relationship between accent and national origin requires that courts be more diligent than they are currently in determining that a university's decision is free of discrimination. The proper inquiry demands a searching look into the accent itself and the actual impact it may havein the classroom. The university should be prepared to demonstrate that it has used this type of information to form its

decision.

Part I of this Note describes the usual tenure process. Part II analyzes the legal process - namely, a Title VII action - that a candidate for tenure generally employs when denied tenure for allegedly discriminatory reasons and Part II discusses current academic deference, which often creates insurmountable obstacles to success in Title VII discrimination cases. Part III introduces evidence that inherent bias against accents in the classroom adversely affects non-white instructors. Finally, Part IV is a proposal directed to courts and universities. Courts should give less deference to academic decision makers and engage in a more in-depth analysis of accent- related cases. Universities should endeavor to promote diversity and to prepare students for the "global village."

I. THE TENURE PROCESS

Tenure is a highly coveted award in the university and college setting. In a tenured position, a professor is conferred lifetime employment to teach and research, shielded from termination for arbitrary or doctrinal reasons. [FN7] Granting lifelong tenure is a significant investment for universities, quite unlike ***729** almost any other employment situation. [FN8] Because of this, it is argued, universities need to have the discretion to make decisions that promote their academic missions, free from undue interference. [FN9]

Faculty members who are denied tenure ordinarily are terminated from their positions after the following academic year. [FN10] The prospects for future employment after that year may be grim. Those who are "tossed from the ivory tower" lose the prestige, security, and financial benefits associated with tenure, and are sometimes stigmatized as being 'unworthy' faculty members: "[a] s 'tainted goods,' their prospects of employment at other institutions of higher learning may be very limited." [FN11]

The long-lasting consequences of a tenure decision have prompted most institutions to establish elaborate tenure-review systems that are meant to ensure that a candidate's potential is rigorously analyzed; tenure review is also meant to balance the candidate's potential with the particular standards or goals that the institution may have. [FN12] Universities reach tenure decisions through an evaluation of the tenure candidate by the faculty member's peers in his or her academic department, and then through a structured process of evaluation up an administrative chain, a process that usually takes account of assessments of the candidate's publications by recognized experts in the relevant field. [FN13] Tenure review committees assess the candidate's publications, teaching effectiveness, and service to the university community as they decide whether or not to grant tenure to the candidate. [FN14] These assessments are somewhat subjective and cannot always be measured objectively. [FN15] Instead, the "holy trinity" of teaching, publications, and service are measured by supervisor evaluations (such as a department head or university administrator, who makes the decision primarily based on lower-level assessments), assessment by peers (co-faculty in the department and faculty in other institutions), self-evaluation, and student evaluations of instruction. [FN16]

Many universities claim that the most important component of the tenure review process is the evaluation of the candidate's teaching. [FN17] To be considered ***730** an effective teacher, the candidate must "consider the rights and needs of students, contribute to student intellectual growth, fairly evaluate student performances, command her subject, clearly set forth course objectives, and effectively transmit the subject matter." [FN18] Student evaluations of the instructor are sometimes used to help determine the effectiveness of the teacher; such evaluations have been found to be legitimate, non-discriminatory factors to consider in deciding tenure. [FN19] Traditional student perception, however, of their yearly evaluations as being trivial is close to accurate at certain institutions. "Although student evaluations are usually included in a tenure file, historically they have not been given great weight in a research university." [FN20] Interestingly, however, they are routinely given significant weight in tenure cases when accent is involved. [FN21] Although they do not have as much impact as peer or supervisor evaluations, "they can be

decisive, especially when combined with other performance deficiencies." [FN22]

II. TITLE VII CHALLENGES: ANALYSIS, APPLICATION, AND OBSTACLES

If a professor has been denied tenure, allegedly on the basis of ineffective teaching or poor communication, and suspects national origin to be the real reason, he or she may bring a claim against the university under Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin in employment decisions. [FN23] In ***731** addition to prohibiting discrimination on the basis of these five traits, courts have interpreted Title VII to prohibit discrimination based on direct "proxies" for them. For example, a classification based on height has been found to be a direct proxy for national origin discrimination. [FN24] Some traits, like height or skin color, are so closely linked to national origin or race that using those traits in a classification could be directly related to discrimination against a historically targeted group. [FN25] In fact, the Equal Employment Opportunity Commission has found that the use of accent as a selection procedure may be discriminatory on the basis of national origin. [FN26] Yet, in Title VII cases concerning tenure candidates, accent is addressed with less scrutiny than the other categories. As one commentator points out, "[w]e do not, cannot under our laws, ask people to change the color of their skin, their religion, their gender, but we regularly demand of people that they suppress or deny the most effective way they have of situating themselves socially in the world." [FN27] Accent's close relationship to national origin requires that courts and universities treat it as they would any race- or national origin-based trait. The following sections discuss the current treatment of accent cases by the courts under Title VII, and demonstrate that, in certain cases, accents are not treated as other traits are.

A. Analysis: Disparate Impact and Disparate Treatment

Courts have developed two models for determining whether an employer has violated Title VII: disparate impact, which is used to prove unintentional discrimination, and disparate treatment, which is used to prove intentional discrimination. Disparate impact discrimination occurs when an employment practice is neutral on its face but actually adversely impacts one group more significantly than another. [FN28] This type of discrimination would be illustrated, for example, by a tenure policy that requires a certain level of English proficiency. Such a requirement could have an adverse impact on instructors for whom English is a second language, based on their national origin. [FN29] Once a ***732** plaintiff shows that there is a connection between the employment practice and the disproportionate exclusion of a protected group, the defendant must show that the practice is both job-related and a business necessity. [FN30] Because plaintiffs in most tenure cases that involve claims of discrimination use the disparate treatment theory to prove intentional discrimination in their cases, this Note will not develop the disparate impact model.

Under the disparate treatment analysis, a claimant can show evidence of an employer's discriminatory intent under the burden-shifting test established by the Supreme Court in McDonnell Douglas Corp. v. Green. [FN31] The first step requires that the plaintiff establish a prima facie case of discrimination: to do so, a plaintiff must show (i) that she is a member of a protected group under Title VII, (ii) that she applied for and was qualified for the position at issue, and (iii) that she ultimately was rejected in spite of her qualifications. [FN32] If the plaintiff establishes a prima facie case, the burden of production shifts to the defendant, who must articulate some legitimate, non-discriminatory reason for the plaintiff's rejection. [FN33] The university need not "prove" its reason was non-discriminatory; it need only "articulate" some legitimate non-discriminatory reason. [FN34] In accent cases, those reasons usually involve claims that the plaintiff's teaching is ineffective because of the accent, possibly along with some other factor. [FN35] This argument is usually accepted, not only because courts defer to the university in its decision regarding an instructor's teaching effectiveness, but also because courts seem to accept the presumption that an accent can automatically

impair an instructor's teaching ability. [FN36] One commentator pointed out in this regard that:

> [I]n every accent case the employer will raise the "can't understand" defense, and in almost every reported case, the courts have accepted it. The rule that trait-based discrimination against an accent is prohibited national origin discrimination dissolves in application, when the courts are faced with the employer's efficiency-based complaint that accent impedes job function. [FN37]

Finally, the plaintiff must prove that the reason offered by the defense for the employment decision was mere pretext for prohibited discrimination. [FN38] ***733** In St. Mary's Honor College v. Hicks, [FN39] the Supreme Court held that a plaintiff must show that her employer intentionally discriminated against her as an individual. [FN40] The plaintiff must meet a stringent standard in proving pretext, showing not only that the defendant's proffered reasons for the adverse employment action are pretextual but also that the defendant intentionally discriminated against her. [FN41] Again, courts have not even reached this stage of the McDonnell Douglas proof scheme - in other words, they have not thoroughly considered pretext in tenure accent cases. [FN42]

B. Application: Three cases

Three cases illustrate the current status of accent-related Title VII cases against academic institutions. Professors filed the first two cases, and a non-academic laboratory employee filed the third case.

The most recent case of accent-based tenure decision is Larebo v. Clemson University. [FN43] Haile Larebo was a native of Ethiopia with a Ph.D. in history from the University of London. [FN44] Although he was born in Ethiopia, Larebo had spent most of his life in England and in Italy. [FN45] In a tenure track position as assistant professor of history at Clemson University in Clemson, South Carolina, Larebo anticipated that, after a customary seven-year probationary period, he would be granted tenure during the 1996-97 academic year. [FN46] Larebo was reappointed five times between 1991 and 1996, amid concerns regarding his teaching ability - namely, organization and accent. [FN47] Comments by the peer review committee included statements that "'[Larebo] must improve his ability to speak American English if he is to reach his students"' [FN48] and that "'problems of communication still remained' due to 'Larebo's pattern of speech and pronunciation."' [FN49] In his second-to-last review, communication was again the major concern along with problems of organization. [FN50]

***734** Despite the five re-appointments, however, in February 1996 the peer review committee recommended that Larebo not be re-appointed because of his teaching. "The decision to recommend not reappointing Larebo was unanimous, as were all the prior decisions recommending that he be reappointed." [FN51] The department head concurred with this decision and noted that the problems of communication extended beyond accent. [FN52] The university provost denied Larebo reappointment. [FN53]

Larebo brought suit in the District Court for the District of South Carolina, alleging that he had been denied tenure because of his race and national origin. [FN54] The district court granted summary judgment to the defendant university. [FN55] Larebo appealed, arguing that he had created an inference that the university's reason for denying tenure was pretextual because it was not credible: if he had indeed been a poor teacher, the university would have denied reappointment earlier. [FN56] Drawing on Clemson University's emphasis on teaching as a factor in its tenure decisions, the Fourth Circuit found that the university had provided a legitimate, nondiscriminatory reason for denying Larebo tenure [FN57] and that Larebo was not able to prove that the reason was pretextual since he failed to show any evidence that comments regarding his accent were discriminatory under the Hicks test. [FN58]

In another recent case regarding alleged discrimination based in part on accent, Dobbs-Weinstein v. Vanderbilt University, [FN59] Idit Dobbs- Weinstein, an Israeli national, was appointed to a tenure track position within the philosophy department

at Vanderbilt University in Nashville, Tennessee, in 1987. [FN60] Dobbs-Weinstein was reviewed for reappointment at various intervals, being reappointed in 1989 for a two-year term and in 1991 for a three-year term. In 1994, however, she was considered for a tenure position and was denied. [FN61] Filing a complaint with the University Senate Committee on Professional Ethics and Academic Freedom, Dobbs-Weinstein claimed sex and national origin discrimination by Dean John Venable, who had refused to concur with the philosophy department in its recommendation to grant the plaintiff tenure. [FN62] One of the considerations was the negative teaching evaluations by undergraduates; graduate evaluations, however, were higher. [FN63] The Committee found that, despite Venable's concerns, Dobbs-Weinstein should be appointed as Associate Professor with tenure, [FN64] and in late 1995 the ***735** University's Board of Trust voted to promote Dobbs-Weinstein to associate professor with tenure, granting back pay based on a salary she would have received had she been granted tenure earlier. [FN65]

Nevertheless, Dobbs-Weinstein filed an action in federal district court against the university to recover the lost interest accruing from the point at which she should have been granted tenure. She argued in her suit that reliance upon undergraduate student evaluations was evidence of pretext for national origin discrimination because the evaluations were "inherently biased against accented speakers such as herself." [FN66] At the trial, she presented the report by Dr. Donald Rubin of the University of Georgia, [FN67] who testified that his studies had shown that "'college students tend to negatively [sic] judge the teaching proficiency of international instructors, and even to comprehend their classroom lectures poorly."' [FN68]

The district court, however, found that no questions of material fact existed on the question of discrimination because the tenure committee had not detected evidence of prejudice in the student evaluations. [FN69] The court disregarded, for the most part, the evidence and research of Dr. Rubin, which "merely outlines the phenomenon by which accented instructors may be penalized by their students .... Dr. Rubin specifically notes that he would have to conduct further study to conclude whether Plaintiff herself was penalized in this way." [FN70] Any possible prejudice, the court said, was simply speculative. [FN71] The court granted the defendants summary judgment. On appeal, the Sixth Circuit affirmed, finding that because Dobbs-Weinstein had been granted tenure, she did not suffer an adverse employment decision; it did not consider any issues regarding accent. [FN72]

A non-tenure case that addressed accent-based denial of employment advancement is Carino v. The University of Oklahoma Board of Regents. [FN73] Donaciano Carino was a native of the Philippines with a noticeable accent. [FN74] He was a member of the U.S. Navy and a naturalized citizen of the U.S. [FN75] In 1974, he was hired by the University of Oklahoma College of Dentistry as a supervisor in the dental laboratory. [FN76] The record indicates that he was hired primarily for his technical skills, rather than for his supervisory skills. [FN77] ***736** About oneyear after he was hired, the College of Dentistry began making changes and expanding the laboratory. Without Carino's knowledge, the title of his position was changed, and another person was hired as laboratory supervisor, demoting Carino in the process. [FN78] Carino discovered the reclassification, which the university called "a misunderstanding," and shortly thereafter he was fired. [FN79] Carino brought suit against the university in federal district court, alleging a violation of Title VII. [FN80] At trial, the university gave as the reason for Carino's demotion that he had been hired primarily for his technical, not supervisory, skills, and that Carino was unqualified to serve as supervisor. [FN81] Carino claimed that this was pretext for national origin discrimination in violation of Title VII. [FN82] The trial court found against the university and awarded Carino back pay and attorney's fees. [FN83] Clemson appealed, claiming that Carino had failed to establish several prongs of the McDonnell Douglas test for disparate treatment. [FN84]

The Tenth Circuit agreed with the trial court that the reasons offered by the university were pretextual, stating that "although plaintiff was not hired primarily for his supervisory skills, the demotion resulted from the opinion held by certain dental college faculty that the plaintiff was unsuitable to continue as supervisor because of his national origin and related accent." [FN85] The court explained that

"[a] foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions." [FN86] The appellate court relied on the findings of the trial court, which had determined that Carino's accent would not interfere with his abilities as a supervisor. As the trial court stated, "[i]t is the Court's opinion from the evidence and the observation of the plaintiff's speech at trial that his accent did not impair his ability to communicate or prevent him from performing any tasks required of the supervisor of the old dental laboratory." [FN87] The Tenth Circuit refused to reverse the trial court's findings of fact and also supported the trial court's award of damages. [FN88]

Two distinctions between Carino and the other two cases are important to recognize. First, Donaciano Carino was not seeking tenure but was seeking a non-academic position with the university. Second, in Carino, the trial court made a significant observation about Carino's actual accent and gave its opinion as to whether that accent would actually interfere with Carino's performance or his job. The appellate court used this finding in affirming the ***737** lower court's decision. In neither of the tenure cases did the courts at any level make a determination of the degree of plaintiff's accent. These distinctions suggest that courts treat academic decisions regarding tenure differently from non-academic employment decisions. The main reason behind the difference is judicial deference to universities with respect to tenure and other purely academic matters.

C. Obstacles: Judicial Deference To Academic Decisions

1. Background

Proponents of academic deference - including the courts - argue that academic decisions involve evaluation of subjective questions that universities, not courts, are best equipped to perform. The Supreme Court addressed academic deference in Regents of the University of Michigan v. Ewing. [FN89] Ewing was not a tenure denial case - it was a suit brought against the University of Michigan by Ewing, a student dismissed from a six-year medical degree program after receiving the lowest score recorded in the history of the program's exam. [FN90] Ewing brought suit in district court, alleging a property interest in his continued enrollment in the program, and arguing that his dismissal from the program violated substantive due process rights. [FN91] The district court found against Ewing on this claim, and the Court of Appeals reversed, ordering the university to allow Ewing an opportunity to retake the exam. [FN92]

The Supreme Court reversed. It decided that Ewing's claim had to be grounded in the claim that the university had misjudged his fitness to remain in the medical program; however, the evidence did not show that the university had acted arbitrarily. [FN93] Justice Stevens, speaking for the majority, warned the courts that "[w]hen judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty's professional judgment." [FN94]

Ewing's "restrained judicial review" has been a popular battle cry for universities defending academic decisions, including tenure decisions. Ewing, however, has been distinguished as "a context where no federal statutory obligation impinged on the academic administrators; their freedom to make genuine academic decisions was untrammeled." [FN95] Certain statutory provisions, such as the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, have been interpreted to limit academic deference by indicating that certain parts of the academic decision-making process are not purely academic, nor are they based on professional judgment, and require more judicial scrutiny than do purely academic decisions. The following section ***738** discusses those interpretations and suggests that Title VII works in a similar way to limit academic deference when discrimination is at issue.

2. Limited Academic Deference

Congress enacted both the Rehabilitation Act [FN96] and the Americans with Disabilities Act [FN97] to prevent discrimination by employers and academic institutions against individuals because of disabilities that could be reasonably accommodated. Courts after Ewing have had to tackle the application of academic deference to decisions activating the two statutes, which imposed obligations on academic institutions and on the courts to ensure that they enforced the acts. [FN98]

In 1991, for instance, a ruling from the First Circuit in Wynne v. Tufts University School of Medicine [FN99] prompted universities to argue that the decision encroached on academic freedom and limited deference to academic decisions. [FN100] The case involved a learning disabled medical student who was dismissed from Tufts University after failing several classes. [FN101] He brought suit under Section 504 of the Rehabilitation Act, claiming that the university had discriminated against him because of his disability. [FN102] The district court granted Tufts' motion for summary judgment. On appeal, the First Circuit stated that a court may defer to an academic decision only when it has determined that the institution has fulfilled the statutory obligations required of it. [FN103] It increased the court's responsibility in determining whether deference to the institution's decision was appropriate, requiring the institution to submit "undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and [come] to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration" before the court could find for the university. [FN104]

A more recent case found that certain questions were not genuinely academic and did not require deference to a university's decision to dismiss a medical student for failing to meet program requirements. In Wong v. Regents of the University of California, [FN105] Andrew Wong brought suit, claiming that the university had refused to accommodate his disabilities as required by the ADA and the Rehabilitation Act. [FN106] The district court granted summary ***739** judgment to the university, but the Ninth Circuit reversed, deciding that Wong had established a question of fact. [FN107] The Ninth Circuit declined to defer to the university's decision that the accommodations that Wong had requested were unreasonable, stressing that deference to academic decisions was not absolute; "courts still hold the final responsibility for enforcing the Acts." [FN108]

Cases after Ewing suggest that there are certain decisions to be made under the ADA and the Rehabilitation Act that are not "genuinely academic" and that a court should not defer to university decisions in those areas. For instance, Wong listed a university's obligations under the ADA to "make itself aware of the nature of the student's disability; to explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modifications ... would give the student opportunity to complete the program without fundamentally or substantially modifying the school's standards" [FN109] as obligations for which academic deference would be inappropriate. Only one of these duties - professional judgment regarding modifications - is arguably a genuinely academic decision. The question of what constitutes "professional judgment," however, is not entirely clear. Wynne expressed skepticism with respect to the reasonableness of the accommodations that were made for a handicapped person, noting that certain technological advances may be outside of "accepted academic norms." [FN110]

Trial courts must determine for themselves that decisions that are not genuinely academic are made according to the law. Title VII, which makes unlawful almost all discrimination based on race, color, religion, sex, or national origin, provides limited wiggle room for academic deference. Eight years after Title VII became law, Congress specifically brought academic institutions under the coverage of Title VII. [FN111] Despite debate regarding institutional autonomy and academic freedom, Congress did not indicate that academic institutions were to be treated any differently from other employers. [FN112] Despite the fact that Congress

specifically included educational institutions under the umbrella of Title VII coverage, courts still overwhelmingly defer to academic institutions. [FN113] Some scholars regard academic deference as contrary to the intent of the Congress that enacted this law. [FN114]

***740** In addition, McDonnell Douglas established a burden- shifting scheme that should not allow analysis to halt at the door of an academic decision, or depend mindlessly on professional judgment. Yet, even when a plaintiff who claims that accent was a factor in tenure denial has established a case of prima facie discrimination, courts sometimes do not fully investigate the claim of accent discrimination. [FN115] Determining whether an accent impedes teaching ability is not solely an academic decision. The answer depends also, in part, on a variety of factors that are outside the realm of "genuinely academic decisions." A court must determine whether, consciously or unconsciously, national origin discrimination has occurred based upon an unfamiliar or unpopular accent; whether teaching ability is a pretext for a university's unwillingness to hire, promote, or grant tenure to a minority with an accent; and whether the accent in fact is heavy enough that an objective and unbiased listener would not be able to understand what an accented person is saying. When a court accepts as legitimate and non- discriminatory a university's claim that tenure was denied because of the candidate's accent, academic deference to such a claim should follow "a very searching look ... at such a claim." [FN116] The following two Parts of this Note describe the substance of the necessary "searching look."

II. UNCOVERING ACCENT DISCRIMINATION: INFORMATION COURTS SHOULD CONSIDER

Courts have maintained a hands-off attitude in tenure litigation because they believe that university tenure committees come to careful decisions that are based upon all the available information. In a case of an accented faculty member, however, those committees may ignore crucial information about accent and national origin discrimination. Before discussing various courts' use - or ignorance - of this information, it is important to look at evidence suggesting that many people, including students, have inherent biases against certain accents and that communication break-downs result not only because of a speaker's incomprehensibility but also because of the listener's biases. [FN117]

A. Some Linguistic Background

Although each of us claims to be able to recognize an accent when we hear one, the concept of accent is remarkably difficult to define. Linguistically, "[a]ccents are loose bundles of prosodic and segmental features distributed ***741** over geographic and/or social space." [FN118] Translated out of the argot of linguists, this assertion says that accent is that which is different from the standard, constructed norm. [FN119] Several myths have developed regarding accent; one is that it is something that can be acquired or lost through a lot of practice. In fact, however, speakers have little control over a trait like accent, just as they have little control over the color of their skin or over where they are born because "[t]he true ability to [acquire new accents] past the acquisition stage is undocumented." [FN120] This means that once we hit a certain age (around puberty), learning a new language becomes increasingly difficult, and learning the accent that comes with it is just as difficult. [FN121] Though we may hear Meryl Streep or Eddie Murphy adopt the accent of a particular ethnic group, these are rehearsed, edited, temporary, and often not very convincing. [FN122]

"Accent has little to do with what is generally called communicative competence, or the ability to use and interpret language in a wide variety of contexts effectively." [FN123] Courts in tenure-accent cases normally do not determine whether there was a question of communicative competence. Instead, they rely on the university's determination that the professor's accent was so bad that it would cause an intolerable disruption in the classroom. In Larebo v. Clemson University, for instance, the court dismissed Larebo's argument that negative comments regarding his accent were motivated by discriminatory reasons; the court pointed out that

Larebo had failed "to consider that such references may reflect a permissible concern regarding his ability to communicate with students." [FN124] In a similar case, a court found against an individual with an accent, explaining simply "that comments about [the plaintiff's] accent, when made, were directed toward the legitimate issue of his teaching effectiveness." [FN125] In another case, the court dismissed certain statements made about the plaintiff's accent as neutral and nondiscriminatory: "references to audience difficulty in understanding Dr. Bina may reasonably be interpreted as expressing a concern about his ability to ***742** communicate to students rather than discriminatory animus based on ethnicity or accent." [FN126] Evidently, regardless of degree of accent or actual communication problems, accent is often accepted as a valid factor that per se diminishes teaching ability.

Linguists studying communication would not find these presumptions surprising. "[L]isteners 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." [FN127] In communication, both the speaker and listener must promote effective communication - the speaker must get his message across clearly, and the listener must be willing to hear the message. A speaker of a dominant language, such as English in the United States, may listen less carefully than normal when he or she detects a low- status or subordinate accent. [FN128] Low-status accents or dialects, such as Asian, African American, or Hispanic, often induce negative reactions and, as a result, induce listeners to make a substandard contribution to the communication process. [FN129] Linguists refer to this reaction as the "rejection of the communicative burden." [FN130]

It may be the case that in tenure decisions reaction of students and faculty to low-status accents is also negative. When an accent is mentioned as a factor in a tenure decision, the professor involved is almost invariably a member ***743** of an Asian, [FN131] Indian, [FN132] African, [FN133] or Middle Eastern [FN134] culture. The issue hardly every arises in the case of native speakers of European languages. [FN135] Admittedly, sometimes accent does create a barrier in communication, but often the "breakdown of 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." [FN136] This is one of the problems that professors and instructors may face in the university setting where many students are unaccustomed to discourse that includes an accent - especially when the accent in question is non-European.

B. Student Attitude Toward Instructor Accent

In 1992, Donald Rubin, a professor at the University of Georgia, found that instructors' accents are strong predictors for how students will evaluate an instructor's teaching ability. [FN137] Researchers looked at reactions to graduate student instructors, who are often near-peers of the undergraduate students, but the results have implications for the perception of tenure-track professors with accents as well. [FN138] In the first phase of the study, researchers presented undergraduate student subjects with one of two pictures: one of a Caucasian female and one of a Chinese female, who were similarly dressed and posed. [FN139] The students then listened to a recording of a lecture while ***744** being shown either of the pictures. [FN140] The same recording was played for each picture, and a native English speaker from central Ohio made the recording. [FN141] "[W]hen [the students] were faced with an ethnically Asian instructor, participants responded in the direction one would expect had they been listening to nonstandard speech." [FN142] This analysis suggests that the students "stereotypically attributed accent differences - differences that did not exist in truth - to the instructors' speech. Yet more serious, listening comprehension appeared to be undermined simply by identifying (visually) the instructor as Asian." [FN143] Thus, when students perceived that a speaker had a foreign accent, they simultaneously perceived him or her to be a poor teacher, regardless of the degree of accent. [FN144] While this does not prove that accent itself causes negative teacher ratings, it does show that the perception of accent undermines some students' attitudes about the teacher's teaching. [FN145] The evidence suggests that students may react negatively to the

instructor's teaching and in turn evaluate teaching ability negatively based on the instructor's race or nationality, or on the perception of an accent. [FN146]

In the second phase of the Rubin study, researchers found that, when the students believed that the instructor had attitudes or beliefs similar to their own, they regarded the instructor's teaching skills more highly. [FN147] Researchers presented subjects with the same stimuli from the first phase of the study, with variations in the recorded subjects (including accented and non-accented speakers). [FN148] Subjects also responded to a questionnaire asking about previous experiences with accented instructors, travel outside the United States, and general attitudes toward accented speakers of English. [FN149] The best predictor of undergraduates' listening comprehension scores was the number of courses they had taken that had been taught by non-native instructors. Students who continued to take classes from non-native English- speaking instructors showed improved skill in listening to accented speech. [FN150] ***745** It seems that more "open-minded" students are able to learn more than just course materials; these students also learn how to listen more effectively. [FN151]

The implications of the Rubin study call into question one component of the courts' faith that tenure decisions are made by university administrators after careful consideration of teaching ability and other factors. Without a more thorough analysis of the actual communication problems between the teacher and her class, the court could overlook discrimination or bias in a tenure decision that takes an instructor's accent into consideration. An accent or a perceived accent does not automatically indicate an inability to instruct. Courts should take into consideration whether the instructor is teaching introductory classes, where interest may wane, or advanced courses, where interest and ability to understand may increase, and whether the perceived accent is based more on race and national origin than on an actual inability to communicate.

III. CAN ACCENT CASES BE BETTER EVALUATED?

The problem of accent-based discrimination, and thereby of national origin- based discrimination, can be tackled from two angles. By assuming a more active judicial role, courts deciding a tenure case can apply the same standards in evaluating evidence of national origin discrimination that they apply to non- academic hiring decisions. In addition, universities can analyze the research available on accent subordination and student bias. They may then approach the communication problems on their campuses not by attempting to educate their professors out of an accent but by educating the students into a global language community.

A. Encouraging the Courts

Courts should be non-deferential in their assessment of tenure decisions when a university has failed to provide actual evidence of alleged communication problems in cases involving professors with an accent. Instead, a standard rule should be applied across the board in both academic and non-academic employment cases. The rule was best articulated in Fragante v. City & County of Honolulu, [FN152] where the plaintiff was denied a position as a clerk because of his accent. The Ninth Circuit established a standard which determined when a person's accent could be considered in an employment decision:

> An adverse employment decision may be predicated upon an individual's accent when - but only when - it interferes materially with job performance. There is nothing improper about an employer making an honest assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance. [FN153]

***746** The standard requires a "factual basis" for believing that the plaintiff would be hampered by his accent in performing his job satisfactorily. [FN154]

A court's analysis of the plaintiff's accent under the McDonnell Douglas test could occur where the plaintiff argues that the university's articulated reason for

denying tenure, inability to communicate, is pretextual. The plaintiff could show that the institution has afforded teaching low significance compared to research in other tenure decisions, that students have had problems understanding or communicating with tenured professors who do not have a low-status accent, or that the plaintiff's accent does not cause any actual communication breakdowns.

To determine what level of communication is actually required for the job, the court would have to weigh the degree of accent against the university's argument that communication is an integral part of the position. Universities claim that job performance, in the context of tenure decisions, hinges in large part on teaching ability. An alleged lack of teaching ability, however, should not become a pretext for a university's desire to be rid of an accented instructor. Many universities place research and publication above teaching ability, or weigh them equally with teaching ability, in most tenure decisions. [FN155] It is also apparent that universities often believe that extensive research and publication make for a good teacher, [FN156] opening the question of whether the same is believed of good researchers with accents. A university that requires stellar teaching ability only when a plaintiff is part of a minority group should not be able to claim that perfect communication is crucial to the job. A plaintiff could show that teaching ability is ordinarily subordinated to other factors - such as research and publications - and becomes a factor particularly in cases involving accents, might be able to show pretext. [FN157]

***747** Courts that have faced the "can't understand defense" in non-academic contexts have relied on two factors to help determine whether an accent materially interferes with teaching ability. The first is the testimony and evidence of expert witnesses who are able to analyze both the speaker and the community in which communication occurs. Experts can more clearly identify the many factors involved in a particular environment to help decide whether the accent has an impact on the plaintiff's teaching ability. [FN158] The second factor already taken into account by courts in non-academic cases is the court or jury's own conclusion about the communicative ability of the plaintiff - that is, the impression the judge or jury has of the plaintiff's speech and whether the accent would impair the plaintiff's ability to teach.

1. Expert Witnesses

"[E]xpert witnesses can help in identifying the relevant, nonprejudiced listeners, and in determining whether the accent discrepancies are so divergent as to impede communication." [FN159] In Kahakua v. Friday, [FN160] for instance, two plaintiffs sued the Hawaiian national weather service, which had denied them broadcasting positions because of their native Hawaiian Creole accents. [FN161] The job went to a Caucasian who was new to Hawaii. [FN162] In their suit, the plaintiffs presented a linguist to testify that their speech was easily intelligible to all residents of Hawaii and that the local accent enhanced communication. [FN163] Importantly, the linguist regarded the accents in the context of the community in which they were heard. The defense also offered an expert witness, a speech pathologist who testified that standard English is and should be used by radio broadcasters. [FN164] This speech pathologist, whose job ***748** was to train speakers to sound as standard as possible, regarded the accent in the context of what the "American" standard was. The district court ruled in favor of the defendants, and the appellate court affirmed. [FN165] In another case that arose in Hawaii, the plaintiff presented two expert witnesses to testify that his heavily accented speech was comprehensible. [FN166] In Dobbs-Weinstein v. Vanderbilt University, the plaintiff's expert witness presented research regarding student perceptions of instructor accents. [FN167] Although the strategy seemingly failed in each of these cases, the circumstances are telling. One case, for instance, was about tenure and involved judicial deference to the university's decision to deny tenure. The other two cases arose from the unique socio- linguistic circumstances of Hawaii, where the languages and ethnicities are more diverse than in any other part of the United States, [FN168] and where past discrimination against low-status languages and accents has left a lasting legacy. [FN169] Despite the poor results for the plaintiffs, the expert witnesses in these cases provide good examples of what constitutes reliable expert testimony.

Another possibility for using expert witnesses is the application of the Test of Spoken English (TSE) in disparate treatment cases. [FN170] The TSE, a reliable predictor of language skills in employment contexts, is already used by academic institutions to evaluate the spoken English of applicants for teaching assistant positions. [FN171] Examinees give oral answers to written and recorded questions. [FN172] The responses are recorded and then evaluated by raters who are specialists in English, English acquisition research, or linguistics. [FN173] Applied in a tenure discrimination suit, the TSE score could be considered "in light of the duties and requirements of the specific job in question, conducting ***749** a case-by-case analysis." [FN174] The difficulty would be, of course, determining what score on the test would trigger a successful rebuttal to the defendant's claim of incomprehensibility. Although the TSE does not eliminate all subjectivity - a particular score must be weighed against the circumstances and responsibilities of the position - expert witnesses and testimony could provide the thorough analysis that is required by the situation.

2. Listening to the Accent

Courts in tenure cases currently do not make independent conclusions about the plaintiff's accent, deferring to decisions made by university administrators. In non-academic employment decisions, however, courts are willing to take into account the plaintiff's actual accent and whether that accent could have interfered with the denied position. Admittedly, this calls for a subjective review by the court of the subjective assessment by the employer. [FN175] Stronger judicial activisim in this area, however, has provided plaintiffs with a better opportunity to argue that discrimination has occurred. For example, the appellate court in Fragante (a case involving a clerical position) cautioned that the close relation between accent and national origin required "a very searching look by the [trial] courts" at a claim of national origin discrimination. [FN176] The same court that decided Fragante similarly opined in a later non-academic employment case that "[a]s in the assessment of credibility, the district court is particularly well-situated to evaluate a litigant's communication skills, especially a litigant who testified on his own behalf." [FN177] In Berke v. Ohio Department of Public Welfare, the Sixth Circuit affirmed the lower court's finding that the plaintiff, a woman born in Poland, had been discriminated against because of her accent. "The district court found that the plaintiff's command of the English language is well above that of the average adult American, but that she retained a pronounced accent." [FN178] The district court in Carino v. The University of Oklahoma Board of Regents was also willing to observe and take into consideration Carino's actual accent, and decided that it was not so heavy an accent as to prevent him from performing his job. [FN179] In another case, "[a]t trial, the court paid careful attention to plaintiff's manner of speaking," [FN180] and commented on the degree ***750** of his accent and on whether the court believed that the plaintiff's speech would be intelligible at work and over the phone. [FN181]

Courts clearly do not defer to the decisions of the employer in non- tenure cases. One case specifically disallowed a defendant's "good faith belief" standard to replace the Fragante standard. In Xieng v. Peoples National Bank of Washington, [FN182] the defendant bank had denied promotions to an employee whose accent, it claimed, interfered with his work. Xieng then sued the bank, claiming a violation of a state anti-discrimination statute. The trial court found for Xieng. On appeal, the bank proposed that the court ignore the Fragante standard and instead adopt a "good faith belief" standard [FN183] that was strikingly similar to the standard that is applied in tenure decisions, leaving the subjective determination of the effect of the accent to the employer. The Fragante standard, on the other hand, as applied by courts in non-academic employment cases, leaves the decision to the courts. The Washington Court of Appeals declined to adopt this approach, explaining, "because a subjective 'good faith belief' that a foreign accent interferes with job performance could easily become a refuge for unlawful national origin discrimination, the 'good faith belief' standard is inconsistent with the heavy burden Fragante places on employers in accent discrimination cases." [FN184] This burden, however, is currently not as heavy for universities making tenure decisions as it is for other

employers in other contexts.

B. Encouraging Universities

Until the courts take a stronger position in accent cases, universities are free to shape their own policies regarding accented faculty. The final part of this Note suggests to universities and colleges that they reconsider their current views of accents in the classroom and that they focus this reconsideration on principles of diversity, tolerance, and power. The United States Supreme Court maintained in Regents of University of California v. Bakke that diversity is a constitutionally permissible goal of substantial importance to academic institutions, [FN185] and most universities have strong policy statements regarding a commitment to diversity. [FN186] Evidence makes clear, however, that higher education is run largely by non-minorities whose native ***751** language is English and who do not have low-status accents. Most four-year institutions are overwhelmingly headed by whites as president, chancellor, executive director, or campus dean: out of 1,865 such positions that were studied in 1996, 1,408 were occupied by whites, compared to 131 African Americans, forty-eight Hispanics, thirteen Asians, eight American Indians, and 257 people of unknown ethnicity. [FN187] Decisions about whom to hire and what kind of instructor would best represent the institution are being made by people whose center of language is the Anglo accent. All other accents are "different," and the acceptability of particular speech depends upon how close it is to Anglo speech. [FN188] These decisions, made by people in power, are critical. "When certain accents are deemed inappropriate ... for use in schools ... a policing of public and private boundaries occurs. Who may speak, when, and where, is a typical mechanism for distributing power." [FN189]

Although universities are diversifying their faculty and student body, discrimination against particular groups may still linger. The present selective distribution of power has had an impact on students. The faculty mentor of a professor who sued after being denied tenure stated:

> Given the existing ethnocentrism of many of our students, I would not be surprised to see a wide range in their evaluations of his teaching. I have heard a few students grumble over the amount of work they have to do in his classes and the fact that he has a slight accent. [FN190]

Similarly, a faculty peer of a professor denied tenure was quoted as stating that "our students are not often exposed to people with different cultural and linguistic backgrounds, and this could lead to a lack of understanding of [the professor] and his cultural perspective." [FN191]

At one time, professors with accents were usually of European origin, and those accents were considered charming. "Of late, however, the professor with the alleged poor communication skills is of Asian rather than European descent, and the affectionate stories of how 'he's brilliant and incomprehensible' no longer apply." [FN192] Similarly, a professor writes,

> [T]he first time I entered the classroom, I was made aware of my cultural identity not just by my race and gender, but also by my status as a nonnative speaker of English. ... I have mixed feelings about my accent .... Sometimes I wonder if some students' attitude towards my Asian accent reflects their attitude toward Asian culture. In my observation, a person who speaks English with a European accent is more ***752** positively received than a person who speaks with an Asian, African, or South American accent. [FN193]

Diversity in the university must include diversity of language and of voices. One of the main concerns is that the marketplace of ideas into which students are preparing to enter is not entirely dominated by native English speakers. Students are entering a world of varied voices, and must be prepared to communicate and do business with people around the world. Entrepreneurs cannot refuse to do business with accented customers or associates; nor can a business transaction end when the parties discover they have some communication problem. That would be bad business, as is training students toward a Anglo-centric accent that subordinates or ignores other language groups.

Cultural awareness would help students appreciate that accents do not necessarily slow down communication. One of the bright spots of Dr. Rubin's study [FN194] of student perceptions of instructors' accents is the evidence showing that more "open-minded" students, who recognize that they share similar attitudes or beliefs with the instructor, regard that instructor's teaching skills more highly. This evidence is available in real-world situations, as well. In one case, a member of a committee that denied the plaintiff tenure wrote that "[t]he obvious grammatical errors on his application attest to his communication problems, but for the more serious students they do not prove to be obstacles to learning." [FN195] In Dobbs-Weinstein v. Vanderbilt University, the court noted that, while undergraduate students had varied opinions of the instructor's abilities, the graduate students in her upper- level classes were much more enthusiastic. [FN196] One student, testifying in a case where a professor's accent was an issue in his tenure denial, stated "[s]ince the first day of classes, [the instructor] forewarned us to ask him to repeat himself if we couldn't understand his accent .... I have acclimated to his accent and find no trouble understanding him." [FN197]

An option that is not legally required of academic institutions in accent cases is to look into whether "accommodations, including assistance to both speakers and listeners in bridging communication gaps, help show that any residual non-understanding reflects a genuine, irremediable intelligibility ***753** problem." [FN198] An accent is not, and should not be considered, a disability. Nevertheless, "[o]ur willingness to accommodate absence of speech [in cases of the deaf in the workplace] but not difference of speech is an interesting contradiction." [FN199] Since almost all universities consider teaching an important part of the university's mission, it would seem that making sure communication is effective between professor and students would be a part of the continuing evaluation of the tenure-track professor. Better teaching materials, computer-aided instruction, good student-teacher ratios, peer teaching, training in pedagogy, and individualized instruction are some of the methods of improving ineffective communication between teachers and students. [FN200]

Universities also need to remedy the incomplete analysis of classroom communication problems that characterize so much of the litigation in this area. Although communication requires both a speaker and a listener, some universities and colleges mandate language conformity by providing extensive training for only the speaker - that is, the foreign instructor. [FN201] While there are various proposed methods at universities to improve the language skills of foreign instructors, such as screening and training, there are few solutions that have been instituted to improve the attitudes that undergraduate students have of their teachers who have accents. [FN202] Some ideas include encouraging students to meet with their professors during office hours or outside of class in a less formal environment where subject matter and communication might be easier. Universities that require "diversity training" of new students [FN203] could introduce basic concepts of awareness: accent bias can be overcome with an open mind, respect for the teacher, and an interest in the subject matter. A policy or program that encourages respect and awareness could be successful in encouraging better communication. So far, universities and colleges have tended either to re-train or to remove accented instructors from the classroom. A shift of resources, however, might bring satisfying and rewarding results for students, instructors, and the entire academic community.

CONCLUSION

Judicial deference to academic freedom has helped to create institutions that play a vital role in the future of our democracy and civilization. [FN204] In an ***754** increasingly global community, where language differences are trivial, universities should be leading the drive in diversifying their communities. Recent cases, however, show that institutions of higher learning are using language differences to exclude people from teaching positions without meaningful review by the courts. If a university makes a decision based on an instructor's accent, academic freedom and judicial deference currently allow it to make that decision free of consequence.

This approach conflicts with the basic understanding of the goal of universities in this country: to encourage teachers and students "to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." [FN205] Using accent as a significant factor in tenure decisions betrays the stated goal of diversity at an academic institution.

An accent, like skin color or height, is not erasable or diminishable by will. Like skin color or a last name, an accent can be a telling marker of a person's nationality or ethnicity, so that separating bias from real communication differences becomes a difficult task. Importantly, communication differences are not caused by one person with an accent. Communication requires two people: a speaker and a listener both willing to participate open-mindedly in the discourse. Evidence suggests that an accent may hamper the listener's willingness to understand more than it actually hampers the ability to understand. A tenure committee that does not consider this is doing the teacher, the university, and its students a disservice if it recommends a terminal contract for an accented professor. In preparing their students for the expanding role of international relations in business, politics, and education, academic institutions should seriously consider hiring accented professors because of those accents, not in spite of them. An adult who comes from another country to teach in an American university has experiences and a perspective that is different from that of most American students. That person also brings with him a unique voice that should be protected by the courts. While the courts are willing to offer such protection in lower-level, non- academic employment cases, they are very unwilling to do so in the academic setting. The idea that accents may be allowed only in blue-collar employment, however, is troubling and also raises questions about how ivory the ivory towers of academe can become. Leaving the question wholly to universities has left too many questions unanswered and too many opportunities unfulfilled.

[FNa1]. B.A. 1997, University of Michigan; J.D. Candidate, 2001, Notre Dame Law School. The author wishes to thank Jill Bodensteiner and Professor John Robinson for their generous help and guidance in the writing of this Note. The author expresses special thanks to her parents for their love and support.

[FN1]. The term "global village" was coined by Marshall McLuhan. See generally MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

[FN2]. See ROSINA LIPPI-GREEN, ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES 124-130 (1997).

[FN3]. See infra notes 124-26 and accompanying text.

[FN4]. See TERRY L. LEAP, TENURE, DISCRIMINATION, AND THE COURTS 97 (1995) ("[A] college or university may decide that there are applicants for a faculty position who have superior language skills and better teaching potential than an incumbent but untenured faculty member.").

[FN5]. See infra Part III.

[FN6]. See, e.g., Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Dep't Pub. Welfare, 628 F.2d 980 (5th Cir. 1980); Odima v. Westin Tuscon Hotel, 53 F.3d 1484 (9th Cir. 1995); E.E.O.C. v. Orkin Exterminating Co., 63 F. Supp. 2d 684, 692 (D. Md. 1999) (defendant's motion for summary judgement on national origin discrimination denied); Mandhare v. W.S. LaFargue Elementary Sch., 605 F. Supp. 238 (E.D. La. 1985), rev'd without opinion, 788 F.2d 1563 (6th Cir. 1986); Xieng v. Peoples Nat'l Bank of Wash., 821 P.2d 520 (Wash. App. 1991).

[FN7]. Burton Leiser, Threats To Academic Freedom and Tenure, 15 PACE L. REV. 15, 15 (1994).

[FN8]. See Robert McGee & Walter Block, Academic Tenure: An Economic Critique, 14 HARV. J.L. & PUB. POL'Y 545 (1991) (arguing that tenure increases overall costs, decreases flexibility, and makes it difficult to remove incompetent professors).

[FN9]. LEAP, supra note 4, at 5.

[FN10]. See id. at 4-5

[FN11]. John Copeland & John Murry, Getting Tossed from the Ivory Tower, 61 MO. L. REV. 238, 239 (1996).

[FN12]. See Jonathan M. Paretsky, Comment, Judiciary Review of Discretionary Grants of Higher Education Tenure, 83 ED. LAW REP. 17, 17 (1993).

[FN13]. See LEAP, supra note 4, at 44-54.

[FN14]. See id. at 71.

[FN15]. See id. at 72.

[FN16]. See Copeland & Murry, supra note 11, at 240. Research, publications and scholarship are areas which can be subjective as well, since different schools or departments and areas of scholarship each have their own unique ways of determining the value of a particular piece of research or writing. See id. These areas, however, have not appeared to be significant issues in tenure-accent cases.

[FN17]. See, e.g., Larebo v. Clemson Univ., No. 98-2234, 1999 U.S. App. LEXIS 4824, *13 (4th Cir. March 22, 1999) ("The department's bylaws state that teaching ability is at the core of a professor's duties"); Jiminez v. Mary Washington College, 57 F.3d 369, 373 (4th Cir. 1995) (teaching effectiveness is paramount in deciding tenure); Hou v. Commonwealth of Pennsylvania, Dept. of Educ., Slippery Rock State College, 573 F. Supp. 1539, 1542 (W.D. Pa. 1983) (teaching effectiveness is most important criterion because college was primarily a teaching rather than a research institution).

[FN18]. Copeland & Murry, supra note 11, at 242.

[FN19]. See Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974, 976 (8th Cir. 1991).

[FN20]. Martha S. West, Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty, 67 TEMP. L. REV. 67, 129-30 (1994).

[FN21]. See, e.g., Jiminez v. Mary Washington College, 57 F.3d 369, 373 (4th Cir. 1995) (discussing student comments and evaluations of professor's teaching); Hassan v. Auburn Univ., 833 F. Supp. 866, 870 (M.D. Ala. 1993) (student evaluations led faculty members to be concerned about the plaintiff's ability to communicate to students); Dobbs-Weinstein v. Vanderbilt Univ., 1 F. Supp. 2d 783, 787 (M.D. Tenn. 1998), aff'd, 185 F.3d 542 (6th Cir. 1999) (evaluations by undergraduate students of plaintiff's success in teaching discussed by tenure panel "at []great[] length").

[FN22]. Copeland & Murry, supra note 11, at 242.

[FN23]. 42 U.S.C. § 2000(e) (1994). The statute reads:

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 race, color, religion, sex, or 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 race, color, religion, sex, or national origin.

[FN24]. See Davis v. Los Angeles County, 566 F.2d 1334 (9th Cir. 1977), vacated as moot on other grounds, 440 U.S. 625 (1979) (invalidating a height requirement that had discriminatory impact on Mexican-Americans and that had no relation to job); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979) (remanded on question of whether height requirement had disparate impact on Hispanic applicants).

[FN25]. See Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII, 35 WM. & MARY L. REV. 805, 835-36 (1994).

[FN26]. Certain employment procedures could be discriminatory on the basis of national origin: "(1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent, or inability to communicate well in English." 29 CFR § 1606.6(b)(1) (1999) (emphasis added). See also Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85,632 (Dec. 29, 1980). See also infra Part III.A.

[FN27]. LIPPI-GREEN, supra note 2, at 63.

[FN28]. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[FN29]. See Copeland and Murry, supra note 11, at 301. Actual examples of disparate impact similar to this are the English-only rules in some workplaces. See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480, 1485 (9th Cir. 1993) (plaintiffs did not show that they were adversely affected by the rule); E.E.O.C. v. Synchro-Start Prod., 29 F. Supp. 2d 911 (N.D. Ill. 1999) (employer must demonstrate a business necessity for the rule).

[FN30]. See Griggs, 401 U.S. at 431.

[FN31]. 411 U.S. 792 (1973).

[FN32]. See id. at 802.

[FN33]. See id.

[FN34]. See Harry Tepker, Jr., Title VII, Equal Employment Opportunity, and Academic Autonomy, 16 U.C.D. L. REV. 1047, 1055-56 (1983). Nevertheless, "only the most foolhardy defendant would attempt to rest a case on mere articulation without proof." Id. at 1056-57 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)). Burdine explained that the defendant need only present evidence that is sufficient to raise a genuine issue of fact as to whether it discriminated against the plaintiff.

[FN35]. See infra Part II.B.

[FN36]. See infra text accompanying notes 124-26.

[FN37]. Mari J. Matsuda, Voices of America: Accent, Andtidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329, 1350- 51 (1991).

[FN38]. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

[FN39]. 509 U.S. 502 (1993).

[FN40]. See id. at 510-11.

[FN41]. See id. at 511. This task has been made relatively easier by courts that limit the confidentiality that a university may employ in protecting the contents of tenure committee files. See University of Pa. v. EEOC, 493 U.S. 182 (1990) (common-law privilege did not protect peer review materials from disclosure, and academic freedom would not be expanded to protect the materials from disclosure). On the other hand, tenure files can also contain "thoughtful, well-written comments on an applicant's work based on individual and committee reviews. Often, this writing process eliminates much of the material the plaintiff might otherwise use to show pretext." Kathryn R. Swedlow, Suing for Tenure: Legal and Institutional Barriers, 13 REV. LITIG. 557, 569 (1994).

[FN42]. See infra notes 130-33 and accompanying text.

[FN43]. No. 98-2234, 1999 U.S. App. LEXIS 4824 (4th Cir. March 22, 1999).

[FN44]. See id. at *3.

[FN45]. See Lyn Riddle, Clemson Panel Studying Better Faculty Integration, ATLANTA J. AND CONSTITUTION, November 27, 1998, at 01C.

[FN46]. See Larebo at *3.

[FN47]. See id. at *3-7.

[FN48]. Id. at *4.

[FN49]. Id. at *5.

[FN50]. See id. at *6-7.

[FN51]. Id. at *7.

[FN52]. See id. at *8.

[FN53]. See id. at *9.

[FN54]. See id. at *1.

[FN55]. See id.

[FN56]. See id. at 11.

[FN57]. See id. at *13.

[FN58]. See id. at *14.

[FN59]. 1 F. Supp. 2d 783 (M.D. Tenn. 1998), aff'd, 185 F.3d 542 (6th Cir. 1999).

[FN60]. See id. at 783.

[FN61]. See id. at 788-89.

[FN62]. See id.

[FN63]. See id. at 787.

[FN64]. See id. at 790.

[FN65]. See id.

[FN66]. Id. at 793.

[FN67]. Dr. Rubin is the head of the Department of Speech Communication and a professor in the Department of Language Education and the Linguistics Programs at the University of Georgia. See Univ. of Georgia Dept. of Speech Communication Website available at http://www.uga.edu/spc (visited April 13, 2000).

[FN68]. Id. at 793. Dr. Rubin's study is discussed in detail infra, Part III.B.

[FN69]. See id. at 800-01.

[FN70]. Id. at 801.

[FN71]. See id. at 802.

[FN72]. See Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542 (6th Cir. 1999).

[FN73]. 750 F.2d 815 (10th Cir. 1984).

[FN74]. See id. at 816.

[FN75]. See id.

[FN76]. See id.

[FN77]. See id.

[FN78]. See id. at 816-17.

[FN79]. See id. at 817.

[FN80]. See id.

[FN81]. See id. at 819.

[FN82]. See id. at 816.

[FN83]. See id.

[FN84]. See id. at 818-19.

[FN85]. Id. at 819.

[FN86]. Id.

[FN87]. Carino v. University of Okla., No. CIV-78-1372-W, 1981 WL 211, * 6 (W.D. Okla. May 7, 1981), aff'd, 750 F.2d 815 (10th Cir. 1984).

[FN88]. See Carino, 750 F.2d at 820.

[FN89]. 474 U.S. 214, 225 (1985).

[FN90]. See id. at 216.

[FN91]. See id. at 217.

[FN92]. See id. at 220.

[FN93]. See id. at 225.

[FN94]. Id. at 225.

[FN95]. Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 25 (1st Cir. 1991).

[FN96]. 29 U.S.C. § 794 (1994).

[FN97]. 42 U.S.C. § 12111-12213 (1994).

[FN98]. See Zuckle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1048 (9th Cir. 1999).

[FN99]. 932 F.2d 19 (1st Cir. 1991).

[FN100]. See Kay Rottinghaus & Whitney Wilds, Comment, Wynne v. Tufts University School Of Medicine, 19 J.C. & U.L. 185, 192 (1992).

[FN101]. See Wynne, 932 F.2d at 21-22.

[FN102]. See id. at 22.

[FN103]. See id. at 25-26.

[FN104]. Id. at 26.

[FN105]. 192 F.3d 807 (9th Cir. 1999).

[FN106]. See id. at 811.

[FN107]. See id.

[FN108]. Id. at 817.

[FN109]. Id. at 818.

[FN110]. Wynne, 932 F.2d at 26.

[FN111]. See Equal Opportunity Act of 1972, H.R. REP. NO. 92-238, 92d Cong., at 19-20, reprinted in 1972 U.S.C.C.A.N. 2137, 2155.

[FN112]. See Susan L. Pacholski, Title VII in the University: The Difference Academic Freedom Makes, 59 U. CHI. L. REV. 1317, 1330-31 (1992).

[FN113]. See Mary Gray, Academic Freedom and Nondiscrimination: Enemies or Allies?, 66 TEX. L. REV. 1591, 1598 (1988).

[FN114]. See Swedlow, supra note 41, at 561 ("By refusing to review academic judgments under the guise of protecting and enhancing the 'ivory tower' model of university life, courts are ignoring the role of the E.E.O.C. and violating the letter and the spirit of Title VII.").

[FN115]. See infra notes 124-26.

[FN116]. Fragante v. City & County of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989).

[FN117]. Socio-linguistic studies have suggested that

> [t]he variation found in speech-evaluation studies reflects social perceptions of the speakers of given varieties and has nothing to say about any intrinsic qualities--logical or aesthetic--of the language or dialect itself. Thus, listening to a given variety is generally considered to act as a trigger or stimulus that evokes attitudes (or prejudices, or stereotypes) about the relevant speech community.

John Edwards, Refining Our Understanding of Language Attitudes, 18 J. LANG. & SOC. PSYCHOL. 101, 102 (1999).

[FN118]. LIPPI-GREEN, supra note 2, at 42.

[FN119]. See id. at 41-44.

[FN120]. Id. at 51.

[FN121]. See STEVEN PINKER, THE LANGUAGE INSTINCT 290-96 (HarperPerennial 1995). Pinker describes the experience of author Vladamir Nabakov, who learned English as a

second language. Though he wrote brilliantly in English, Nabakov "refused to lecture or be interviewed extemporaneously, insisting on writing out every word beforehand with the help of dictionaries and grammars. As he modestly explained, 'I think like a genius, I write like a distinguished author, and I speak like a child.' And he had the benefit of ... an English speaking nanny." Id. at 291.

[FN122]. LIPPI-GREEN, supra note 2, at 49.

[FN123]. Id. at 48. The distinction between an accent and intelligence is fuzzy for some. See, e.g., Ang v. Procter & Gamble Co., 932 F.2d 540, 549 (6th Cir. 1991) (citing an employee brochure, which "advised minorities to 'be aware that inability to speak the "King's English" may be viewed by those in the majority culture as equating to intelligence (i.e. lack of)"').

[FN124]. No. 98-2234, 1999 U.S. App. LEXIS 4824, *14 (4th Cir. March 22, 1999).

[FN125]. Hou v. Pennsylvania, Dept. of Educ., Slippery Rock State College, 573 F. Supp. 1539, 1546 (W.D. Penn. 1983).

[FN126]. Bina v. Providence College, 39 F.3d 21, 26 (1st Cir. 1994). See also Hassan v. Auburn Univ., 833 F. Supp. 866, 871 (M.D. Ala. 1993), aff'd, 15 F.3d 1097 (1994), where the court rejected the plaintiff's argument that only severe accents should be considered in hiring decisions. The court explained that by accepting the plaintiff's argument a court "could not consider whether a foreign national candidate's ability to communicate was merely poorer than that of a competitor candidate." Id. at 871-72.

[FN127]. LIPPI-GREEN, supra note 2, at 70.

[FN128]. See Perea, supra note 25, at 836. Certain groups born and raised in the United States have also encountered negative reactions to their accents. These include Southerners, see LIPPI-GREEN, supra note 2, at 203-216, and African-Americans and Hispanic-Americans, see Thomas Purnell, et. al, Perceptual and Phonetic Experiments on American English Dialect Identification, 18 J. LANG. & SOC. PSYCHOL., March 1999, 10-30 (speakers of African American Vernacular English and Chicano English face discrimination based on dialects). See also Kevin Lang, A Language Theory of Economics, 101 Q.J. ECON. 363 (1986) (analysis of the impact of language difference in the workplace and impact of economics on communication).

[FN129]. See LIPPI-GREEN, supra note 2, at 63-72.

[FN130]. See id. at 70.

[FN131]. See, e.g., Hou, 573 F. Supp. 1539 (W.D. Penn. 1983) (judgment for defendant); Huang v. College of the Holy Cross, 436 F. Supp. 639 (D.C. Mass. 1977) (judgment for defendant).

[FN132]. See, e.g., Kumar v. Univ. of Mass. Bd. of Trustees, 774 F.2d 1 (1st Cir. 1985) (reversing lower court's finding of discrimination); Kureshy v. City Univ. of N.Y., 561 F. Supp. 1098 (D.C.N.Y. 1983) (dismissing plaintiff's complaint of discrimination).

[FN133]. See, e.g., Larebo v. Clemson Univ., No. 98-2234, 1999 U.S. App. LEXIS 4824 (4th Cir., March 22, 1999) (affirming lower court's award of summary judgment for defendant); Jiminez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995) (reversing lower court's finding of discrimination); Hassan v. Auburn Univ., 833 F. Supp. 866 (M.D. Ala. 1993) (judgement for defendant).

[FN134]. See, e.g., Dobbs-Weinstein v. Vanderbilt Univ., 1 F. Supp.2d 783 (M.D. Tenn. 1998), aff'd, 185 F.3d 542 (6th Cir. 1999) (judgment for defendant); Bina v. Providence College, 39 F.3d 21 (1st Cir. 1994) (affirming lower court's judgment for defendant); El-Ghori v. Grimes, 23 F. Supp.2d 1259 (D. Kan. 1998) (granting defendants' motion for summary judgment); Al-Hashimi v. Scott, 756 F. Supp. 1567 (S.D. Ga. 1991) (granting defendant's motion for summary judgment).

[FN135]. See, e.g., Spencer v. City Univ. of N.Y./College of Staten Island, No. 94 Civ. 4477 (DLC) (AJP), 1995 WL 169010 (S.D.N.Y., April 10, 1995) (plaintiff of Jewish and Austrian national origin brought suit and sought production of some documents; motion by defendants to deny production of materials granted).

[FN136]. LIPPI-GREEN, supra note 2, at 71.

[FN137]. See Donald L. Rubin, Nonlanguage Factors Affecting Undergraduate's Judgments of Nonnative English-Speaking Teaching Assistants, 33 RESEARCH IN HIGHER EDUC., 511 (1992). Recall that Rubin was an expert witness on the behalf of the plaintiff denied tenure in Dobbs-Weinstein v. Vanderbilt Univ., supra Part II.B.

[FN138]. See LIPPI-GREEN, supra note 2, at 126 ("It should be stated that these issues are also relevant for non-native English-speaking lecturers and professors: a Ph.D. cannot render anyone accentless.").

[FN139]. See Rubin, supra note 137, at 514.

[FN140]. See id. at 515.

[FN141]. See id. at 515.

[FN142]. Id. at 519.

[FN143]. Id.

[FN144]. See id. at 514.

[FN145]. See id. at 519.

[FN146]. A similar study found that landlords may discriminate against potential tenants based upon telephone conversations and the accents or dialects that they detected. See Purnell, supra note 107. The dialects at issue in the study belonged to speakers of Chicano English and African American Vernacular English. The researchers concluded that "auditory cues constitute stimuli for disparate impact

and nonaccidental disparate treatment cases." Id. at 17. See also Chandoke v. Anheuser-Busch, Inc., 843 F. Supp. 16 (D.N.J. 1994) (denying defendants summary judgment in claim of national origin discrimination because of possibility that plaintiff's accent in phone conversations would convey his national origin).

[FN147]. See Rubin, supra note 137, at 521.

[FN148]. See id. at 520.

[FN149]. See id.

[FN150]. See id. at 513.

[FN151]. See id. at 521.

[FN152]. 888 F.2d 591 (9th Cir. 1989).

[FN153]. Id. at 596-97.

[FN154]. See id. at 597.

[FN155]. See Jesse L. Ward, Promotional Factors in College Teaching, 8 J. HIGHER EDUC., Dec. 1937 at 475, 477-78 (college administrators asked to rank factors in granting of promotions ignored teaching competence); Thomas W. Martin & K. J. Berry, The Teaching Research Dilemma: Its Sources in the University Setting, 40 J. HIGHER EDUC., Dec. 1969, at 691, 697 ("Consider the following paradox: the university hires a professor mainly to teach, but retains or promotes him almost entirely on the basis of his scholarship."); Yi- Guang Lin & Wilbert J. McKeachie, The Use of Student Ratings in Promotion Decisions, 55 J. HIGHER EDUC., Sept.-Oct. 1984 at 583, 584 (studies showed that teaching ability and student evaluations had little impact on decisions compared to research productivity).

[FN156]. See Phillip E. Hammond et al., Teaching v. Research: Sources of Misperceptions, 40 J. HIGHER EDUC. Dec. 1969 at 682, 683-84.

[FN157]. See Tracy Anbinder Baron, Keeping Women out of of the Executive Suites: The Courts' Failure to Apply Title VII to Upper-Level Jobs, 143 U. PA. L. REV. 267, 276-77 (discussing unequal performance standards, requiring higher standards for women than for men). For cases in which plaintiffs have used the usually unsuccessful argument that disparate treatment resulted from unequal performance standards, see Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992) (plaintiff testified that defendant told her she needed to work twice as hard as her co-workers because she was young, Hispanic, and female); Henry v. Trammell Crow SE, Inc., 34 F. Supp. 2d 629, 631 (W.D. Tenn. 1998) (African-American plaintiff alleged that a discrepancy in compensation occurred because defendant required a higher performance standard from her than from white co-workers); Marino v. Louisiana State Univ. Bd. of Supervisors, No. Civ.A. 96-1689, 1998 WL 560290, *5 (E.D.La., Aug 27, 1998) (statements by female faculty members, that females were held to a higher standard than men and had to work twice as hard, found by court to be "generalized and conclusory"); Bennun v. Rutgers State Univ., 737 F. Supp. 1393, 1405 (D.N.J. 1990), rev'd 941 F.2d 154 (3d. Cir. 1991) (court found pretext where Hispanic plaintiff was held to a higher standard than faculty member with fewer credentials

who was awarded promotion); E.E.O.C. v. Minneapolis Elec. Steel Casting Co., 552 F. Supp. 957, 964 (D. Minn. 1982) (safety policy found to be enforced more strictly against female employee than male co-workers).

[FN158]. See infra Part IV.A.1.

[FN159]. Matsuda, supra note 37, at 1381.

[FN160]. 876 F.2d 896 (9th Cir. 1989) (unpublished table decision). The text of the unpublished memorandum opinion for Kahakua is available on Westlaw, Kahakua v. Friday, No. 88-1668, 1989 WL 61762 (9th Cir. June 2, 1989).

[FN161]. Hawaiian creole is the result of the mixture of several different languages (including Portuguese, Chinese, Japanese, Filipino, and Spanish) belonging to workers who came to or were brought to the Hawaiian islands when sugar plantations first emerged. These languages groups created a "pidgin," a language formed out of necessity and convenience. The second generation of workers constructed from the pidgin a true language, Creole, that had developed rules of tense, gender, and all the necessities of language. See Matsuda, supra note 39, at 1342. In this case, the plaintiffs spoke standard English with the accent of their native Hawaiian Creole.

[FN162]. See id. at 1341.

[FN163]. See id. at 1375.

[FN164]. See id. at 1345. "[T]he variety of English spoken by [the plaintiffs] was acquired as a result of their economic status, environment, and education, and not as a result of race or national origin." Kahakua at *3.

[FN165]. Kahakua, 1989 WL 61762, at *3.

[FN166]. Fragante v. City and County of Honolulu, 888 F.2d 591, 595 (9th Cir. 1989). In Fragante, the court decided against the plaintiff, a man with a Filipino accent, explaining that he had been "passed over because of the deleterious effect of his Filipino accent on his ability to communicate orally, not merely because he had such an accent." Id. at 599. Matsuda, supra note 37, discusses the Fragante case at length, including references to the transcript of the trial and the party briefs. A linguist for the plaintiff testified that Fragante spoke grammatically correct, standard English, with an accent that is characteristic of someone raised in the Philippines. Matsuda, supra note 37, at 1337. The linguist also noted that "[a]ttorneys for both sides suffered lapses in grammar and sentence structure, as did the judge. Mr. Fragante's English [based on a review of the court transcripts] was more nearly perfect in standard grammar and syntax than any other speaker in the courtroom." Id. at 1338. Matsuda further pointed out the irony that no one at the trial - including the court reporter, the judge, and the attorneys - had a problem understanding Fragante when he spoke. See id.

[FN167]. 1 F. Supp. 2d 783, 793 (M.D. Tenn. 1998), aff'd 185 F.3d 542 (6th Cir. 1999). Ultimately, the impact of the research was not successful in convincing the court. See 1 F. Supp. 2d at 800-01.

[FN168]. See Matsuda, supra note 37, at 1333.

[FN169]. See id. at 1344.

[FN170]. See Beatrice Nguyen, Accent Discrimination and the Test of Spoken English, 81 CALIF. L. REV. 1325, 1353-60 (1993).

[FN171]. See id. at 1347.

[FN172]. See id. at 1348.

[FN173]. See id. at 1349.

[FN174]. Id. at 1358.

[FN175]. See id. at 1343-46 (arguing that current subjective analyses clash with the standard of strict scrutiny required by race or national origin classifications); see also LIPPI-GREEN, supra note 2, at 160.

[FN176]. Fragante v. City & County of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989).

[FN177]. Odima v. Westin Tuscon Hotel, 991 F.2d 595, 600 (9th Cir. 1993).

[FN178]. 628 F.2d 980 (6th Cir. 1980).

[FN179]. No. CIV-78-1372-W, 1981 WL 211, *6 (W.D. Okla. May 7, 1981), aff'd 750 F.2d 815 (10th Cir. 1984) ("It is the Court's opinion from the evidence and the observation of the plaintiff's speech at trial that his accent did not impair his ability to communicate or prevent him from performing any tasks required of the supervisor of the old dental laboratory." 1981 WL 211, at *6).

[FN180]. Madiebo v. Div. of Medicaid/State of Mississippi, 2 F. Supp. 2d 851, 856 (S.D. Miss. 1997).

[FN181]. See id. See also Chaline v. KCOH, Inc., 693 F.2d 477, 481-82 (5th Cir. 1982) (holding that the plaintiff, a white disc jockey, had been dismissed for from a black-oriented radio station because he did not have the proper "voice" for the station; the court affirmed the lower court, which had observed that his voice quality was sufficiently similar to those of black audience disc jockeys to show pretext); E.E.O.C. v. Orkin Exterminating Co., 63 F. Supp. 2d 684, 692 (D. Md. 1999) (holding that the jury, which had heard the plaintiff testify at trial, could judge for itself the effect of the accent in a business environment).

[FN182]. Xieng v. Peoples Nat'l Bank of Wash., 821 P.2d 520, 524 (Wash. App. 1991).

[FN183]. See id. at 524.

[FN184]. Id.

[FN185]. 438 U.S. 265, 311-15 (1978) (Powell, J., concurring).

[FN186]. See American Council on Education, Making the Case for Affirmative Action in Higher Education available at http:// www.acenet.edu/bookstore/descriptions/making_the_ case/works/leaders.html (remarks by university and college presidents on importance of diversity) (visited April 2, 2000).

[FN187]. See AMERICAN COUNCIL ON EDUCATION, SEVENTEENTH ANNUAL STATUS REPORT ON MINORITIES IN HIGHER EDUCATION 103 (1999-2000).

[FN188]. See Matsuda, supra note 37, at 1394. See also Lynn A. Muster, A Proposal for the Hire and Tenure of Faculty of Color in Higher Education, 20 T. MARSHALL L. REV. 45 (1994).

[FN189]. Matsuda, supra note 37, at 1397.

[FN190]. El-Ghori v. Grimes, 23 F. Supp. 2d 1259, 1262 (D. Kan., 1998). See generally LIPPI-GREEN, supra note 2, at 122-30.

[FN191]. Bina v. Providence College, 844 F. Supp. 77, 81 (D.R.I. 1994).

[FN192]. Matsuda, supra note 37, at 1354.

[FN193]. Xing Lucy Lu, Identity Negotiation in the Classroom, in I'VE GOT A STORY TO TELL: IDENTITY AND PLACE IN THE ACADEMY 71, 72 (Sandra Jackson & Jose Solis Jordan, eds., 1999).

[FN194]. See supra, section III. B.

[FN195]. Hou v. Commonwealth of Pennsylvania, 573 F. Supp. 1539, 1547 (W.D. Penn. 1983) (emphasis added).

[FN196]. 1 F. Supp. 2d 783, 787 (M.D. Tenn. 1998), aff'd, 185 F.3d 542 (6th Cir. 1999). The implication is that graduate students are generally more serious about their studies.

[FN197]. Jiminez v. Mary Washington College, 57 F.3d 369, 373 (4th Cir. 1995). See also Laura A. Hennessey, Look Beyond Language Barrier and Learn from International TAs, DAILY COLLEGIAN (Pennsylvania State Univ.), January 26, 1999, available at 1999 WL 12728590. ("Instead of a burden, these students view the situation as an opportunity to challenge their own ways of viewing a particular subject and quite possibly their perspective on life and the world.")

[FN198]. Matsuda, supra note 37, at 1381.

[FN199]. Id. at 1380.

[FN200]. See Matsuda, supra note 37, at 1381. In addition, voice recognition technology could have a profound impact on education, including providing visual transcription of a professor's lecture, not only for disabled students but also for students listening to a variety of professors, with or without accents. See Jordan Zivitz, An Experiment in Voice-Recognition, GLOBE & MAIL (Toronto Can.), June 22, 1998, at C15.

[FN201]. See LIPPI-GREEN, supra note 2, at 125 (discussing the English Language Institute at the University of Michigan).

[FN202]. See id. at 126.

[FN203]. See Anthony DePalma, Freshman Orientation Turns into Serious Business, L.A. TIMES, Sept. 1, 1991, at USW3 (describing orientation events for freshman at several universities that include seminars on date rape, racism, and homophobia).

[FN204]. See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[FN205]. Id. at 250.

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