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Smoking Out Racism in the FDNY: The Dwindling Use of Race-Conscious Hiring Remedies

Hal Budnick

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THE DWINDLING USE OF RACE-CONSCIOUS HIRING REMEDIES

INTRODUCTION

The New York City Fire Department (the Fire Department or FDNY), despite its proud history, remains an organization unwelcoming to minorities. In 2007, the United States—later joined by the Vulcan Society and individual plaintiffs—brought suit against the Fire Department alleging that it discriminated against blacks and Hispanics in violation of Title VII of the Civil Rights Act of 1964.[1] The U.S. District Court for the Eastern District of New York found that the Fire Department's entry-level hiring examinations had both a disparate impact and was the product of systematic disparate treatment.[2] However, the initial remedy—an interim race-conscious hiring plan—did not require the hiring of a sufficient number of black and Hispanic applicants to address the severe underrepresentation of minority firefighters.[3] Nevertheless, the City of New York (the City) refused to implement any of these plans.[4] As a result, the court imposed an extensive oversight plan that prematurely restrained the City from developing its own solution.[5]

Before resorting to extensive oversight, the court should have adopted a race-conscious hiring plan that requires the City to hire a sufficient number of black and Hispanic

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[1] *See* Complaint ¶ 1, United States v. City of New York, No. 07-CV-2067 (E.D.N.Y. May 21, 2007), ECF No. 1. The Vulcan Society also brought a similar state claim under New York Human Rights laws. Intervenors' Complaint ¶ 1, *City of New York*, No. 07-CV-2067 (E.D.N.Y. July 17, 2007), 2007 WL 3117053, ECF No. 48.

[2] *See infra* Parts IV.B-C; United States v. City of New York, 637 F. Supp. 2d 77, 132 (E.D.N.Y. 2009) (disparate impact order); United States v. City of New York, 683 F. Supp. 2d 225, 273 (E.D.N.Y. 2010) (disparate treatment order).

[3] *See infra* Part V.A; *City of New York*, No. 07-CV-2067, 2010 WL 3709350, at *1 (E.D.N.Y. Sept. 13, 2010).

[4] Letter from Michael A. Cardozo, N.Y.C. Corp. Counsel, to Nicholas G. Garaufis, Judge, E.D.N.Y., *City of New York*, No. 07-CV-2067 (E.D.N.Y. Sept. 17, 2010), ECF No. 532.

[5] *See infra* Part V.B; *City of New York*, 07-CV-2067, 2011 WL 6131136, at *15 (E.D.N.Y. Dec. 8, 2011).

applicants. If such a plan were enforced, the Fire Department would have had incentive to reform its hiring and recruiting methods without having to continuously seek court approval. The court likely avoided this option because it was sensitive to an increasing sentiment that affirmative action is no longer an appropriate method of relief.[6] Unless and until this social and political movement results in an amendment to Title VII, however, future courts should embrace the benefits of race-conscious hiring remedies.

Part I of this note provides a background of Title VII of the Civil Rights Act of 1964, discussing the theories of disparate treatment and disparate impact, as well as the broad range of remedies available. Part II provides a summary of the current affirmative-action debate, and concludes that court-ordered, race-conscious relief is still a legitimate and important remedy in Title VII claims. Part III discusses the history of racial discrimination in the FDNY. Part IV discusses the procedural history and current posture of *United States v. City of New York*. Part V critiques the court in *United States v. City of New York* for its extensive oversight plan, and suggests that if it enforced an adequate ratio of race-conscious hiring at the outset, it would have provided sufficient incentive for the Fire Department to more permanently remedy the discrimination on its own terms. Finally, this note concludes that future courts should continue to embrace race-conscious injunctive relief, especially where deep-seated racial discrimination is found.

I. TYPES OF CLAIMS AND RELIEF UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Under Title VII of the Civil Rights Act of 1964, the court has broad authority to grant relief. The court in *United States v. City of New York* should have used this broad authority to impose race-conscious interim hiring. Title VII makes it illegal "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[7] Title VII is "a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the

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[6] *See infra* Part II.

[7] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006).

American dream for so long."[8] There are essentially two theories under which a plaintiff can prove an unlawful employment practice: disparate treatment and disparate impact.

A. Disparate Treatment and Disparate Impact Claims

In race-based disparate treatment claims, the principal issue is whether the employer "treats some people less favorably than others because of their race, [or] color."[9] These cases typically involve discrete instances of intentional discriminatory conduct, rather than general practices.[10] Liability is found where the employer's decisions are "actually motivated" by the employee's protected trait.[11] In other words, the protected trait must have "had a determinative influence" on the employer's decision.[12]

Disparate treatment claims are further subdivided into single-motive,[13] mixed-motive,[14] and systematic disparate treatment (or "pattern or practice")[15] theories. Single-motive and mixed-motive claims are the more traditional and more easily supported claims because they tend to focus on discrete events. Systematic disparate treatment, on the other hand, is in many ways more difficult to prove. Nevertheless, the court found systematic disparate treatment in *United States v. City of New York*.[16]

A systematic disparate treatment ("pattern or practice") case must establish that the employer has put in place an overall system that naturally (and purposely) leads to adverse employment actions that are based on employees' protected class.[17] Statistical evidence alone may establish such a case.[18] For example, in a test-taking situation, if the ratio of minority applicants who pass the exam is two or three standard

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[8] United Steelworkers of Am. v. Weber, 443 U.S. 193, 204 (1979) (citation omitted) (internal quotation marks omitted).

[9] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[10] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[11] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (noting that disparate treatment theory is also available under the Age Discrimination in Employment Act).

[12] *Id.*

[13] *See McDonnell Douglas*, 411 U.S. at 801.

[14] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 247 & n.12 (1989).

[15] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 329, 342 (1977).

[16] United States v. City of New York, 683 F. Supp. 2d 225, 241-42, 273 (E.D.N.Y. 2010).

[17] *See Int'l Bhd. of Teamsters*, 431 U.S. at 334-36.

[18] *See id.* at 339-40 & n.20.

deviations below the ratio of minority applicants who took the exam, that may suffice.[19] Typically, however, courts look for anecdotal evidence of discrimination to buttress the statistical showing.[20] The employer could attack the statistical showing by questioning the accuracy of the data collected, or by arguing the particular labor pool that the plaintiff used was not appropriate.[21] The employer could also assert a nondiscriminatory reason for the disparity—for example, that the general population within the protected class simply does not prefer the occupation—but this defense is difficult to make credibly since the employer must support it with extensive evidence and cannot base its reasoning on stereotypical inferences.[22] Once a pattern or practice is found, each plaintiff has the opportunity to present evidence of individual damages, for which the employer can offer a legitimate, nondiscriminatory reason.[23]

The court in *United States v. City of New York* also found that the City discriminated against black and Hispanic applicants under the theory of disparate impact.[24] Disparate impact cases, unlike disparate treatment cases, do not require discriminatory motive.[25] Instead, the plaintiff must show that a particular policy, while not discriminatory on its face, disproportionately affects a protected class.[26] This theory was developed to combat employment procedures that are not predictive of future job performance and have "built-in headwinds" that work against minority groups.[27] However, applicants claiming injury under the disparate impact theory must still have been qualified for the job; the theory does not

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[19] *See* Anderson v. Douglas & Lomason Co., Inc., 26 F.3d 1277, 1291 n.26 (5th Cir. 1994); *cf.* Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 362 (7th Cir. 2001) (noting that not all cases find two to three standard deviations to be sufficient and that there is no bright-line rule).

[20] *See, e.g.*, *Int'l Bhd. of Teamsters*, 431 U.S. at 339 (noting that plaintiffs did not rely on "statistics alone," but instead "brought the cold numbers convincingly to life").

[21] *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308-13 (1977); Robinson v. Metro-North Commuter R.R., Co., 267 F.3d 147, 159 (2d Cir. 2001)

[22] *See infra* note 249 and accompanying text.

[23] *See Int'l Bhd. of Teamsters*, 431 U.S. at 361-62.

[24] *See infra* Part IV.B; United States v. City of New York, 637 F. Supp. 2d 77, 132 (E.D.N.Y. 2009).

[25] *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Like systematic disparate treatment claims, two or three standard deviations from the expected ratio will normally suffice. *See* Stagi v. Nat'l R.R. Passenger Corp., 391 F. App'x 133, 137-38 (3d Cir. 2010).

[26] *See Griggs*, 401 U.S. at 431.

[27] *See id.* at 432 (internal quotation marks omitted).

simply allow "the less qualified [to] be preferred over the better qualified simply because of minority origins."[28]

B. Forms of Relief and the Value of Race-Conscious Measures

The wide-ranging forms of relief available under Title VII demonstrate that the court in *United States v. City of New York* both failed to utilize and subsequently abused this broad authority. The goal of relief in an employment discrimination action is always a combination of deterrence and compensation.[29] Forms of relief include preliminary and permanent injunctions,[30] back pay,[31] and front pay.[32] Disparate treatment claims, unlike disparate impact claims, also allow for compensatory damages[33] and "any other equitable relief."[34]

1. The Development of Race-Conscious Injunctive Relief

Injunctive relief has been interpreted broadly—a district court "has not merely the power but the duty" to "bar like discrimination in the future."[35] Therefore, courts will often issue remedies that allow the court to monitor—but not dictate the methods of—compliance. For example, it is regularly required that any future examination or "selection device" be reviewed by the court and approved before its use.[36] Other court-ordered procedures typically require applicants to be

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[28] *Id.* at 436.

[29] *See* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 740, 749 (2008) (discussing the history of the Civil Rights Act of 1991, stating that its purpose was largely "'to effectuate a greater level of deterrence'" and to "'strengthen existing protections and remedies available under federal civil rights laws to provide . . . adequate compensation for victims of discrimination'" (quoting Vanessa Ruggles, Note, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 CONN. PUB. INT. L.J. 143, 154 (2006); H.R. REP. NO. 102-40, pt.2, at 1)).

[30] *See, e.g.*, 42 U.S.C. §§ 2000e-5(f)(2), (g), 12117(a) (2006).

[31] *See, e.g.*, 42 U.S.C. §§ 2000e-5(g), 2000e-16(d), 12117(a); 29 U.S.C. § 216(b), (c).

[32] *See* Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889 (3d Cir. 1984) ("[A]n award for a reasonable future period required for the victim to reestablish her rightful place in the job market.").

[33] *See, e.g.*, 42 U.S.C. §§ 2000e-5, -16, 12117(a).

[34] *Id*. § 2000e-5.

[35] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[36] *See* United States v. City of New York, No. 07-CV-2067, 2010 WL 3709350, at *3-4 (E.D.N.Y. Sept. 13, 2010) (quoting Guardians Ass'n of the N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n, 630 F.2d 79, 109 (1980)) (internal quotation marks omitted).

hired at a certain ratio, usually reflecting "the applicant pool or the relevant work force," which ensures that no disparate impact could later be found.[37] Courts understand that combating future discrimination will almost invariably require a race-conscious effort in order to be effective.[38]

The scope of injunctive relief in Title VII cases has expanded greatly over the last thirty-plus years. At first, while employers were not forced to engage in affirmative action measures, they were given permission to do so by courts without the threat of future litigation based on "reverse discrimination." In 1979, the Court in *United Steel Workers of America v. Weber* explicitly allowed the employers to engage in "private, voluntary, race-conscious affirmative action plans."[39] To deny this form of relief, the Court opined, "would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."[40] Since the original purpose of Title VII was to aid in the "'the plight of the Negro in our economy,'"[41] "[i]t would be ironic indeed" to use it against this purpose.[42]

Specifically, the Court in *Weber* allowed the employer to set racial-equality goals by reserving half of the positions in its craft-worker training programs for blacks.[43] The Court found that the plan did not "unnecessarily trammel the interests of the white employees" since it did not go so far as to require white employees to be discharged.[44] The Court also found it important to emphasize that the plan was temporary; the plan ended the moment the percentage of blacks in the labor force was properly represented in the plant.[45]

In 1987, *United States v. Paradise* laid the foundation for injunctive relief in the form of court-ordered affirmative-action plans.[46] The fundamental shortcoming of the court in *United States v. City of New York* was to discount the significance of *Paradise* in some instances and overextend its

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[37] *Id.* at *7 (quoting *Guardians*, 630 F.2d at 109).

[38] *See infra* notes 51-54 and accompanying text.

[39] 443 U.S. 193, 208 (1979).

[40] *Id.* at 202 (quoting United States v. Pub. Utils. Comm'n, 345 U.S. 295, 315 (1953)).

[41] *Id.* (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

[42] *Id.* at 204. *But see* Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (finding that employers engaged in "reverse discrimination" when the employer voluntarily invalidated an entrance exam under the belief that the exam had a disparate impact on minority applicants).

[43] *Weber*, 443 U.S. at 198.

[44] *Id.* at 208.

[45] *Id.* at 208-09.

[46] 480 U.S. 149 (1987).

scope in others. *Paradise* affirms that "courts have the authority and the duty not only to order an end to discriminatory practices, but also to correct and eliminate the present effects of past discrimination."[47] Almost twelve years after the district court ordered its initial decision, the court forced the employer "to take affirmative and substantial steps to open the upper ranks to black troopers."[48] The court's order required 50 percent or more of corporal promotions be given to qualified black troopers until the employer developed its own nondiscriminatory plan.[49] When granting relief, the corrective plan "must unavoidably consider race."[50]

Paradise shows that broad, court-ordered injunctive relief is necessary because "the effects of past discrimination . . . 'will not wither away of their own accord.'"[51] For instance, allowing an employer to come up with its own integration plan may do little to prevent "the continuing effects" of discrimination if the courts have no mechanism to enforce the plan in the future.[52] The injunctive approach is particularly essential when an employer has failed to correct the problem for decades; the FDNY has failed to do so arguably since its inception and at least since the district court recognized the Fire Department's discriminatory practices in 1973.[53] The relief must be race-conscious because the alternatives, such as "an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure," are less appealing.[54]

Of course, courts do not have unlimited leeway in determining what injunctive relief is appropriate, and at times the court in *United States v. City of New York* failed to pay heed to these limitations. Once the court determines that it should take some form of action, it must take care to ensure that its ordered plan is sufficiently narrow.[55] The Supreme Court has articulated what factors are relevant in determining whether the plan is sufficiently narrow:

> (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority

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[47] *Id.* at 154 (quoting NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972)) (internal quotation marks omitted).

[48] *Id.* at 163 (quoting Paradise v. Prescott, 585 F. Supp. 72, 74 (M.D. Ala. 1983)).

[49] *Id.*

[50] *Id.* at 194 (Stevens, J., concurring).

[51] *Id.* at 163 (majority opinion) (quoting *Paradise*, 585 F. Supp. at 75-76).

[52] *Id.* (quoting *Paradise*, 585 F. Supp. at 75-76).

[53] *See id.* at 166-67; *supra* Part III.

[54] Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 450-51, 464 (1986).

[55] *See Paradise*, 480 U.S. at 187 (Powell, J., concurring).

> workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties.[56]

Under this analysis, the Court in *Paradise* found the lower court's order to be sufficiently narrow. The Court emphasized that the length of the plan was appropriate because it was "contingent upon the Department's own conduct."[57] The fifty percent hiring requirement acted as "an end date, which regulated the speed of progress toward fulfillment of the hiring goal."[58] In addition, the order did not place an absolute bar on white employees because it did not require that any of them be discharged,[59] and it did not reduce the quality of workers promoted because they must all still be qualified.[60] Ultimately, the court-imposed hiring scheme in *Paradise* was successful. After the order was implemented, the defendant had sufficient incentive to promptly submit a nondiscriminatory promotion method, and as a result, the race-conscious court order was lifted shortly thereafter.[61] Thus, the relief granted in *Paradise* established a successful template that the court in *United States v. City of New York* failed to adequately consider.

Limits on injunctive relief are particularly salient when dealing with government entities. *Missouri v. Jenkins* set the outer limit for court control over local government through injunctive relief.[62] There, the Supreme Court considered whether the district court had the power to direct an increase in local government taxes to ensure adequate funding for a desegregation plan.[63] The Court noted that a "proper respect for the integrity and function of local government institutions" was a substantially important consideration.[64] The Court found that

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[56] *Id.* (citations omitted).

[57] *Id.* at 178 (majority opinion) ("The requirement endures only until the Department comes up with a procedure that does not have a discriminatory impact on blacks—something the Department was enjoined to do in 1972 and expressly promised to do by 1980.").

[58] *Id.* at 180 (citing *Sheet Metal Workers*, 478 U.S. at 487-88 (Powell, J., concurring)).

[59] *Cf.* Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (finding disparate treatment where, by throwing out an entry-level exam after the applicants' scores were already submitted, the white applicants were in a sense discharged).

[60] *See Paradise*, 480 U.S. at 183.

[61] *See id.* at 179.

[62] 495 U.S. 33 (1990).

[63] *Id.* at 39.

[64] *Id.* at 51.

the lower court, by imposing a tax increase in local government, completely circumvented local authority.[65] The Court noted that the lower court had an equally viable and significantly less invasive alternative; it could have simply required local government "to levy property taxes at a rate adequate to fund the desegregation remedy."[66] The Court found that the "difference between these two approaches is far more than a matter of form."[67] Allowing local government to create its own remedy "protects the function of those institutions" and "places the responsibility for solutions . . . upon those who have themselves created the problems."[68] *Jenkins* demonstrates that the court in *United States v. City of New York* should have more seriously contemplated its alternatives before resorting to extensive oversight of the FDNY.

There is leeway for a district court to influence the actions of local government, however, particularly when other methods proved unsuccessful. In *United States v. Yonkers Board of Education*, the Court of Appeals for the Second Circuit addressed whether the district court abused its discretion by refusing to adopt the City's alternate proposal for remedying unconstitutional housing segregation, and by appointing a Housing Special Master.[69] In rejecting the City's contention, the Second Circuit thought it particularly significant that it had been eight years since the first order regarding remedial measures was entered, and there was little progress to show for it.[70] The court also found that the City must come up with an alternative that the district court will find to "'realistically . . . work *now*.'"[71] Otherwise, the district court would not be obligated to consider those alternatives. With regards to a Special Hiring Master, the court found that although the City did not have final authority when disagreements arose, it did have the ability to appeal those decisions.[72] Thus, the court found that the plan did not unnecessarily restrict the local government.[73] By contrast, in

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] 29 F.3d 40 (2d Cir. 1994).

[70] *Id.* at 44.

[71] *Id.* at 43 (quoting Green v. Cnty. Sch. Bd. of New Kent Cnty., Va., 391 U.S. 430, 439 (1968)).

[72] *Id.* at 44.

[73] *Id.* Still, a court cannot simply refuse to entertain alternatives proposed by a local government. *See* Schwartz v. Dolan, 86 F.3d 315 (2d Cir. 1996) (finding that the

United States v. City of New York, there was little demonstration that other alternatives did or would have failed, and it was apparent that the court heavily restricted the City's affairs.[74]

2. *Ricci v. DeStefano* and the Ebbing Support for Race-Conscious Injunctions

The court in *United States v. City of New York*, by choosing not to enforce race-conscious hiring relief, was likely influenced by *Ricci v. DeStefano*.[75] *Ricci*, while not explicitly contradicting or limiting race-conscious remedies—conveyed an attitude that *Paradise*-type relief may be falling out of favor. In *Ricci*, the Fire Department discarded a written exam after it had already been administered and the results submitted.[76] Consequently, white firefighters from the City of New Haven, Connecticut, filed suit for disparate treatment discrimination.[77] The Fire Department's main defense was that it has been caught in a catch-22: in an effort to avoid discriminating against minorities it was forced to reject qualifying white applications.[78]

In a five-to-four decision, Justice Kennedy, writing for the Court, held in favor of the disparate treatment claim, stating the decision to throw out the exam was made "because of race."[79] The Court held that an employer must have a "strong basis in evidence" that use of the test will lead to disparate-impact liability, and the employer in *Ricci* did not meet that standard.[80] Justice Scalia, concurring, made a prediction that disparate-impact claims may soon be extinct altogether.[81] He argued that the majority's decision only "postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[82] In furtherance of his argument, Scalia noted that the Equal Protection Clause of the Fourteenth Amendment prevents the

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local government should have been given an opportunity to have its proposal heard before the court).

[74] *See infra* Part V.

[75] 129 S. Ct. 2658 (2009).

[76] *Id.* at 2664.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 2676 (citation omitted) (internal quotation marks omitted).

[80] *Id.*

[81] *Id.* at 2682-83 (Scalia, J., concurring).

[82] *Id.* at 2682.

government from discriminating on the basis on race.[83] In addition, Scalia expressed his own distaste for disparate-impact claims which, in his view, "place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."[84]

Lower courts sympathetic to Scalia's views might be hesitant to implement any race-conscious injunctive relief for fear of being viewed as placing a "racial thumb" on the scales.[85] The court in *United States v. City of New York* actually attempted to *separate* itself from *Ricci*. There, the court had a narrow interpretation of *Ricci*: whether an employer could engage in disparate treatment, yet still avoid liability by arguing it did so in order to avoid disparate impact liability.[86] As a result, the court found that *Ricci* has no application—including in *United States v. City of New York*—where the question is whether the employment practice "*actually had* a disparate impact."[87] While the court attempted to limit *Ricci*, its aversion to race-conscious hiring measures strongly suggests that the court sided with Scalia's anti-affirmative action sentiments.[88] As the next section demonstrates, however, the court was at best premature to adopt such an outlook.

II. AFFIRMATIVE ACTION AND ITS CRITICS

Affirmative action has a complex history in U.S. jurisprudence. Ever "since its inception in 1961, [it] has been under siege."[89] It has been attacked on several fronts: Presidential Executive Orders,[90] theories of "color-blind[ness]"[91] and "reverse discrimination,"[92] hostility exemplified in academic articles and studies[93] and state constitutional amendments banning

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[83] *Id.*; *see also* Darrell VanDeusen, *VanDeusen on* Ricci v. DeStefano *and Its Aftermath*, LEXSEE 2009 EMERGING ISSUES 4031, at 1, 8 (2009).

[84] *Ricci*, 129 S. Ct. at 2682.

[85] *Id.*

[86] United States v. City of New York, 637 F. Supp. 2d 77, 83 (E.D.N.Y. 2009).

[87] *Id.*

[88] *See infra* Part IV.F.

[89] andré douglas pond cummings, Commentary, *The Associated Dangers of "Brilliant Disguises," Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 IND. L.J. 1277, 1277 (2010).

[90] *See, e.g.*, *id.* at 1277 & n.1.

[91] *See, e.g.*, *id.* at 1277 & n.2.

[92] *See, e.g.*, *id.* at 1277 & n.3 (citations omitted) (internal quotation marks omitted).

[93] *See, e.g.*, *id.* at 1277 & n.5.

affirmative action.[94] Barack Obama's presidential election in 2008 made many believe that "the United States ha[d] officially entered a postracial era."[95] Until this political movement directly and explicitly changes the broad range of Title VII remedies available, however, courts should not incorporate this sentiment into Title VII doctrine. In any event, the movement is ultimately flawed and should not be followed on its merits.

While the movement does appear to have had some recent success in implementing these types of statutory changes on the state level, there has not been significant change on the federal level. Ward Connerly, a black Republican political activist who "spearheaded" the proposals for state constitutional amendments, believes that "[w]ithout any doubt, we have to understand that race preferences are on the way out."[96] Connerly argues that "it does not bode well for a civilized society that professes to believe in equality to countenance treating its citizens differently based on traits over which they have no control as a result of acquiring them by reason of birth."[97] Connerly also feels there are negative societal consequences in a society where "people can't talk honestly about issues without somebody screaming about it. . . . [and] those who are the beneficiaries [of affirmative action] never want to let go. . . . [I]t becomes a crutch."[98] On November 2, 2010, Arizona became the fifth state in the country to pass an anti-affirmative action amendment to its state constitution.[99]

Proponents of a postracial society, or "[c]olorblindness," hope to place race in a "vacuum," removing it from societal consciousness.[100] They argue that "'racism is irrational'" since it is "'unconnected from social reality'" and is nothing more than mere "'physical presence.'"[101] Adopting this philosophy would

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[94] *See, e.g.*, *id.* at 1277 & n.6.

[95] *Id.* at 1277 & nn.7-8.

[96] Peter Slevin, *Affirmative Action Foes Push Ballot Initiatives*, WASH. POST (Mar. 26, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/03/25/AR2008032502401.html.

[97] *A Candid Discussion About Racial Preferences*, PRIMARY SOURCE: TUFTS' J. CONSERVATIVE THOUGHT (Jan. 24, 2007), http://primarysource.typepad.com/main/2007/01/a-candid-discus.html.

[98] *Id.*

[99] *See Arizona Bans Affirmative Action*, INSIDE HIGHER ED (Nov. 3, 2010, 3:00 AM), http://www.insidehighered.com/news/2010/11/03/arizona ("California, Michigan, Nebraska and Washington State have already imposed such bans.").

[100] Khaled Ali Beydoun, *Without Color of Law: The Losing Race Against Colorblindness in Michigan*, 12 MICH. J. RACE & L. 465, 486 (2007).

[101] *Id.* (quoting Neil Gotanda, *A Critique of the Constitution Is Colorblind*, 44 STANFORD L. REV. 1, 48 (1991)).

require courts to provide "a consistent and categorical application of the law" across racial lines.[102] One goal of postracialists is to achieve a "pure meritocracy," where one's social standing is truly a result of inherent skill and perseverance, irrespective of race.[103] Affirmative action arguably presents an "egregious affront" to this structure;[104] by definition, affirmative action reduces the need for minorities to achieve, based on the traditional standards of merit.[105] Because of this supposed imbalance, many proponents argue that affirmative action leads to unqualified candidates and leaves the "successful" minority candidates nevertheless stigmatized by their peers.[106] Postracialists also reject race-based remedies because they believe that class-based injuries are often at the core of what we traditionally view as based on race.[107] They also postulate that any advantages given to one race necessarily harms all others, resulting in a "zero-sum game."[108] Finally, they suggest that an imbalance is created when whites, who fear they will otherwise be confronted with "false accusations of racism," decline to pursue reverse discrimination claims.[109]

Although the movement has had some material gains in some states, their philosophy is ultimately flawed. At best, Connerly and his followers ignore how the implementation of a so-called postracial society will impact a nation that has focused on race throughout its history.[110] At worst, postracialists actually help reinstate "a formal regime of White privilege."[111]

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[102] *Id.*

[103] *Id.* at 487 (internal quotation marks omitted).

[104] *Id.* at 488.

[105] Especially when compared to their majority counterparts.

[106] Beydoun, *supra* note 100, at 488; *see also* Tanya Kateri Hernandez, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 139-40 (1998).

[107] *See* Sumi Cho, *Critical Race Theory Speaker Series, CRT 20: Honoring Our Past, Charting Our Future: Post-Racialism*, 94 IOWA L. REV. 1589, 1602 (2009).

[108] *Id.*

[109] *Id.* (citing RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 339 (2008)).

[110] *See generally* Mario L. Barnes, Erwin Chemerinsky, & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010).

[111] Beydoun, *supra* note 100, at 486. Critics have questioned the legitimacy and noted the hypocritical nature of the movement's tactics. For example, Ward Connerly was likely chosen as a spokesperson against affirmative action "because of his identity as a Black man." *Id.* at 489. In addition, critics note that Connerly receives a yearly salary of $1 million to perform these duties, suggesting that his motives may not necessarily be sincere. *Id.* Critics also note that the supporters of this movement largely stem from "a small group of wealthy and powerful rights [sic] wing corporate tycoons," which suggests their motives may be in line with "trying to turn back the clock on civil rights . . . ." *Id.* at 490-91 (citing Lee Cokorinos, *The Big Money Behind*

First, a postracial society is simply too utopian an ideal to be successful in our current society. Second, even if a truly postracial society is possible, deep inequalities that are based on race still exist today.[112] While postracialists point towards symbolically significant but nonetheless anecdotal evidence—for example, President Obama's presidency—as proof of a postracial society,[113] significant statistical disparities still exist across the nation that are attributable to race.[114] In addition, the forms of discrimination have become "more subtle and covert," not lending themselves to straightforward detection by the public or statistical analysis.[115] Unconscious discrimination permeates our daily lives, especially during "the course of reasoned evaluations."[116] Additionally, colorblindness, or "race-neutral universalism," is rarely applied universally and tends to benefit nonminorities disproportionately.[117] Finally, the idea that we have entered a postracial era has been raised many times before—practically every time minorities have made significant strides—and those proclamations have almost universally been discredited.[118] There is nothing to suggest that we have now developed the awareness and foresight necessary to determine whether race has become a nonissue.

In sum, the politics of today need not erode the purposes and goals of remedies developed under federal and state law. While the tides of public opinion may have swayed as of late,

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Ward Connerly, EQUAL JUST. SOC'Y (May 26, 2005), http://www.equaljusticesociety.org/Cokorinos_Connerly_BigMoney.pdf).

[112] *See* Barnes et al., *supra* note 110; Cho, *supra* note 107; Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2007); Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503 (2009).

[113] *See* Barnes et al., *supra* note 110, at 981-82.

[114] *See id.* at 982-91 (noting that significant statistical disparities still exist in terms of poverty, income and wealth, homeownership, employment, education, and criminal justice statistics); *see also* Pager, *supra* note 112, at 107 (noting that "blacks, and young black men in particular, have become increasingly likely to drop out of the labor market altogether when faced with the prospect of long-term unemployment or marginal employment opportunities").

[115] Pager, *supra* note 112, at 105 ("It could be the case . . . that discrimination remains fairly routine in certain contexts, despite infrequent public exposure.").

[116] *Id.* at 108 (citations omitted).

[117] Cho, *supra* note 107, at 1602 (citing john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 789-98 (2009)). For example, model recipients for the "G.I. Bill, welfare, and social security" are "white, able-bodied, and male." *Id.* (citing powell, *supra*, at 794-98).

[118] *See* Barnes et al., *supra* note 110, at 972 ("Almost from the moment the Civil War ended and the Thirteenth Amendment abolished slavery, there were declarations that the United States had moved beyond race.").

there is nothing to suggest that courts—particularly federal courts and the great majority of state courts where affirmative action is still permitted—should lessen their resolve to provide race-conscious remedies. These remedies help achieve the very thing postracialists believe we already have—a society in which one's race does not hamper one's equal opportunity to succeed.

III. HISTORY OF RACE DISCRIMINATION IN THE FDNY

The long history of racial discrimination in the FDNY only emphasizes the need to implement impactful race-conscious hiring in *United States v. City of New York*. In the 1920s, Black firefighters needed strong resolve to last in the Fire Department. They lived—and literally slept—with reminders that they were not welcomed. For instance, while on overnight duty they were assigned to a "black bed" at the firehouse, "which whites refused to use even when no black firefighters were on duty."[119] Being a New York City Firefighter "tends to be a family business."[120] As a result, black and Hispanic citizens do not have the same access or encouragement to become part of the Fire Department.

Black and Hispanic firefighters, however, were not without their champions. In 1940, Wesley Williams, the third black firefighter in the Fire Department,[121] helped establish the Vulcan Society in an effort to draw the black-firefighter community together.[122] By 1944, the Vulcan Society had successfully lobbied for regulations that banned racial discrimination—at least officially—within the Fire Department.[123]

By the 1970s, overt racial discrimination had been supplanted by more subtle, yet equally virulent, racial discrimination. A typical experience for a black firefighter at this time was akin to that of "being in Archie Bunker's living room."[124] They often found "racial epithets written on the

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[119] TERRY GOLWAY, SO OTHERS MIGHT LIVE: A HISTORY OF NEW YORK'S BRAVEST 203 (2002).

[120] Tom Deignan, *Is the FDNY Racist?*, VOICES THAT MUST BE HEARD (Feb. 23, 2005), http://www.indypressny.org/nycma/voices/158/editorials/editorials/.

[121] GOLWAY, *supra* note 119, at 203; *see also History of the Vulcan Society*, VULCAN SOCIETY INC. FDNY: OFFICIAL WEB SITE OF THE VULCAN SOCIETY INC., http://www.vulcansocietyfdny.org/History.html (last visited Jan. 26, 2012).

[122] *History of the Vulcan Society*, *supra* note 121; *see also* GOLWAY, *supra* note 119, at 204.

[123] *History of the Vulcan Society*, *supra* note 121; *see also* GOLWAY, *supra* note 119, at 204. Although, "the black bed . . . persisted into the immediate postwar years . . . ." *Id.* at 205.

[124] GOLWAY, *supra* note 119, at 277 (internal quotation marks omitted).

firehouse blackboard,"[125] and it was apparent that their "white colleagues were not particularly fond" of the "black neighborhoods."[126] In fact, in 1973 the United States District Court for the Southern District of New York found that the Fire Department discriminated against minorities, holding that the City's entry-level exams had a disparate impact[127] on minority firefighters.[128]

Minority representation in the FDNY has not appreciably improved since 1973. In that year, only 5 percent of blacks and Hispanics made up the Fire Department while making up 32 percent of the general population.[129] Between 1991 and 2007, the percentage of black firefighters never exceeded 3.9 percent, and by 2007, had dropped to 3.4 percent.[130] In a 1999 census of minority firefighter representation in large American cities, New York ranked at the bottom of the list; New York minority firefighters were only one-tenth as represented in the FDNY relative to the city's general population.[131] Not surprisingly, a discrimination suit was again brought in 2007.

IV. BACKGROUND AND ORDERS ISSUED THUS FAR IN *UNITED STATES V. CITY OF NEW YORK*

A. Facts and Prior History

In 2007, the United States, followed by the Vulcan Society of the New York Fire Department and individual plaintiffs, filed suit in District Court within the Eastern District of New York alleging that the Fire Department's hiring practices violated Title VII of the Civil Rights Act of 1964.[132] The focus of the complaint concerned two written exams that ranked prospective entry-level firefighters and significantly impacted hiring.[133] Plaintiffs argued that the tests had a disparate impact on black

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[125] *Id.*

[126] *Id.*

[127] For a general discussion on the theory of disparate impact, see *supra* Part I.A.

[128] *See infra* Part IV.A; Vulcan Soc'y of N.Y.C. Fire Dep't, Inc. v. Civil Serv. Comm'n, 360 F. Supp. 1265, 1272, 1275 (S.D.N.Y. 1973).

[129] United States v. City of New York, 683 F. Supp. 2d 225, 241 (E.D.N.Y. 2010).

[130] *Id.*

[131] *Id.* at 242 (citations omitted).

[132] Complaint ¶ 1, *City of New York*, No. 07-CV-2067 (E.D.N.Y. May 21, 2007), ECF No. 1; Intervenors' Complaint ¶ 1, *City of New York*, No. 07-CV-2067 (E.D.N.Y. July 17, 2007), 2007 WL 3117053, ECF No. 48.

[133] Complaint ¶ 1, *City of New York*, No. 07-CV-2067 (E.D.N.Y. May 21, 2007), ECF No. 1.

and Hispanic applicants.[134] The Vulcan Society also argued that the continued racial disparities in the Fire Department amounted to disparate treatment and that defendants "have been long-aware of the discriminatory impact" their examination process has had on blacks.[135] The Vulcan Society alleged that defendants "continued rel[ying] on and perpetuat[ing] . . . these racially discriminatory hiring processes."[136]

The entry-level exams for New York City firefighters have been under scrutiny for some time. In 1973, the city's entry-level exams were similarly found to have had a disparate impact on minority firefighters.[137] In fact, the court in *United States v. City of New York* found the testing procedures used during the 1973 decision to be "strikingly similar to the testing procedures in this case."[138] In addition, the defendants in the 1973 decision "failed to . . . demonstrat[e] that the examination was job-related," which had "the quality of déjà vu" when compared to the current action.[139] The 1973 court ordered the City to hire one-third minority applicants until they were able to develop a new, nondiscriminatory test.[140] The City also hired a private consulting firm to help develop the tests.[141]

Only three years later, however, the City abandoned their relationship with the private consulting firm purportedly because of a "fiscal crisis."[142] The City also failed to follow the minority hiring requirement and instead "instituted a hiring procedure that required . . . minimum appointment requirements such as college credits, a driver's license, and certified first responder with defibrillation training."[143] The 2012 court found that any effect the 1973 decision had on minority hiring "constituted little more than a brief departure from an otherwise relentless pattern" of discrimination.[144]

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[134] *Id.*

[135] Intervenors' Complaint ¶ 51, *City of New York*, No. 07-CV-2067 (E.D.N.Y. July 17, 2007), 2007 WL 3117053, ECF No. 48.

[136] *Id.*, *cited in City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009).

[137] *See City of New York*, 683 F. Supp. 2d 225, 238 (E.D.N.Y. 2010) (citing Vulcan Soc'y of N.Y.C. Fire Dep't, Inc., 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973)). The court notes this case "furnishes proof of an old adage: the more things change, the more they remain the same." *Id.*

[138] *Id.* at 239.

[139] *Id.* at 240.

[140] *Id.* (citing Vulcan Soc'y of N.Y.C. Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387, 391 (2d Cir. 1973)).

[141] *Id.* at 241 (citing Berkman v. City of New York, 536 F. Supp. 177, 184 n.1 (E.D.N.Y. 1982)).

[142] *Id.* (citing *Berkman*, 536 F. Supp. at 184).

[143] *Id.* (citation omitted).

[144] *Id.*

B. Disparate Impact Decision

On July 22, 2009, the court in *United States v. City of New York* found that the entry-level exams—Written Examinations 7029 and 2043—had a disparate impact on black and Hispanic applicants in violation of Title VII of the Civil Rights Act of 1964.[145]

Both exams were "an 85-question, paper-and-pencil multiple choice test" administered from 1999 through 2002 and from 2002 through 2007, respectively.[146] Passing either exam was a prerequisite for taking the physical performance test (PPT).[147] The applicants were ranked in order by combining the results of both the written and physical tests.[148] About 1750 black applicants and 2125 Hispanic applicants took exam 7029.[149] Only 104 (3.2 percent) blacks were hired from those who took the exam.[150] Also, black applicants passed the exam only 67 percent as often as white applicants.[151] This "disparity [amounted] to 33.9 units of standard deviation,"[152] which means the probability the disparity "occurred by chance [was] less than 1 in 4.5 million-billion."[153] In addition, only 274 (8.5 percent) Hispanics who took the exam were hired.[154] Hispanic candidates passed the exam 85.3 percent as often as white candidates.[155] "[T]his disparity is equivalent to 17.4 units of standard deviation, meaning that the likelihood it occurred by chance is less than 1 in 4.5 million-billion."[156] A similar set of statistics was present for Exam 2043.[157]

The court found that there were no "material factual disputes sufficient to preclude summary judgment on job-relatedness."[158] The court stated that "the City tested for tasks and abilities that could be learned on the job,"[159] rather than

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[145] *City of New York*, 637 F. Supp. 2d 77, 82-83 (E.D.N.Y. 2009).
[146] *Id.* at 84-85.
[147] *Id.* at 85.
[148] *Id.*
[149] *Id.* at 86.
[150] *Id*.
[151] *Id.* at 88.
[152] *Id.*
[153] *Id.* (citations omitted).
[154] *Id.* at 86.
[155] *Id.* at 88-89.
[156] *Id.* (citations omitted).
[157] *See id.* at 89-90.
[158] *Id.* at 110.
[159] *Id.* at 113 (citations omitted).

measuring tasks and abilities that "are needed at entry."[160] In addition, the court found that "the City [did] not offer[] any evidence of a competent test construction process . . . . Instead, ... the City appear[ed] to be relying on the same practices for which it was criticized by the Second Circuit thirty years ago."[161] The court also found the City "fail[ed] to test various cognitive and non-cognitive abilities . . . [and] fail[ed] to show that the examinations had an appropriate reading level."[162] Finally, the court found that a reasonable fact-finder could not conclude that exams had the "reliability or validity" necessary to refute the statistical claims.[163] In sum, the court found that the exams—in which a disproportionate number of black and Hispanics had failed—did not adequately predict future performance. Therefore, the court found that the exams had a disparate impact on black and Hispanic applicants.[164]

C. Disparate Treatment Decision

On January 13, 2010, the court also found that the City engaged in systematic disparate treatment.[165] The court stated the exams were "part of a pattern, practice, and policy of intentional discrimination against black applicants that has deep historical antecedents and uniquely disabling effects."[166] The plaintiffs were able to establish their prima facie case primarily through "undisputed statistical and anecdotal evidence."[167] The large standard deviation in racial disparity—from 10.5 to 33.9 units—made the statistical evidence legally significant,[168] and the statistical evidence was "supplemented . . . [by] showing with extensive historical, anecdotal, and testimonial evidence that intentional discrimination was the City's 'standard operating procedure.'"[169]

The City made no attempt to show that the plaintiffs' proof was either "inaccurate or insignificant" by questioning its

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[160] *Id.* (citations omitted).
[161] *Id.* at 116.
[162] *Id.* at 123.
[163] *Id.* at 131.
[164] *Id.*
[165] *City of New York*, 683 F. Supp. 2d 225, 233 (E.D.N.Y. 2010).
[166] *Id.* at 273.
[167] *Id.* at 251.
[168] *Id.* at 236.
[169] *Id.* at 250 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977)).

"source, accuracy, or probative force."[170] Instead, the City attempted (and failed) to show that it had no "subjective intent to discriminate."[171] Therefore, the court found that the defendants engaged in disparate treatment based on a pattern and practice of discrimination[172] and left the form of relief to the remedial stage.[173]

D. Preliminary Injunction Decision

On June 29, 2010, the City stated that it "expect[ed] to hire approximately 300 new firefighters" from a new test, "Exam 6019."[174] Plaintiffs were able to demonstrate, however, that this new exam would still produce a disparity between black and white applicants' pass rates—estimated at 22.70 units of standard deviation.[175] The plaintiffs also demonstrated that Hispanics and white applicants' pass rates would be separated by 11.35 units of standard deviation.[176] The court was persuaded that this potential disparity was more than sufficient to show that a prima facie case would be met if litigation was brought regarding the new exam.[177]

The court also found that the City would be unable to raise a proper business necessity defense, since it still could not successfully demonstrate that a higher test score, by as much as three points, detected any marked increase in an applicant's actual skill as an entry-level firefighter.[178] In addition, the City failed to demonstrate that the new exam was "content valid."[179] As a result, the court enjoined any further hiring by the City under the new exam until October 1, 2010, giving the court time to develop an interim hiring plan that would not violate federal or state discrimination laws.[180]

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[170] *Id.* at 253-55 (quoting Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 158 n.4 (2d Cir. 2001)).

[171] *Id.* at 251.

[172] *Id.* at 255.

[173] *Id.* at 273.

[174] Letter from James M. Lemonedes, *City of New York*, No. 07-CV-2067 (E.D.N.Y. June 29, 2010), ECF No. 456.

[175] *City of New York*, 731 F. Supp. 2d 291, 300 (E.D.N.Y. 2010).

[176] *Id.*

[177] *Id.* at 301.

[178] *Id.* at 315.

[179] That is, the exam failed to test specific knowledge necessary for entry-level firefighters to possess. *Id.*

[180] *Id.*

E. Interim Hiring Decision

On September 13, 2010, the court offered several hiring alternatives from which the City was to choose, most or all of which contained race-conscious adjustments to the Exam 6019 rankings.[181] The court emphasized it had the power to issue broad relief to combat past discrimination; "the district court 'has not merely the power but the duty' to 'bar like discrimination in the future.'"[182] The proposals included variations of "random selection" procedures, where a specified pool of qualified applicants (avoiding the lowest-scoring candidates) would be hired at random, as well as "applicant flow" procedures.[183]

The "random selection" proposals included race-conscious adjustments.[184] For example, one proposal allowed the white applicants who were ranked at the bottom 2500 candidates to be replaced by minority candidates who were just below the 2500 mark, and this new pool would be used to select candidates at random.[185] While the court admitted that "the rank-adjustment proposal [was] a race-conscious compliance measure," the court had no doubt that the proposal was lawful.[186] Indeed, "[a]n unbroken string of Supreme Court and Second Circuit case law confirm[ed] that race-conscious remedial compliance measures are permissible under Title VII."[187]

The "applicant flow" procedures arguably had a more blatant race-conscious component; the City could hire using "any criteria [it] desired" as long as it did so in proportion to the minority representation of the applicant pool.[188] The court recognized that "these proposals [also] strongly resemble[d]

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[181] *See City of New York*, No. 07-CV-2067, 2010 WL 3709350, at *7 (E.D.N.Y. Sept. 13, 2010) (admitting that "[t]here is no question that the rank-adjustment proposal" along with its other proposals, are "race-conscious compliance measure[s]").

[182] *Id.* at *3 (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

[183] *Id*. at *5, *12.

[184] *Id.* at *5-12 (discussing the random selection procedures).

[185] *Id.* at *6.

[186] *Id.* at *7. Although the City disagreed. *See id.* at *7 n.8; Supplement to Special Master's Report at 1, *City of New York*, No. 07-CV-2067, (E.D.N.Y. Sept. 4, 2010), ECF No. 522.

[187] *City of New York*, 2010 WL 3709350, at *7 (citing Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 450-51, 464 (1986); United States v. Paradise, 480 U.S. 149, 166 (1987)).

[188] *Id.* at *12.

racial hiring quotas," but believed that precedent allowed this procedure.[189]

The court was partially persuaded by the fact that the City proclaimed its "current fiscal condition may . . . be such that it cannot reasonably bear the costs of further firefighter hiring delays."[190] A major advantage of the court-proposed interim hiring procedures was that they could be implemented in a matter of weeks rather than months or even years.[191]

F. The City's Rejection of Interim Hiring and the Court's Response

On September 17, 2010, the City enigmatically ignored all of its previous financial and safety concerns. In a letter to the presiding judge, the City stated that "[e]very one of the five proposals from which the Court [was] allowing the city to select involve[d] some form of race-based quota."[192] The defendants recognized that, as a consequence, the City would not be "permitted to hire any entry level firefighters for the duration of the 'temporary injunction.'"[193] The City would simply try to make a valid examination "as expeditiously as possible."[194]

The court—with unambiguous distaste for the City's tactics[195]—"permanently enjoin[ed] the City from hiring firefighters based on the results of Exam 6019."[196] The court found that the City's refusal to follow the court's order was "compelling evidence that enjoining the City from hiring off that test, except according to one of the Hiring Options, would not unduly burden the City . . . ."[197]

Thus, the court did not require the City to implement any of the offered interim hiring procedures.[198] Instead, the

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[189] *Id.* at *14 (citing *Local 28 of Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 450-51, 464; *Paradise*, 480 U.S. at 166; Guardians Ass'n of the N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n, 630 F.2d 79, 109 (1980)).

[190] *Id.* at *15.

[191] *Id.*

[192] Letter from Michael A. Cardozo, *City of New York*, No. 07-CV-2067 (E.D.N.Y. Sept. 17, 2010), ECF No. 532.

[193] *Id.*

[194] *Id.*

[195] Indeed, the court contemplated "sanctions either pursuant to Federal Rule of Civil Procedure 11 or the court's inherent power." *City of New York*, No. 07-CV-2067, 2010 WL 4137536, at *1 (E.D.N.Y. Oct. 19, 2010) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43-46, 50 (1991)).

[196] *Id.* at *2.

[197] *Id.* at *8.

[198] *Id.* at *2.

court enjoined any immediate hiring and gave the City the option to change its mind at any time, leaving the plaintiffs, and everyone else who spent a significant amount of time preparing and taking entry-level exams 7029 and 2043, without any legitimate hiring opportunities in the interim.[199] Although the court was aware that the City's "shifting and contradictory positions"[200] were "simply the latest episode in the City's long campaign to avoid responsibility for discrimination in its Fire Department, whatever the cost,"[201] it left the City to come up with its own nondiscriminatory procedure. The court chose not to enforce any of its temporary hiring procedures despite the fact that even the City "now implicitly accept[ed] that the court has the authority to order quotas in the appropriate circumstances."[202]

G. Subsequent Motion by the Plaintiffs for Compensatory and Injunctive Relief

On December 19, 2010, the plaintiffs filed a motion for a proposed order for injunctive and monetary relief.[203] The plaintiffs requested that the court appoint a "Special Monitor to oversee compliance with the Court's Order."[204] The plaintiffs also requested specific injunctive relief, including a requirement that the Fire Department administer an entry-level exam every two years rather than every four.[205] This frequency would alleviate the fact that blacks and Hispanics are less likely to be aware of the exam or exam date.[206]

In addition, the plaintiffs moved for the court to order the Fire Department to enhance their minority recruitment and publicity programs.[207] In doing so, the Fire Department should "ensure that blacks, Hispanics, and whites are equally informed about employment opportunities . . . ."[208] The goal

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[199] *See id.*

[200] *Id.* at *1.

[201] *Id.*

[202] *Id.* at *7.

[203] Memorandum of Law in Support of Plaintiffs-Intervenors' Proposed Order for Injunctive Relief, *City of New York*, No. 07-CV-2067 (E.D.N.Y. Dec. 9, 2010), 2010 WL 6917514, ECF No. 596.

[204] *Id.* at 2, 6 (arguing that "District Courts have the authority to appoint a Special Master or Monitor when broad injunctive relief is ordered" (citing United States v. Yonkers Bd. of Educ., 29 F.3d 40, 44 (2d Cir. 1994))).

[205] *Id.* at 7-8.

[206] *Id.* at 8.

[207] *Id.* at 8-9.

[208] *Id.* at 9.

would be to have an applicant pool that is "representative of the racial and ethnic makeup of the age-eligible residents of New York City."[209] Such a plan included retaining an expert recruitment consultant, employing thirty full-time recruiters, and providing for an adequate budget.[210] The plan would also include quality test-preparation courses that are "[f]ree and [a]ccessible" to minority applicants.[211]

The plaintiffs also sought to implement changes to the postexam candidate screening process.[212] The plaintiffs noted that minority candidates who were eligible for consideration were screened out "at much higher rates than white candidates."[213] This disparity occurred because the Fire Department often failed to successfully notify minority candidates about their "initial candidate screening intake interview,"[214] and others were disproportionately scrutinized for "arrests that did not result in convictions."[215] In addition, the plaintiffs requested that the Fire Department should have a system in place for monitoring and preventing retaliation and workplace discrimination against minority firefighters.[216]

H. The Court Finds Continued Supervision Necessary to Eliminate Recruiting and Hiring Racial Discrimination in the Fire Department

On September 30, 2011, the court issued a Memorandum and Findings of Fact highlighting many of the issues that remain with regards to the Fire Department's hiring and recruiting processes, creating a strong impression that the entry-level exams only reach the surface of the Fire

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[209] *Id.*

[210] *Id.* at 12-14.

[211] *Id.* at 15.

[212] *Id.* at 16-17.

[213] *Id.* at 17.

[214] *Id.* at 17-18 (noting that minorities were generally harder to reach because their addresses changed more often, but little was done to try to ensure notice when it was apparent the addresses were incorrect).

[215] *Id.* at 17; *see also* Dave Saltonstall, *Bravest's Hiring Under Fire Minorities Seek Larger Numbers on Force That's 93% White*, DAILY NEWS (N.Y.C.), May 2, 1999 (noting that family members of firefighters receive help with "training and surviving the required background checks that minority firefighters say are often used to keep them out of the department. Such checks . . . have snared black candidates for jumping subway turnstiles as kids, while whites with more troubling records are allowed to pass.").

[216] Memorandum of Law in Support of Plaintiffs-Intervenors' Proposed Order for Injunctive Relief at 24-28, *City of New York*, 07-CV-2067 (E.D.N.Y. Dec. 9, 2010), 2010 WL 6917514, ECF No. 596.

Department's discriminatory practices.[217] The court found the need for an attrition-mitigation plan for its entry-level hiring process.[218] The elongated hiring process made black candidates 40 percent more likely than white candidates to eventually be disqualified.[219] The court noted several other areas of concern that needed to be addressed, including setting measurable goals and ensuring continued support.[220]

In essence, the court found the City unwilling to address the issue and thus felt the need to impose a structure for remedial measures. Indeed, the court felt that if the City had "shown the least bit of concern . . . this would be a much different order."[221] The court based this conclusion in part on the amount of time that had passed in this litigation—four years—rather than the amount of time that an actual plan has been implemented, which had not yet occurred. Thus, although the remedial phase of the litigation was in its opening stages, the City was not given an opportunity to implement its own plan.

The Order itself called for extensive oversight by multiple independent parties, and required the City to explain itself when it disagreed with the independent parties.[222] For example, an independent Court Monitor was appointed, and the City could not take "any step in any process for the selection of entry-level firefighters . . . without first obtaining the approval of the Court Monitor."[223] In addition, the City must "retain an independent recruitment consultant . . . subject to the approval of the Court Monitor," who, among other things, "identifies best practices for the recruitment of black and Hispanic" applicants.[224] The City must also come up with a plan to prevent "voluntary" attrition.[225]

The Order also imposes extensive record-keeping and document retention measures and gives the Court Monitor broad authority to request on "short notice" any document or investigation of any individual it deems relevant.[226] Any employee, including unpaid interns, who are "formally or

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[217] Memorandum [and] Findings of Fact, *City of New York*, 07-CV-2067 (E.D.N.Y. Sept. 30, 2011), ECF No. 741.

[218] *Id.* at 13-14.

[219] *Id.* at 15.

[220] *Id.* at 24-39.

[221] *Id.* at 18.

[222] *City of New York*, 07 Civ. 2067, 2011 WL 6131136 (E.D.N.Y. Dec. 8, 2011).

[223] *Id.* at *4.

[224] *Id.* at *6.

[225] *Id.* at *7 (internal quotation marks omitted).

[226] *Id.* at *13, *15-16.

informally" involved in the hiring process of an entry-level firefighter must "immediately create a written record of all oral communications in which they are involved" relating to such conversations.[227] In addition, the City must appoint an independent EEO consultant, who will produce a report that, among other things, "identifies all tasks the EEO Office should be performing to ensure the FDNY's compliance with applicable equal employment opportunity laws."[228] Most notably, the Order is enforceable for up to ten years, unless upon the second civil service hiring list, the City is essentially able to show that there currently is no disparate impact or treatment, and there is no reason to believe that such discrimination would present itself in the near future.[229]

The court explicitly refused to entertain alternatives to this extensive oversight. Indeed, despite the court's previous attempt to implement race-conscious hiring measures, it emphasized that the Order "does not impose hiring quotas in any shape or form," and that "this court has never endorsed hiring quotas . . . it does not believe quotas would be an effective remedy to the City's discrimination."[230] From this context, it is apparent that the decision to impose extensive oversight so early in the remedial phase was due to the court's unjustified aversion to race-conscious hiring.

V. *UNITED STATES V. CITY OF NEW YORK* PROPOSED AN INSUFFICIENT REMEDIAL PLAN AND PREMATURELY IMPOSED RESTRAINTS ON LOCAL GOVERNMENT

In *United States v. City of New York*, the court initially failed to fully exercise its duty to remedy long-institutionalized racial disparity. Subsequently, the court overstepped its bounds by not respecting local government independence over federal courts. When "proposing" its interim plan for relief, the court should have created a plan that required a greater ratio of race-conscious hiring and should have imposed it despite the City's objections. Instead, after the City rejected the interim plan, the court severely limited the City's control over its own hiring practices by imposing extensive oversight. While there is

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[227] *Id.* at *8.
[228] *Id.* at *11.
[229] *Id.* at *17-18.
[230] Memorandum [and] Findings of Fact at 20, *City of New York*, 07-CV-2067 (E.D.N.Y. Sept. 30, 2011), ECF No. 741.

potential for the current plan to address many of the deep-seated racial issues in the FDNY, it unnecessarily does so at the expense of local government's control over its own affairs.

A. The Interim Relief of Race-Conscious Hiring Practices

When the court offered several interim hiring plans from which the City could choose (but ultimately rejected), the plans should have been more expansive in order for them to effectively eradicate racial discrimination. In addition, it was within the court's power to issue a preliminary injunction ordering, rather than asking, that the City follow these proposed hiring procedures.[231]

1. The Proposed Hiring Procedures Should Have Required a Greater Ratio of Minority Firefighters

Under each proposal, the number of black and Hispanic candidates passing the test must have been a "Representative Pool"[232] of all the applicants. In other words, the percentage of black and Hispanics who pass the entry-level exam should be equal to the percentage of black and Hispanic applicants who take the exam. On its face, this proposal would provide a measure of remedy for the particular applicants who had brought a claim. The proposal fails, however, to adequately address the extensive discriminatory effects of the Fire Department's actions in two respects.

First, requiring that the Fire Department hire a "Representative Pool" of the applicants fails to provide relief to the greater minority population because the number of minority applicants was insufficient in itself. Minorities have understandably been discouraged from applying to the Fire Department after witnessing decades of minority applicants who fell short of success.[233] In order to address the long history of discrimination, a greater minority hiring ratio—that of the age-eligible local population—is required.[234] This ratio would

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[231] *See supra* notes 46-60 and accompanying text; United States v. Paradise, 480 U.S. 149, 180 (1987).

[232] *City of New York*, No. 07-CV-2067, 2010 WL 3709350, at *4 (E.D.N.Y. Sept. 13, 2010) (defining "Representative Pool" to mean "that the subgroup's racial demographics reflect the racial demographics of the entire applicant pool").

[233] *See supra* Part III.

[234] *See* Memorandum of Law in Support of Plaintiffs-Intervenors' Proposed Order for Injunctive Relief at 7-12, *City of New York*, No. 07-CV-2067, 2010 WL 6917514 (E.D.N.Y. Dec. 9, 2010).

better represent the potential applicants that would have applied had the City not engaged in disparate treatment, which in turn would help alleviate the long-term effects of discrimination.

Second, even considering the court's modest goal of reaching the ratio of minority applicants, it will take a significant (if not an indefinite) amount of time for the entire Fire Department—rather than just the newest, entry-level firefighters—to reach the desired minority ratio.[235] In essence, most nonminority firefighters hired before this plan would have to retire or resign in order for the appropriate ratio to be reached. In addition, considering that this measure, if implemented, would have been only temporary, minority representation would not have significantly increased during that limited time. As a result, the ultimate goal of the plan would not have been reached since the City would have had little incentive to promptly come up with an examination procedure that lacked disparate impact.

Indeed, the "relevant population or work force," rather than the relevant applicant pool, is traditionally used as the standard ratio for race-conscious hiring.[236] It is within the court's scope to use the relevant population or work force as a point of comparison, since "eradicat[ing] race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination."[237] This type of ratio would do much to address the long history of discrimination in the Fire Department. It would ensure that

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[235] *See Paradise*, 480 U.S. at 180 (holding that a "one-for-one" promotion requirement would "have determined how quickly the Department progressed toward [the] ultimate goal"). There, the Court found that "[s]ome promptness in the administration of relief was plainly justified" where the previous "use of deadlines or end dates had proved ineffective." *Id.* In that case, the implementation of a "one-for-one" ratio, where it was determined that the labor pool was twenty-five percent black, "was crafted and applied flexibly, [and] was constitutionally permissible." *Id.*

[236] *Id.* at 187. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 565 (1984) (where the employer agreed to "adopt[] the long-term goal of increasing the proportion of minority representation in *each* job classification in the Fire Department to approximate[] the proportion of blacks in the labor force" (emphasis added)); United Steelworkers v. Weber, 443 U.S. 193, 199 (1979) (upholding an agreement that "50% of the new trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant *approximated the percentage of blacks in the local labor force*" (emphasis added)).

[237] Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 516 (1986); *see also Paradise*, 480 U.S. at 184 (recognizing that "the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court'" (citing Fullilove v. Klutznick, 448 U.S. 448, 508 (1980) (Powell, J., concurring))).

integration of minority firefighters would occur at a sufficient pace. In addition, the rate of integration would remain consistent even if minority applicants continued to be discouraged from becoming firefighters.[238]

The greater ratio also helps prevent future disparate impact discrimination, which was one of the court's main goals.[239] If the minority applicant ratio were applied, the Fire Department would be incentivized to dissuade minorities from applying in the first place since it would reduce the impact of the interim hiring plan. If the Fire Department engaged in this activity, however, it would create an acute possibility of future disparate impact and treatment liability.[240] On the other hand, a hiring ratio based on the general population would eliminate that incentive. Indeed, the general population ratio would actually dissuade the City from such a practice because it would only serve to reduce the pool of minority firefighters from which they could choose—thus lowering the chances that the new hires would be the highest qualified.

This higher ratio would not "trammel the rights" of white employees,[241] nor would it put the qualifications of the accepted applicants into question. The court's reasoning for interim relief still holds in this respect.[242] There, the court felt the hiring procedures were not "likely to upset the expectations of the Qualified Candidates, white and minority alike" because "a high percentage of the [so-called] Qualified Candidates will be appointed to one of the next two firefighter classes."[243] By ensuring that all the candidates are "qualified"[244] and that

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[238] A hiring ratio based on the number of applicants might incentivize the Fire Department to discourage minorities from applying; reducing the pool of minority applicants would in turn reduce the number of minority entry-level firefighters they would have to hire. This tactic would have no impact, however, on a hiring ratio based on minority representation in the local population.

[239] *See supra* Part I.B; Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[240] Plaintiffs could bring a disparate treatment or disparate impact claim against the Fire Department regarding its recruitment of minority applicants. Even if the Fire Department ultimately hired a sufficient ratio of minorities, this event would not preclude a disparate impact claim because the "bottom line defense" is not a legitimate defense against disparate impact claims. *See* Connecticut v. Teal, 457 U.S. 440, 442 (1982).

[241] *See Paradise*, 480 U.S. at 183 (noting that any promotion requirement would give an advantage to black applicants, the "situation is only temporary, and is subject to amelioration by the action of the Department itself").

[242] *See* United States v. City of New York, No. 07-CV-2067, 2010 WL 3709350, at *6 (E.D.N.Y. Sept. 13, 2010) (addressing interim hiring).

[243] *Id.*

[244] *Paradise*, 480 U.S. at 183 ("[T]he basic limitation, that black troopers promoted must be qualified, remains. Qualified white candidates simply have to compete with qualified black candidates.").

white employees do not face an "absolute bar" from employment,[245] the court would be able to institute temporary relief that allows for a greater ratio of black and Hispanic workers to be hired.

In addition, such a hiring procedure would actually help keep race-conscious relief a temporary measure. Because the hiring would create a substantial and predictable inflow of minority firefighters, the procedure would have a substantial effect—enough to encourage the City to develop a nondiscriminatory test that the court could accept. The incentives to develop an acceptable test would persist even if the City's intentions for doing so were dubious. For example, because a nondiscriminating test does not necessarily mean that the ratio of the eligible population will be hired,[246] the City—in an effort to *reduce* minority integration—may calculate that developing their own court-approved exam will actually slow the integration of minority firefighters.

The City opposed hiring blacks at a ratio matching the percentage of blacks that are age-eligible within the City. The City first argued that some of these members will inevitably "self select out because they know they do not meet some of the unassailably objective criteria for being a firefighter."[247] This argument is at best incomplete, because it does not provide any legitimate reason why potential black applicants would "select out" at a higher rate than white applicants. The City also suggests that "[n]o matter how effective the FDNY's recruitment efforts are, and no matter how positively an FDNY career is viewed in diverse communities, at the end of the day firefighting will not be everyone's career choice."[248] This statement implies that blacks are simply not as interested in becoming firefighters. However, such an argument must be

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[245] *See id.* at 182 (stating that an "'absolute bar' to white advancement" does not exist where "50% of those elevated were white" and the procedure "does not require the layoff and discharge of white employees" (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986))). The Court in *Wygant* notes that "layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." 476 U.S. at 283.

[246] The disparity will generally need to be between two to three standard deviations away from the eligible population for a disparate impact claim to be successful, which leaves room for the "neutral" test to have results that are somewhat below the ratio of minorities in the relevant population. *See supra* note 19 and accompanying text.

[247] Defendants' Memorandum of Law in Opposition to Plaintiffs-Intervenors' Motion for a Proposed Order for Injunctive Relief at 18, *City of New York*, No. 07-CV-2067 (E.D.N.Y. Dec. 9, 2010), 2010 WL 6917516, ECF No. 599.

[248] *Id*.

supported by strong evidence that is not based on stereotypical belief.[249] Here, not only does the City fail to provide such evidence, but it also fails to rebut the presumption that many minorities have been discouraged specifically because of the intentional discrimination[250] that has existed in the Fire Department for decades.[251]

2. The Court Should Have Required Implementation of an Interim Hiring Procedure Rather Than Issue a Permanent Injunction and a Subsequent Intensive Oversight Program

A race-conscious hiring procedure (using either ratio) would have been preferable over the court's permanent injunction because of the injunction's effect upon third-party bystanders. The injunction forced all the applicants who took entry-level exams 7029 and 2043 to bear the costs of the finding of discrimination. None of the applicants who took these exams will be able to begin employment for an indefinite period of time. Even if a hiring procedure came close to "trammel[ing] the rights" of white employees[252]—for example, by hiring little or no white firefighters for a specified time period—there would still be a substantial benefit in allowing the current plaintiffs some form of immediate relief. The permanent injunction, on the other hand, leaves *all* the applicants with no prospects of employment, as now they all must wait for the City to develop an adequate exam.[253] If the court intended to use this delay to allow the City to work on a more effective plan, it could have instead simply implemented a temporary race-conscious hiring procedure and let the City use the subsequent time to come up with a more permanent solution.

In addition, the injunction did not create sufficient incentive for the City to develop a nondiscriminatory exam. If the court does not accept the City's new proposals, the court

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[249] EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 876-77 (7th Cir. 1994) (an employer cannot simply assert that the racial disparity is based on lack of interest without providing closely scrutinized evidence); *cf.* EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 313-14 (1988) (employer successfully argued with extensive evidence that women were not interested in becoming salespersons).

[250] The court acknowledges that such discrimination exists. *See City of New York*, 683 F. Supp. 2d 225, 241 (E.D.N.Y. 2010).

[251] *See supra* Part III.

[252] *See supra* note 241 and accompanying text.

[253] *City of New York*, No. 07-CV-2067, 2010 WL 4137536, at *11 (E.D.N.Y. Oct. 19, 2010).

would be again forced to offer interim race-conscious hiring procedures before the City could commence hiring. Given the fact that the court's proposals as constituted would not have a significant impact over time,[254] the consequences for the City are small if it does not produce an adequate exam.

B. The Court Overzealously and Prematurely Imposed Restraints on Local Government

Despite the apparent difficulty the court faced in getting the City to cooperate with its interim hiring plan, the court was overzealous and premature in developing an extensive oversight system. While the plan allows the City to have its proposals heard before the court and provides for the ability to take appeal—and thus does not on its face violate the limits on local government outlined in *Missouri v. Jenkins*[255] and *Schwartz v. Dolan*[256]—the plan was implemented too soon and puts into question the City's practical ability to effect such proposals.

The limits on injunctive relief set forth in *Paradise* shed light on this plan.[257] A significant factor in determining whether injunctive relief is too broad is the planned duration of the remedy.[258] Here, the plan could last as long as ten years. Admittedly, the length of the plan is somewhat "contingent upon the [City's] own conduct," as it was in *Paradise*;[259] the court could relinquish its control if the City were able to meet certain goals.[260] The goals the City must reach, however, are unrealistic. For example, the City must prove, by a preponderance of the evidence, that it does not and will not use "any examination that in any way results in a disparate impact" and must be job-related or required by business necessity.[261] Even with earnest intentions and generous resources, no amount of evidence can definitively pronounce that future examinations will not have a disparate impact. A proposed change in any step of the examination procedure, up to and including the examination questions, can have an unexpectedly profound effect on the results.

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[254] *See infra* Part V.A.1.

[255] 495 U.S. 33 (1990).

[256] 86 F.3d 315 (2d Cir. 1996); *see supra* notes 62-73.

[257] United States v. Paradise, 480 U.S. 149 (1987).

[258] *Id.* at 187.

[259] *Id.* at 178.

[260] United States v. City of New York, No. 07-CV-2067, 2011 WL 6131136, at *17-18 (E.D.N.Y. Dec. 8, 2011).

[261] *Id.* at *17.

In addition, even if the Fire Department were able to meet these goals, the court would enforce the plan at least while the next two entry-level exams were administered. Currently, the Fire Department administers the exam every four years, but plaintiffs are hoping to condense it to every two years.[262] Therefore, the court will likely enforce the plan for at least four years—if not eight—regardless of the Fire Department's progress.

More importantly, the court overstepped its authority by failing to properly address the "efficacy of alternative remedies."[263] Specifically, the court refused to address the efficacy of more direct race-conscious hiring practices, and in fact outright rejected this possibility. A potent race-conscious interim hiring measure has the potential to be just as successful in attacking racial discrimination without encroaching on local government.[264] In the event that these measures were unsuccessful, only then could the court find that more intensive oversight is necessary.

C. Regardless of Who Is in Control, Minority Focused Recruitment Measures Should Be Implemented

Providing for recruitment policies will lead to many of the advantages of race-conscious hiring without directly imposing a race-conscious remedy.[265] Therefore, whether the court or the Fire Department is in control of developing the hiring program, it should be apparent to both parties that enhanced recruiting measures would be both beneficial and not politically costly. Thus, even if the court did not impose strict oversight, it is highly likely that the Fire Department would have implemented its own recruiting procedures.[266]

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[262] *See supra* note 218.

[263] *Paradise*, 480 U.S. at 187.

[264] *See supra* Part V.A.

[265] While minority recruiting efforts are "race-conscious" in the general sense of the word, such efforts are not as controversial as affirmative action techniques that account for race during or after the application process itself. Minority recruiting, for example, does not raise any possible doubt as to the qualifications of the accepted applicants, because they objectively scored well on the test without adjusting for race. Similarly, it poses little threat to white applicants who fear that minority applicants who did less well on the exam will nevertheless be hired in place of them.

[266] Indeed, the Fire Department has already proposed and began to implement recruitment efforts. *See* Alan Feuer, *A Fire Department Under Pressure to Diversify*, N.Y. TIMES (Aug. 26, 2011), http://www.nytimes.com/2011/08/28/nyregion/a-fire-department-under-pressure-to-diversify.html?pagewanted=all; Tim Stelloh, *Fire Commissioner Visits Black Church to Seek Recruits*, N.Y. TIMES (July 17, 2011), http://www.nytimes.com/2011/07/18/nyregion/nyc-fire-commissioner-recruits-at-black-church.html.

Although minority recruitment efforts in the Fire Department began as early as 1991, the sincerity of the effort and its actual successes are open to question. In 1991, the City's first black mayor and first Hispanic fire commissioner stated they would increase firefighter diversity.[267] Fire Department officials, however, would rarely if ever attend meetings when minority recruitment was the topic of discussion and future meetings were eventually cancelled.[268] The Fire Commissioner at the time, Carlos Rivera, complained that City Hall "was not really committed to minority hiring and . . . never gave him authorization to spend more money for recruiting."[269] The recruiting drive was not successful by any calculation; not only were minority applicants who passed the exam still underrepresented as compared with the total number of minority applicants, but the total number of minority applicants continued to be underrepresented when compared to the local labor pool.[270]

Although unsuccessful in the past, if the Fire Department were required to implement a race-conscious hiring procedure until it could provide a reasonable alternative, it would have incentive to conduct a recruitment campaign properly. Under those circumstances, a successful recruitment campaign would be politically desirable because it would allow the Fire Department to avoid the public backlash from using quotas or race-conscious hiring; if they successfully recruit and train a sufficient number of qualified black and Hispanic applicants to meet the imposed hiring ratios, they would not need to engage in any race-conscious hiring after the scores were submitted. Thus, the desire to avoid race-conscious relief should make developing a recruitment policy an especially attractive option to both the court and the Fire Department.[271]

There are many other advantages to developing a successful recruitment program to the benefit of all parties. It

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[267] William Murphy & Joseph W. Queen, *Recruiting Farce FDNY Minority Drive Described as Sadly Lacking*, NEWSDAY (N.Y.C.), June 25, 1996, at A04.

[268] *Id.* (noting that "[r]ecruiters could not attend some strategy meetings because their supervisors gave them 'priority' assignments that took them elsewhere"). The authors derived their information from the "city's Equal Employment Practices Commission, a mayoral agency, in its 1994 annual report." *Id.*

[269] *Id.*

[270] *See* Saltonstall, *supra* note 215 (noting that in February 1999, "only 10% of those who took the February exam were black and only 12% Hispanic, an increase of only a few percentage points from 1992, when the last test was given"). The lack of minority turnout resulted "despite a much-ballyhooed minority recruiting drive the department undertook in 1994." *Id.*

[271] The court in *United States v. City of New York* has shown a propensity to limit race-conscious relief when possible. *See supra* notes 85-88 and accompanying text.

would naturally increase the number of minorities who choose to join the applicant pool, which no amount of race-conscious hiring could ever achieve directly. It would also lessen the negative impact of using the pool of applicants as the "Representative Ratio," since the ratio of minority applicants could equal and possibly even eclipse the ratio of minorities in the local population after successful recruitment.

A recruitment program would also help prevent the type of disparate impact liability that would stem from an underrepresentation of minority applicants. Lieutenant Rod Lewis believes "the recruiting problem is, in part, a matter of perception in the city's minority neighborhoods . . . [y]ou see the Fire Department . . . [b]ut you don't see black firefighters, so many kids don't think it's an option."[272] By reaching out to minorities, and sending the message that they have legitimate opportunities to become firefighters, the Fire Department will be able to break the "Irish and Italian firehouse culture in which fathers routinely pass on their knowledge and contacts to sons eager for work."[273] As a result, the City will be better protected from racial discrimination claims regarding its recruiting programs.

The methods of recruitment suggested in plaintiffs' memorandum should largely be implemented.[274] It is especially important to develop outreach programs that help train minority candidates for the entry-level exam,[275] since current firefighters' families have been enjoying access to similar preparatory programs for some time.[276] Such a program would be directly related to the subject of the litigation because it would decrease the disparate impact of any future testing.[277] It may also be a more cost-effective and reliable way to reduce disparate impact than relying on consultants to create a test that is reliable, predictive, and consistent with business necessity. Standardized tests, such

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[272] Saltonstall, *supra* note 215.

[273] *See id.*

[274] *See generally* Memorandum of Law in Support of Plaintiffs-Intervenors' Proposed Order for Injunctive Relief, *City of New York*, No. 07-CV-2067 (E.D.N.Y. Dec. 9, 2010), 2010 WL 6917514, ECF No. 596; *see also supra* Part IV.G.

[275] *See* Memorandum of Law in Support of Plaintiffs-Intervenors' Proposed Order for Injunctive Relief at 15, *City of New York*, No. 07-CV-2067 (E.D.N.Y. Dec. 9, 2010), *supra* note 274.

[276] *See* Saltonstall, *supra* note 215.

[277] The City argued that their recruitment process was not the subject of the litigation, despite acknowledging that the court has great leeway in developing a remedy. *See* Defendants' Memorandum of Law in Opposition to Plaintiffs-Intervenors' Motion for a Proposed Order for Injunctive Relief at 2-7, *City of New York*, No. 07-CV-2067 (E.D.N.Y. Dec. 9, 2010), 2010 WL 6917516, ECF No. 599.

as the SATs and LSATs, have proven that money and intense research can only go so far in creating a successful, nondiscriminatory exam.[278] After more than thirty years of waiting for the City to develop a test that accomplishes this feat,[279] the court should recognize that such an effort may not ever be wholly successful, even if the City acts in good faith. *Preparing* minorities for the exam, on the other hand, attacks the racial disparity at its source; it educates minorities in order for them to have the tools already available to nonminorities.

CONCLUSION

Although recent political movements have attempted to rid the nation of affirmative action, courts should not acquiesce to them because doing so undermines well-established doctrines in Title VII. The court in *United States v. City of New York*, however, has given full consideration to the movement in its decision. In an effort to avoid race-conscious hiring measures, the court instead instituted an extensive oversight program. While this program gives the plaintiffs, past victims of discrimination, and future minority applicants hope of recourse for the systematic disparate treatment that plagued the Fire Department for decades, this achievement could have been reached without imposing heavy oversight on local government by a federal court.

Future courts, when dealing with deep-seated discrimination, should instead require defendants to engage in interim hiring at a ratio equal to that of the local minority population. If such a plan were implemented here, the City would have had sufficient incentive to develop an unbiased exam and genuine recruitment efforts within a short time.

Hal Budnick[†]

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[278] *See, e.g.*, Harry Ritter, *The Failure of the SATs*, HARV. CRIMSON (Nov. 18, 2003), http://www.thecrimson.com/article/2003/11/18/the-failure-of-the-sats-this/.

[279] *See supra* Part IV.A.

[†] J.D. Candidate, Brooklyn Law School, 2012; B.S., Cornell University, 2008. I would like to thank the editors and staff of the *Brooklyn Law Review* for all their hard work. And a special thanks to my mom and dad, who would always break my writer's block when it came to vocabulary homework.