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New Haven's Racial Test
Merit doesn't matter for city firefighters.

By ABIGAIL THERNSTROM AND STEPHAN THERNSTROM

The Supreme Court is almost the only place in American society where the "frank" debates on issues of race that Attorney General Eric Holder recently called for actually take place. Justices with lifetime tenure feel free to explore -- camouflaged as legal argument -- the conflicting moral visions that still prevent resolution of America's most important, complex and divisive domestic issue.

That debate is likely to be very much in evidence today when the Court hears argument in Ricci v. DeStefano. The issue in Ricci was simply stated by Judge José Cabranes, dissenting from a cursory, unenlightening opinion by the Second Circuit Court of Appeals. "At its core," he wrote, "this case presents a straight-forward question: May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another?"

The employer was the New Haven, Conn., fire department, which in 2003 had a number of vacancies for new lieutenants and captains. The department administered written and oral tests to candidates for these promotions, as required by state civil service provisions and city law. But the city's civil service board refused to certify the results and no promotions were approved. Seventeen white candidates and one Hispanic candidate sued, charging a denial of their 14th Amendment rights, the Civil Rights Act of 1964, and other federal laws.

The board found the racially disparate results of the tests unacceptable. New Haven's population is 37.4% black, but no African-American was among the top performers on either exam. The highest-scoring black candidate for a captaincy ranked 16th, behind 12 whites and three Latinos. On the lieutenant's exam, the strongest black performers ranked 14th, 15th and 16th.

Statistical parity, however, does not define racial fairness, the plaintiffs contend. The case poses a familiar question: Which road will lead to the racial equality most American seek: racial quotas or color-blind, meritocratic standards?

Frank Ricci, the lead plaintiff, had trusted a test of merit. He had been a firefighter for 11 years and was determined to become a lieutenant. All applicants were given three months to prepare for the exam and provided with a detailed reading list. Mr. Ricci is dyslexic, so he paid an acquaintance more than $1,000 to read textbooks onto audiotapes, made flashcards, took practice tests, worked with a study group and participated in mock

interviews. He gave up a second job in order to study long hours. His work paid off: He came in sixth among the 77 candidates who took the exam.

The city set aside the results, although the test had been designed by an experienced Illinois company, Industrial/Organizational Solutions, which routinely scrubbed its assessments for any possible racial bias to protect the agencies from potential civil rights complaints.

The city proclaimed the New Haven test must have been biased, given the results. An amicus brief for the International Association of Professional Black Firefighters declared flatly that it was "widely known and accepted that cognitive examinations, such as used here, have a demonstrated adverse impact on blacks and other minorities." The federal Equal Employment Opportunity Commission has a "four-fifths rule," which holds that a job-related test in which the passing rate of a racial minority is less than 80% of the white rate is presumptively flawed.

If sharp racial disparities are the measure, however, then virtually any test of knowledge is biased. As the Ricci case was making its way through the courts, the authoritative National Assessment of Educational Progress reported its 2005 findings: 29% of white 12th graders -- but only 6% of those who were black -- scored at the "proficient" level in mathematics. Huge racial disparities also show up in state bar examination results, as well as in those administered to aspiring physicians by the National Board of Medical Examiners. These disparities -- which should not be regarded as a permanent fact of life -- are not an argument for racial quotas, however; individuals, not groups, have rights in American law.

A representative of the black firefighters association told the New Haven civil service board that the tests were irrelevant, since they measure only the "ability to read and retain."

But the days of bucket brigades fighting fires in log cabins are long gone. As any firefighter would tell you, to deal with fires in today's technologically complex environment requires at least some understanding of mathematics, structural engineering, electricity and chemistry.

Judge Janet Bond Arterton, writing for the district court, made the assertion that the plaintiffs couldn't have been the victims of racial discrimination. "All applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted," she argued. But change the race of the plaintiffs from white (plus one Hispanic) to black, and the obtuseness of her reasoning is apparent. If a disproportionately large numbers of blacks would have been promoted and the examination results were tossed out for that reason, it would have been an open-and-shut case of blatant racial discrimination.

Let us hope that is the way the Supreme Court views the matter.

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