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RICCI V. DESTEFANO: A MASCULINITIES THEORY ANALYSIS⁺

ANN C. MCGINLEY*

“It was an amazing experience. They were greeted like heroes on the streets, in the hotels, in the restaurants. Everywhere we went, people rushed over to them to shake their hands and thank them for what they did.”¹

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¹ William Kaempffer, *Skilled Tenacious Torre to the Rescue: When Public Safety Workers Need Help, They Know Where to Go*, NEW HAVEN REG., July 19, 2009, at *2 (quoting Karen Torre, attorney for the Ricci plaintiffs, after their victory).

INTRODUCTION: LEGAL AND CULTURAL IMPLICATIONS

In *Ricci v. DeStefano*,² the United States Supreme Court decided one of the most important race discrimination cases in the Court's history. The plaintiffs, one Hispanic and seventeen white firefighters of the City of New Haven, sued the city for failure to certify the results of promotional exams for the positions of lieutenant and captain and argued that the failure to certify was illegal race discrimination in violation of Title VII of the 1964 Civil Rights Act³ and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁴ The City refused to certify the exam results because doing so would have had a disparate impact on African Americans and Latinos.⁵ There were fifteen vacancies at the time the test results were returned; no African Americans and only two Hispanics who took the test would have been eligible for promotion upon certification of the test results.⁶ To the plaintiffs, the case was simple: the city's refusal to certify the results was illegal race discrimination.⁷ The Supreme Court agreed.⁸ It held

² 129 S. Ct. 2658 (2009).

³ 42 U.S.C. § 2000e (2006).

⁴ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 144 (D. Conn. 2006). One hundred eighteen candidates took both written and oral examinations. *Id.* at 145. Once a candidate passed the written test with a minimum score of 70%, his written scores were weighted 60% and the oral scores were weighted 40% to create an index. *Id.* A rank order list was then compiled. *Id.* Based on "the rule of three" in the City Charter, the City was required to consider the top three ranked candidates for each position. *Id.* Although six blacks passed the exam for promotion to Lieutenant and three blacks passed the exam for promotion to Captain, they all were ranked too low on the list to fill the vacancies then open for lieutenants and captains. *Id.* No Hispanics ranked high enough on the list for promotion to Lieutenant and only two Hispanics ranked high enough to be eligible for promotion to Captain. *Id.* By law, the list would remain valid for two years. *Id.* When the city's officials realized that the results had "a very significant disparate impact," it notified the Civil Service Board ("CSB"), which was tasked with certifying the test results. *Id.* (quoting Thomas Ude, Corporate Counsel for the City of New Haven). After holding five hearings and taking testimony from experts and firefighters from both sides, the CSB did not certify the test results, *id.* at 145–50, and the plaintiffs sued the City for race discrimination. *Id.* at 150. The lower court granted the defendant's motion for summary judgment. *Id.* at 163. On appeal, the panel of the Second Circuit Court of Appeals affirmed the judgment of the lower court in a one paragraph summary order. *Ricci v. DeStefano*, 264 F. App'x 106, 106 (2d Cir. 2008). It subsequently withdrew the order and entered a per curiam opinion with virtually identical language that adopted the lower court's opinion as its own. *Ricci v. DeStefano*, 530 F.3d 87, 87 (2d Cir. 2008). The Second Circuit refused to hear the case en banc in a split decision (seven to six). *Ricci v. DeStefano*, 530 F.3d 88, 88 (2d Cir. 2008). Judges Calabresi, Katzmann, and Parker wrote concurring opinions, and Judges Jacobs and Cabranes wrote dissenting opinions. *Id.* The Supreme Court granted certiorari to consider whether respondent had violated Title VII or the Equal Protection Clause in its failure to certify the promotional exams. See *Ricci v. DeStefano*, 129 S. Ct. 893 (2009); *Ricci v. DeStefano*, 129 S. Ct. 894 (2009).

⁵ I use the terms "Latino" and "Hispanic" interchangeably to denote persons of Hispanic heritage.

⁶ *Ricci*, 554 F. Supp. 2d at 145. Blacks represented only twenty-two percent of the lieutenant and four percent of the captain positions even though they represented approximately thirty percent of the firefighters. See Chart provided by Victor Bolden (Dec. 9, 2009) (on file with the Harvard Law Library).

⁷ *Ricci*, 129 S. Ct. at 2661.

that an employer is liable under Title VII if it overturns test results because of race unless the employer can demonstrate that it has a strong basis in evidence that it would lose a disparate impact suit.⁹ The Court concluded that there was not a strong basis in evidence that the City of New Haven would be liable to the unsuccessful test takers in a disparate impact suit if it certified the test results.¹⁰ This conclusion, however, ignored strong evidence that the African American and Hispanic firefighters had a credible disparate impact suit against the City.¹¹ None of this evidence mattered to five members of the Supreme Court. Instead, the majority focused only on the City's refusal to certify the test results because of the race of those who succeeded.¹² Because there had been no fact finding at the trial court level and there was significant evidence that the employer's test was not job-related and that other less discriminatory alternatives existed,¹³ at the very least, the Court should have remanded to the lower court to find relevant facts and to apply the Court's new legal standard.

Ricci was about much more than Title VII, however. It was the judicial equivalent of a paperback potboiler with gender, class, race, and politics on every page. Then-Judge Sonia Sotomayor was on the Second Circuit panel that upheld the City's decision. The case was therefore linked to Republican opposition to the confirmation of the first Latina Supreme Court nominee

⁸ *Id.*

⁹ *Id.* at 2676.

¹⁰ *Id.* at 2681. The case involved a conflict between two theories of Title VII of the Civil Rights Act of 1964: disparate treatment and disparate impact. *Id.* at 2625. Under the disparate treatment theory, it is illegal to discriminate against an applicant or employee intentionally on the basis of race, color, religion, sex, or national origin. *Id.*; see also 42 U.S.C. § 2000e-2(a) (2006). Disparate impact theory was first articulated by the Supreme Court in 1971 in *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971), and Congress later codified it in the 1991 Civil Rights Act. *Ricci*, 129 S. Ct. at 2672; see 42 U.S.C. § 2000e-2(k)(1). Under disparate impact theory, employees may prevail if they prove that a particular neutral employment practice has a disparate impact on members of a protected class and the employer does not prove that the employment practice is job related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Even if the employer meets its burden of proving that a practice is related to job performance, the plaintiffs may still prevail if they demonstrate that there are less discriminatory alternatives that are equally effective. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

¹¹ First, it was undisputed that the test imposed a disparate impact on racial minorities. *Ricci*, 129 S. Ct. at 2677–78. Second, proof supporting the City's affirmative defense of job relatedness and business necessity was weak. *Id.* at 2691–95 (Ginsberg, J., dissenting). Finally, even if the City could prove that the test was job related, Title VII would have required the City to adopt a less discriminatory alternative if the black and Hispanic firefighters could prove that such alternatives existed. *Id.* at 2701. There was proof in the record that in neighboring Bridgeport, Connecticut the fire department had achieved a much more diverse supervisor population by using assessment centers rather than pencil and paper tests to measure qualifications. *Id.* at 2692. Assessment centers, the evidence suggested, allowed candidates for promotion to respond to “real life” situations in order to prove their ability to act as leaders in the fire department. *Id.* at 2705–06.

¹² This conclusion avoided the question of the constitutionality of the disparate impact provision itself. *Id.* at 2674 (majority opinion).

¹³ See *id.* at 2692–95, 2705–06 (Ginsberg, J., dissenting).

and to the success of the first black President of the United States.¹⁴ It was cast in terms of fairness and colorblindness. It was political theater: an opportunity for white, upper-middle class male senators to confirm to the people back home that they believed in hard work, that they understood the plight of the white working man, and that they did not intend to let him down. The subtext was that African American and Hispanic firefighters did not work hard and hence their promotion would have required an unfair advantage.

The case was about white masculinity and heterosexuality and breadwinner status. It was about heroism: the noble job of firefighters who risk their lives to save others. It was about self-respect and a sense of fairness. It was about ethnic heritage—Italian and Irish and even Puerto Rican. It was about the American dream and the ability of all who work hard and act responsibly to accomplish their goals.

In writing the final chapter of this saga, the Supreme Court handed down an ahistorical, acontextual victory to the plaintiff-petitioners and engaged in the construction of the firefighter hero as white (and on one occasion, Hispanic) and male—a construction that was reinforced by Senate hearings less than a month later. Members of the Senate Judiciary Committee that considered then-Judge Sotomayor's qualifications for the Supreme Court invited petitioners Frank Ricci and Ben Vargas to testify.¹⁵ Senators at the hearing contributed to the construction of the ideal firefighter as white (and, at times, Hispanic) and male by congratulating Ricci and Vargas profusely, emphasizing their courage, and ignoring African American, Hispanic and female firefighters who had not succeeded. The explicit message was that the nearly-all white plaintiffs were "real men" and "real firefighters" who worked hard and cared for their families. The implicit message was that female firefighters of all races were not qualified to do the job and that African American and Hispanic firefighters who complained about the disparate impact were lazy and could not measure up.

This Article applies masculinity theory to explore these aspects of the case and its political reverberations. Part I briefly introduces masculinity theory. Part II discusses the history of the New Haven Fire Department and the lawsuits against New Haven and other cities across the country that were brought to give white women and racial minorities access to firefighter jobs. Part III examines how the identity of many white male firefighters is related to race, class, and masculinity and reviews qualitative empirical research that describes the raced and gendered working conditions of firefighters. After a short doctrinal analysis of *Ricci*, Part IV unveils the political response to *Ricci* and the petitioners, Frank Ricci and Ben Vargas, who testi-

¹⁴ See Robert Barnes, Michael D. Shear & Perry Bacon Jr., *Sotomayor Girds for Hill Showdown*, WASH. POST, July 11, 2009, at A01 (suggesting that the confirmation process could affect the future of judiciary).

¹⁵ See discussion *infra* Part IV.

fied before the Senate Judiciary Committee. Finally, the Article concludes that an understanding of the case and its political response requires a historical and contextual approach using a multi-faceted lens that considers not only race, but also class, gender, and politics. It then offers suggestions to public employers faced with decisions regarding how to proceed after *Ricci*. It argues that municipalities should consider the lessons learned from history and masculinity theory in establishing its methods of evaluating candidates for firefighting and supervisory positions in the future.

PART I: A SHORT INTRODUCTION TO MASCULINITY THEORY

Before turning to the workplace conditions in fire departments in New Haven and nationwide, it is important to have a basic understanding of masculinity theory. Developed primarily by sociologists to understand men and masculinity, masculinity studies also draw from psychology, criminology, feminist theory, queer theory, anthropology, and geography.¹⁶ Masculinity research has recently received significant attention from feminists¹⁷ because it explains why men engage in behaviors that are harmful to women.¹⁸ It also demonstrates how competitive behaviors among men of different races may also be gendered.¹⁹ This Part, therefore, provides a brief orientation to masculinity theory that places into context the history of the New Haven and other fire departments nationwide.²⁰

Masculinity theory challenges the view that masculinity is biologically predetermined or natural for men and unnatural for women.²¹ Researchers

¹⁶ See Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 211–21 (2008).

¹⁷ See NANCY E. DOWD, *THE MAN QUESTION: FEMINIST JURISPRUDENCE, MASCULINITIES, AND THE LAW* (forthcoming 2010) (describing the relationship between feminist legal theory and masculinities studies of law). In 2009, Professor Martha Fineman, the Robert W. Woodruff Professor of Law at Emory University Law School, the founder and director of the Feminist Legal Theory Project, and the co-director of Emory's Race and Difference Initiative, held a conference on masculinities theory and feminist theory. *Masculinities and the Law, Feminism and Legal Theory Project*, Emory University (Sept. 11–12, 2009). There were at least twenty significant masculinities and law articles published over the past five years; a comprehensive list of the scholarship regarding law and masculinities scholarship through 2009 can be found in Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 672–74 n.7 (2009) (collecting scholarship).

¹⁸ See, e.g., Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151 (2008) (using masculinities theory to analyze workplace harassment occurring "because of sex"); see also, e.g., Dowd, *supra* note 16 (explaining the concepts of masculinities theory and how feminist theory would benefit from masculinities theory and vice versa).

¹⁹ See Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 798–99 (2000).

²⁰ For an in depth explanation of masculinity theory and how it relates to law and feminism, see Dowd, *supra* note 16, at 235–48; Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 368–78 (2004).

²¹ Michael S. Kimmel, *Masculinity as Homophobia*, in *FEMINISM & MASCULINITIES* 182, 182–83 (Peter F. Murphy ed., 2004).

conclude that rather than evolving naturally from biological sex, masculinity is socially constructed through performances.²² That is, men construct their masculine identities through relationships with others.²³ There are various forms of masculinity; therefore, the term “masculinities” is used in the plural.²⁴

Masculinity prescriptions affect men and women of different races, ethnic backgrounds, classes, and sexual orientations in different ways. Although numerous types of masculinity exist in tension with one another, the ideal is the powerful hegemonic masculinity that is white, middle class, and heterosexual.²⁵ The definition of “masculinity” depends on proof of two negatives: that one is not feminine or a girl, and that one is not gay.²⁶ Most men cannot achieve the hegemonic masculinity ideal, however, and they respond by constantly struggling toward achieving the ideal²⁷ or by engaging in subversive forms of masculinity that are reactions to the ideal.²⁸ These performances are homosocial—men engage in them to prove to other men that they are masculine.²⁹ The performances often involve mistreatment of non-conforming men and of women. These behaviors are particularly evident in exclusively male environments or workplaces or jobs that are traditionally male.³⁰

A few examples will clarify these concepts. White middle class college men who are members of fraternities gain group acceptance by proving their masculinity to each other.³¹ They drink heavily, brag about sexual exploits, mistreat gay men on campus, and participate in “trains” or gang rapes.³² Fortunately, these behaviors do not ordinarily continue once college-educated men mature, but more subtle and still damaging behaviors occur in the

²² *Id.* at 182; see also JAMES W. MESSERSCHMIDT, *MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY* 174 (1993).

²³ Kimmel, *supra* note 21, at 182–83.

²⁴ JACK S. KAHN, *AN INTRODUCTION TO MASCULINITIES* 2 (2009).

²⁵ R. W. CONNELL, *MASCULINITIES*, 76–77 (2d ed. 2005); Kimmel, *supra* note 21, at 184.

²⁶ Kimmel, *supra* note 21, at 185. As Kenneth Karst states, “[t]he main demands for positive achievement of masculinity arise outside the home, and those demands reinforce the boy’s need to be what his mother is not. In the hierarchical and rigorously competitive society of other boys, one categorical imperative outranks all the others: don’t be a girl.” Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 503 (1991).

²⁷ Kimmel, *supra* note 21, at 186–87.

²⁸ See, e.g., David L. Collinson, ‘Engineering Humor’: Masculinity, Joking and Conflict in Shop-floor Relations, 9 ORG. STUD. 181 (1988) (observing masculinities displayed by blue collar workers in shop culture).

²⁹ Kimmel, *supra* note 21, at 186–87.

³⁰ See Ann C. McGinley, *supra* note 18, at 1151, 1184 (describing hazing and gang rape in fraternities).

³¹ *Id.*

³² See PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* 4 (2d ed. 2007) (describing hazing on college campuses).

workplace that enhance masculinity of the male workers.³³ Research demonstrates that even without being aware of it, white collar men exclude women, make them feel out of place, and require them to “act like men.”³⁴ In blue collar workplaces, men construct their masculinity by hazing men who are new to the job or harassing other men who do not belong—i.e. members of racial minorities or gender nonconforming men and women.³⁵ This behavior enhances the men’s self-esteem by identifying the job as belonging to the majority, thereby bolstering their sense of masculinity and the masculinity of the job.³⁶

Besides the gender performances described here, the term “masculinities” also refers to masculine structures and performances in the workplace that create barriers to entry and promotion and affect the terms and conditions of employment based on gender combined with race, national origin, class, and other individual characteristics. One example of a masculine structure in fire departments is the physical performance tests often used intentionally to screen out female firefighters.³⁷

In sum, masculinity theory posits that men engage in homosocial behavior in order to prove their masculinity to each other and to assure that they are part of the group. The behavior’s purpose is to solidify the men as a group and to identify women and others as outsiders.³⁸ Men who engage in this behavior construct and perform their masculinity at work.³⁹ As we shall see, the empirical research in Part III.B below confirms that male firefighters construct their masculine identities through work behavior that affects the working conditions of their colleagues who are racial minorities and white women. But first, we turn to the history of the New Haven Fire Department and the lawsuits brought against fire departments by white women and racial minorities in an attempt to gain some semblance of equality at work.

PART II: A HISTORY OF URBAN FIRE DEPARTMENTS

This Part briefly examines the history of white women and racial minorities in gaining access to firefighting jobs. Section A describes the history of the New Haven Fire Department, a history that confirms the predominance of white men. Section B discusses the 1972 amendment to Title VII that prohibited sex and race discrimination in public employment

³³ See Patricia Yancey Martin, *‘Mobilizing Masculinities’: Women’s Experiences of Men at Work*, 8 ORG. 587 (2001) (describing masculinity practices that harm women in white collar workplaces).

³⁴ Patricia Yancey Martin, *“Said and Done” Versus “Saying and Doing”: Gendering Practices, Practicing Gender at Work*, 17 GENDER & SOC’Y 342, 357 (2003).

³⁵ See McGinley, *supra* note 18, at 1183–89, 1217–19, 1223–26.

³⁶ *Id.* at 1223–24.

³⁷ See Proceedings, *Taking the Heat: Gender Discrimination in Firefighting*, 17 AM. U. J. GENDER SOC. POL’Y & L. 713, 716 (2009) (statement of Richard Ugelow).

³⁸ McGinley, *supra* note 18, at 1223–27.

³⁹ *Id.* at 1223–24, 1229.

and opened a path for lawsuits against fire departments by women and racial minorities seeking to gain access to jobs and promotions.

A. *History: New Haven and Its Fire Department*

New Haven, currently a city of approximately 124,000 residents,⁴⁰ was first incorporated as a city in 1784, though it had existed for a century and a half as a colony and town.⁴¹ After a number of destructive fires in the early nineteenth century, the New Haven mayor established the first paid fire department in New Haven in 1862.⁴² Since that date, only fifteen different fire chiefs have governed the department.⁴³

Like other departments across the country,⁴⁴ New Haven's fire department has a history of disproportionate representation of Irish and Italian immigrants. After 1830, increasing numbers of immigrants moved to New Haven.⁴⁵ The Irish emigrated en masse in 1847 to escape the potato famine.⁴⁶ There was considerable backlash between 1850 and 1860 against the Irish in New Haven and other cities across the country.⁴⁷ This anti-Irish sentiment was somewhat ameliorated, however, by the Irish immigrants' participation in the Civil War and their demonstrated loyalty to the Union.⁴⁸ After the Irish, Germans, Italians, Eastern Europeans, and Hispanics arrived.⁴⁹

The Irish eventually found a home in civil service jobs in New Haven, including the fire department.⁵⁰ Irish names predominate in lists of New Haven firefighters, combined with a sprinkling of German,⁵¹ Italian,⁵² and

⁴⁰ U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2008), available at http://factfinder.census.gov/servlet/ADPTable?_bm=Y&-qr_name=ACS_2008_1YR_G00_DP5&-geo_id=16000US0952000&-context=adp&-ds_name=&-tree_id=308&-lang=EN&-redoLog=false&-format=.

⁴¹ ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY 11 (2d ed. 2005).

⁴² BOX 22 ASSOCIATES, NEW HAVEN FIREFIGHTERS 7 (2005); ROLLIN G. OSTERWEIS, THREE CENTURIES OF NEW HAVEN, 1638-1938, at 277-78 (1953).

⁴³ BOX 22 ASSOCIATES, *supra* note 42, at 7.

⁴⁴ JAMES S. OLSON & HEATHER OLSON BEAL, THE ETHNIC DIMENSION IN AMERICAN HISTORY 128 (2010); Samuel Koenig, *Ethnic Factors in the Economic Life of Urban Connecticut*, 8 AM. SOC. REV. 193, 195 (1943) (stating that the Irish had a virtual monopoly on the fire departments in Connecticut).

⁴⁵ OSTERWEIS, *supra* note 42, at 282-85.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* Germans came next, but suffered less discrimination because fewer settled in the Eastern cities than did the Irish, and they expressed less interest in politics. *Id.* at 285-87.

⁴⁹ *Id.* at 367; see DAHL, *supra* note 41, at 36-51.

⁵⁰ See DAHL, *supra* note 41, at 41. In a study conducted of heads of families in 1933, the Irish represented thirteen percent of all families but almost fifty percent of the jobs in city government. *Id.*

⁵¹ BOX 22 ASSOCIATES, *supra* note 42, at 76 (Weiderhold), 69 (Heinz), 125 (Ehrler).

⁵² *Id.* at 71 (Granelletti), 58 (Cucinelli, Caprio), 118 (Conforte).

Eastern European⁵³ names. Irish names like Buckley, McGrath, Hurley, Mayer, Ryan, Donahue, Connelly, Collins, McHugh, McNamara, O'Connell, and Sullivan appear on photographs from 1910 and 1911.⁵⁴ Later photographs demonstrate a continuing presence of men of Irish heritage.⁵⁵ And, because firefighting was a profession that ran in families,⁵⁶ Irish ethnics represent a large percentage of firefighters, captains, and lieutenants.⁵⁷ New Haven was not alone in having a large percentage of firefighters of Irish descent. In New York City, firefighters pass jobs down from father to son; many of them are Irish Catholics.⁵⁸ In the 1920s, the Anchor Club, a charitable organization of Catholic firemen, was formed to combat prejudice against Irish Catholics in the fire department in New York City.⁵⁹ The chaplain of the club, Reverend Delendick, explained with reference to Joseph Ginley, a firefighter, and his sons who also became firefighters, that religion was important to the family and was "directly connected to the boys' desire to become firefighters."⁶⁰ Joseph's son, John, died during the terrorist attack on the World Trade Center on 9/11.⁶¹ Reverend Delendick stated, "[i]n a family like the Ginleys . . . becoming a fireman is like living out your vocation—instead of becoming a priest, you become a fireman."⁶² As we will see below, this reverence likely constructed masculine identities of the white male firefighters and simultaneously created resistance to black and female newcomers to the department who had a different vision of the role of firefighters.⁶³

Africans were present in New Haven before the Revolutionary War. Black slaves were freed by state statute when they reached the age of twenty-five.⁶⁴ There was considerable antislavery sentiment in New Ha-

⁵³ *Id.* at 76 (Wojtina), 77 (Markiewicz), 111 (Bysiewicz).

⁵⁴ *Id.* at 32–33. In 1920, Irish names such as Roach, Foley and Haggarty appear. *Id.* at 40. Of the twenty-nine members of the New Haven fire service who were called to serve in World War II, at least thirteen have Irish names. *Id.* at 60. Of the twenty-three charter members of Local 825 of the International Association of Firefighters, the first union members in New Haven in 1945, at least thirteen had Irish names. *Id.* Of course not everyone with an Irish name is of Irish descent, but the prevalence of Irish names indicates that the Irish predominated in the New Haven department.

⁵⁵ *Id.*

⁵⁶ *Id.* at 78 (describing the success of the three Bohan brothers and noting that over the years many fathers, sons, and brothers were in the fire department).

⁵⁷ *Id.* at 74 (Assistant Chief George Lynch), 95 (Chief Francis Sweeney), 126 (Chief John Reardon).

⁵⁸ See DAVID HALBERSTAM, *FIREHOUSE* 68 (2002).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 73.

⁶² *Id.* at 68.

⁶³ See, e.g., CAROL CHETKOVICH, *REAL HEAT: GENDER AND RACE IN THE URBAN FIRE SERVICE* 40–67 (1997); discussion *infra* Part III.B.1.

⁶⁴ OSTERWEIS, *supra* note 42, at 288 (noting that the Gradual Emancipation Act of 1784 granted liberation at the age of twenty-five; the act was later amended to age twenty-one). Robert Dahl reports that in 1791 there were 207 blacks in New Haven and seventy-eight of them were slaves. DAHL, *supra* note 41, at 36 n.3. By 1830, there were 941 free blacks and forty-three slaves. *Id.* In 1848, slavery was banned in Connecticut.

ven,⁶⁵ but African Americans were initially totally segregated from the rest of the community, and it took civil rights legislation and lawsuits before they were integrated into the fire department.⁶⁶ The African American population of New Haven has grown from a low of 2.7% in 1910⁶⁷ to approximately 37% in 2008.⁶⁸ Even today, African Americans are underrepresented in the fire department, especially in supervisory positions. Approximately 30% of the firefighters, 22% of the lieutenants, and 4% of the captains are black.⁶⁹ There are, however, a few African American men in the upper ranks of the fire department (two Assistant Chiefs, one Fire Inspector, and one Drillmaster).⁷⁰

The population of Hispanics in New Haven has grown significantly since the 1960s. The first Latinos to arrive in New Haven were Puerto Ricans, but in ensuing years there was an influx of persons of Mexican and Cuban descent.⁷¹ The Latino population has risen from 4,916 in 1970 to approximately 26% of the population in 2008.⁷² Like African Americans, Hispanics are underrepresented in the fire department among firefighters and supervisors. Hispanics represent 13% of firefighters, 14% of lieutenants, and 16% of captains.⁷³ There are two Hispanic male Fire Inspectors, two Hispanic male Assistant Drillmasters, and one male Hispanic Deputy Chief.⁷⁴

Women represent only a miniscule number of firefighters in New Haven. In fact, of the 118 members of the department who took the promotional exams in 2003,⁷⁵ only three were women.⁷⁶ Both women who took the

Id. In both the North and the South of the United States, there was violence and systemic labor market discrimination against free blacks, much of it practiced by labor unions, in an effort to ensure that whites would not have to compete with free blacks for jobs. See Susan D. Carle, A Social Movement History of Title VII Disparate Impact Analysis 12–21 (Jan. 26, 2010) (unpublished manuscript, on file with the Harvard Law Library).

⁶⁵ OSTERWEIS, *supra* note 42, at 287–90, 297–309.

⁶⁶ *Firebird Soc. of New Haven v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457 (D. Conn.), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975); *New Haven Firebird Soc., v. Bd. Fire Comm'rs of New Haven*, 32 Conn. App. 585 (1993) (granting injunction to plaintiffs and declaring null and void certain promotions).

⁶⁷ DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* 257–58 (2003).

⁶⁸ U.S. CENSUS BUREAU, *supra* note 40.

⁶⁹ See Chart provided by Victor Bolden, *supra* note 6.

⁷⁰ See *id.* A book with over 110 photographs of New Haven firefighters from 1862 until 1990, in which the race of the firefighters is visible, includes pictures of only six firefighters who appear to be black. Box 22 ASSOCIATES, *supra* note 42, at 81 (James Curry), 109 (George Sweeney), 115 (Donald Wilson), 120 (Donald Wilson again), 125 (Charles Holness, Charles Hewitt, and Lou Bosley).

⁷¹ See MICHAEL SLETCHER, *NEW HAVEN: FROM PURITANISM TO THE AGE OF TERRORISM* 118–19 (2004).

⁷² See RAE, *supra* note 67, at 258; U.S. CENSUS BUREAU, *supra* note 40.

⁷³ See Chart provided by Victor Bolden, *supra* note 6.

⁷⁴ See *id.* In 2005, Hispanics were sixteen percent of firefighters, sixteen percent of lieutenants, and nine percent of captains. See Affidavit of Noelia Marciano, Joint Appendix at 217, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

⁷⁵ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006).

lieutenant's test failed.⁷⁷ The one woman who took the captain's test passed, but she was ranked sixteenth and was not promoted.⁷⁸ As of December 9, 2009, there were only eleven female firefighters (seven white, four black) in the department.⁷⁹ This number represented approximately 4% of the firefighters,⁸⁰ just slightly above the national average.⁸¹ Of the twenty-five captains, none was a woman.⁸² Of the forty-nine lieutenants, only one was a woman (white). In the ranks above captain, there were no women.⁸³ A book of images of firefighters in New Haven from 1862 until 1990 that has more than 100 photographs of firefighters displays no photographs of female firefighters.⁸⁴ None of the fifteen fire chiefs in the history of the New Haven Fire Department has been a woman.⁸⁵ None of the fifty-nine firefighters who have lost their lives since 1852 in the line of duty was a woman.⁸⁶

In 1973, only 3.6% of New Haven firefighters were African American and none was Hispanic, even though approximately 30% of the city's population belonged to a racial minority.⁸⁷ The Firebirds Society, the local branch of an international association of black firefighters, filed suit alleging race discrimination in hiring.⁸⁸ The suit was settled by consent decree and the ranks of firefighter were integrated, but there were still few racial minorities among those promoted.⁸⁹ The Firebirds sued twice more over promotions.⁹⁰ In one of the suits, a special master who supervised promotions took away the badges of white firefighters who had been promoted in violation of the law.⁹¹

After the Supreme Court decided *Ricci* in the plaintiffs' favor, a number of African American firefighters moved to intervene in the lawsuit to prevent the promotions of those who scored the highest in the 2003 exam.⁹²

⁷⁶ E-mail from Kathleen Foster, Assistant Corporation Counsel, City of New Haven, to David McClure, Faculty Services Librarian, Wiener-Rogers Law Library, William S. Boyd School of Law, UNLV (Feb. 2, 2010) (on file with the Harvard Law Library).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Chart provided by Victor Bolden, *supra* note 6.

⁸⁰ *Id.*

⁸¹ DENISE M. HULETT, MARC BENDICK, SHEILA Y. THOMAS & FRANCINE MOCCIO, A NATIONAL REPORT CARD ON WOMEN IN FIREFIGHTING 1 (2008).

⁸² See Chart provided by Victor Bolden, *supra* note 6.

⁸³ *Id.*

⁸⁴ BOX 22 ASSOCIATES, *supra* note 42.

⁸⁵ *Id.* at 128.

⁸⁶ *Id.*

⁸⁷ Nicole Allen & Emily Bazelon, *The Ladder: Part 4: Is There a Better Way to Decide Who Gets Promoted?*, SLATE, June 25, 2009, <http://www.slate.com/id/2221250/entry/2221298/>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Randall Beach, *Black Firefighters Try to Halt 10 Promotions*, NEW HAVEN REG., Dec. 8, 2009.

The lower court denied the motion.⁹³ The City then promoted twenty-four firefighters.⁹⁴ Fourteen of those promoted were plaintiffs in the lawsuit who would have come up for promotion between 2004 and 2006, when the list would have expired.⁹⁵ Another ten firefighters promoted had not joined the lawsuit but had sufficiently high scores that they, too, would have been promoted.⁹⁶ Because of attrition, additional vacancies opened for promotions, and the new group of ten firefighters promoted includes three African Americans and one Hispanic.⁹⁷ Not one was a woman.⁹⁸

B. *Lawsuits in New Haven and Other Places*

From 1965, when the Civil Rights Act became effective, until 1972, Title VII's prohibition of employment discrimination applied to private employers only.⁹⁹ In part because of the severe discrimination in police and fire departments,¹⁰⁰ Congress amended Title VII in 1972 to make the Civil Rights Act applicable to state and local governments and to the federal government.¹⁰¹ At the time, fire departments nationwide were composed almost exclusively of white men.¹⁰² Since 1972, white women and racial minorities have brought many lawsuits alleging race and/or sex discrimination in employment and promotional decisions in fire departments.¹⁰³ Written entrance examinations often exacerbated the problem because of their frequent disparate effect on racial minorities.¹⁰⁴ Women were screened out by physical

⁹³ See William Kaempffer, *10 More Firefighters Receive Promotions*, NEW HAVEN REG., Dec. 5, 2009.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

¹⁰⁰ *Id.* at 2690–91 (citing H.R. REP. NO. 92–238 at 17 (1971); 118 CONG. REC. 1817 (1972)).

¹⁰¹ Proceedings, *supra* note 37, at 714 (statement of Richard Ugelow).

¹⁰² *Id.* at 715.

¹⁰³ See, e.g., Fred Barbash, *High Court Cautiously Enters Quota Fight*, WASH. POST, June 17, 1984, at A3; Paul G. Edwards, *Dismissal of Job Bias Suit by Va. Firemen Upheld*, WASH. POST, Dec. 1, 1978, at B3; Arnold H. Lubasch, *Fire Dept. Ordered to Hire More Nonwhites*, N.Y. TIMES, Apr. 19, 1981, at CN6; Arnold H. Lubasch, *Yonkers Settles Fire Dept. Bias Suits*, N.Y. TIMES, July 24, 1981, at B2; Luix Overbea, *Boston Police, Fire Departments in Clash with US Judge—Yet Again*, CHRISTIAN SCI. MONITOR, Aug. 10, 1981, at 10; *Plan to Promote Blacks Divides Detroit Firefighters*, N.Y. TIMES, Oct. 5, 1980, at 27; Eugene Robinson, *New Exam Standard for DC Police is a) Fair, b) Unfair*, WASH. POST, Aug. 20, 1981, at C1; Joann Stevens, *DC's First Female Firefighter: Job Is Challenge She Expected*, WASH. POST, May 10, 1979, at DC6 (alleging race and sex discrimination in the ranks); Loretta Tofani, *U.S. Accuses San Francisco of Bias in City Employment; Fire Department Hiring Said to Favor Whites*, WASH. POST, Nov. 15, 1984, at A2.

¹⁰⁴ See, e.g., Robinson, *supra* note 103, at C1.

performance tests, which were instituted in the 1970s for the purpose of keeping women out.¹⁰⁵

After the passage of the 1972 Amendment, the Civil Division of the Justice Department brought a number of class actions against fire departments, primarily for race discrimination.¹⁰⁶ While the Justice Department was aware that fire departments established physical performance tests to exclude women, it challenged only the written hiring tests that had a disparate impact on men of color.¹⁰⁷ It did not challenge the physical performance tests because Justice Department decision-makers believed that women were not physically able to do the job of firefighter.¹⁰⁸ The cases were tried or settled with consent decrees.¹⁰⁹ The consent decrees in large part required affirmative action hiring of men of color, but many neglected to require affirmative action hiring of women.¹¹⁰

Along came Brenda Berkman, a law student who applied for a firefighter position in New York City. Although Berkman was an athlete and a marathon runner, who trained hard for the test by carrying her husband up and down the stairs, she failed the physical performance test.¹¹¹ Brenda Berkman was not alone. One hundred seventy women took the physical performance test along with Berkman in 1978, and they all failed.¹¹² At the time, there were 11,000 firefighters in New York City; not one of them was a woman.¹¹³ The New York University Women's Rights Clinic brought a class action against the city with Berkman as the named plaintiff.¹¹⁴ The plaintiffs demonstrated that the performance test had a disparate impact on women and the city was unable to demonstrate that the test was job related.¹¹⁵ The judge ordered a new test and interim hiring of female firefighters.¹¹⁶ Berkman was hired, but after her probationary period, she and another outspoken female member of the class were fired.¹¹⁷ The court held that the firing was intentional discrimination in violation of its orders.¹¹⁸

¹⁰⁵ See Proceedings, *supra* note 37, at 717 (statement of Richard Ugelow).

¹⁰⁶ *Id.* at 715.

¹⁰⁷ *Id.* at 717.

¹⁰⁸ *Id.* at 716.

¹⁰⁹ *Id.* at 715.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 720–21 (statement of Brenda Berkman).

¹¹² *Id.* at 717 (statement of Richard Ugelow).

¹¹³ *Id.*

¹¹⁴ *Id.* at 717–18.

¹¹⁵ *Berkman v. New York*, 536 F. Supp. 177 (E.D.N.Y. 1982) (concluding that the physical performance test was discriminatory because it had a disparate impact on women and was not job related); 705 F.2d 584 (2d Cir. 1982) (upholding lower court's interim remedy of hiring forty-five women as firefighters and creating a new test); 812 F.2d 52 (2d Cir. 1987) (concluding that the new test was legal).

¹¹⁶ *Berkman*, 536 F. Supp. at 217–18.

¹¹⁷ *Berkman v. New York*, 580 F. Supp. 226, 229 (E.D.N.Y. 1983).

¹¹⁸ *Id.* at 226.

Even after numerous lawsuits, women represent only 3.7% of the 350,000 paid firefighters in the nation.¹¹⁹ Fifty-one percent of all the metropolitan fire departments in the 2000 Census had no paid female firefighters in the entire metropolitan area.¹²⁰ In New York City, only one quarter of 1% of the force is female; in Los Angeles, only 2.5% is female.¹²¹ In New Haven, approximately 4% is female.¹²² These low percentages of women contrast with those in cities like Minneapolis, Minnesota (17%), San Francisco, California (15%), and Boulder, Colorado (14%) whose fire departments hire and retain a significant percentage of women.¹²³ Women's ability to thrive (relatively) in the Minneapolis, San Francisco, and Boulder fire departments proves that firefighting is a job that women can do successfully if given the opportunity.

Based on the percentage of female firefighters in the more progressive fire departments and the percentage of women in jobs requiring similar skills and abilities, a study performed by economic consultants and Cornell University's School of Industrial and Labor Relations made a conservative estimate that approximately 17% of firefighters should be women.¹²⁴ Because only 3.7% of firefighters nationwide are women, this means that the fire service is short approximately 40,000 women.¹²⁵ Underrepresentation of women of color is twice that of white women.¹²⁶

Access to jobs is not the only problem for women who desire careers in firefighting. Once women overcome the hurdles at entry, they suffer sexual advances and hostile behaviors.¹²⁷ Male colleagues tamper with the women's equipment and put human feces in the women's boots.¹²⁸ Women work longer in lower level jobs than men before they are promoted.¹²⁹ Female firefighters suffer hostility, ill-fitting uniforms and equipment, ostracism, and disparities in training and experience.¹³⁰ A small but significant percentage of women are assaulted physically, but most fail to report the incidents

¹¹⁹ HULETT, BENDICK, THOMAS & MOCCIO, *supra* note 81, at 1.

¹²⁰ *Id.*

¹²¹ *Id.* In California, most of the cities besides San Francisco have few female firefighters. See Russell Clemings, *Women Not Common in California Fire Stations*, FRESNO BEE, Dec. 10, 2009, <http://www.fresnobee.com/local/story/1742725.html?storylink=misrelated> (noting that Fresno had 2.4%, Anaheim had 1.3%, and Long Beach had 2.2% female firefighters).

¹²² See Chart provided by Victor Bolden, *supra* note 6.

¹²³ HULETT, BENDICK, THOMAS & MOCCIO, *supra* note 81, at 2.

¹²⁴ *Id.* at introductory letter.

¹²⁵ *Id.* at 2.

¹²⁶ *Id.* Minority women equal only 0.8% of all persons in firefighting, whereas the researchers concluded that minority women should represent 5.9% of firefighters. This number is only 13.6% of expected representation, whereas white female firefighters represent 26% of those expected. *Id.*

¹²⁷ *Id.* at 8 (noting that a "fraternity house" atmosphere prevails in fire houses—with sexually-oriented conversation, pornography, and homophobia—and that women complained about "locker-room" pranks).

¹²⁸ *Id.*

¹²⁹ *Id.* at 9.

¹³⁰ *Id.* at 7–11.

due to fear of retaliation.¹³¹ In large part, the culture of fire departments is responsible for these results. The presence of female firefighters creates competition for jobs, constrains male firefighter behavior, and challenges the self-esteem that “male firefighters derive from perceiving themselves as doing a job for which only a select few have the ‘right stuff.’”¹³²

The history of the New Haven Fire Department demonstrates the tight hold that ethnic white men had on the department as recently as the early seventies.¹³³ After the 1972 amendments to Title VII, lawsuits granted limited access to firefighter positions to men who are racial minorities and a few women.¹³⁴ Because the Justice Department viewed women as incapable of doing the job, however, it did not focus on gaining equal access to firefighting jobs for women.¹³⁵ By assuming that women were incapable of doing the job, the Justice Department reinforced the masculine idea that the job was for men and failed to challenge fire departments for the masculine practices and structures that prevented women from accessing the departments. Moreover, while African Americans and Latino men are underrepresented in supervisory positions, women are underrepresented in the New Haven Fire Department in all positions; women represent less than four percent of firefighters and there is only one woman in a supervisory position.¹³⁶

Besides limited access, other behaviors that are tolerated by the heads of departments become the “norm” and therefore create masculine structures that hinder women’s advancement.¹³⁷ Harassment is a serious deterrent to women who hold firefighting jobs.¹³⁸ While I have no independent evidence that female firefighters in New Haven suffer serious harassment, studies demonstrate that this behavior is prevalent in other fire departments in cities with similar demographics.¹³⁹ It would not be surprising to find hostile environments for women in the New Haven department.

PART III. CONSTRUCTING WHITE MASCULINITIES IN THE FIRE HOUSE

This Part examines the job of firefighters, the close connections they have to each other, and the self-esteem that firefighters gain from the importance of their job, but it also looks at problems inherent in firefighting con-

¹³¹ *Id.* at 9.

¹³² *Id.* at 11.

¹³³ By “ethnic white men” I refer to white men of Irish, Italian, German, and Eastern Europe descent. I do not include White Anglo-Saxon Protestants.

¹³⁴ See *supra* Part II.A.

¹³⁵ See Proceedings, *supra* note 37, at 716 (statement of Richard Ugelow).

¹³⁶ See Chart provided by Victor Bolden, *supra* note 6.

¹³⁷ See generally HULETT, BENDICK, THOMAS & MOCCIO, *supra* note 81 (detailing the harassment that female firefighters face at the hands of their male colleagues).

¹³⁸ See *id.* at 8–10.

¹³⁹ See *infra* Parts III. B.1, B2. See generally HULETT, BENDICK, THOMAS & MOCCIO, *supra* note 81.

cerning unequal treatment of African American, Hispanic, and female firefighters.

Part A examines the job of firefighter through the lens of white male firefighters who have written accounts about firefighting. These accounts demonstrate the difficulty and danger of the job, the importance of heroism to the male firefighters, and the emotional ties they develop with other firefighters. As a means of stressing the heroic and masculine aspects of the job, these accounts ignore job duties that are less dangerous, including the emergency medical treatment that firefighters provide.

Part B describes how male firefighters construct their masculine identities through their jobs. It also discusses two empirical studies of fire departments that reveal inequalities in fire departments based on race and gender. These studies demonstrate that many of the practices that white male firefighters use to construct their masculine identities harm women, especially black women. The identity of the job as a calling—almost spiritual in nature—that demands heroism and a particular brand of masculinity helps explain the resistance to all women and racial minorities in the firehouses. While the resistance is racist and sexist, it is experienced by the white men as a means of preserving and performing their own masculine identities and the identity of the job. These identities include dedication to family and community, hard work, sacrifice, and heroism. Of course, these are important values, but the white firefighters' concept of family and community values is actually raced and gendered. While masculinity theory explains why the men resist outsiders such as white women and racial minorities, the resistance raises important questions concerning the extent to which the firefighters' concept of heroism is both raced and gendered.¹⁴⁰

A. *Heroism and White Masculinity*

Because of their disproportionate representation in the firefighting community, the vast majority of sources written about firefighters are written by white men.¹⁴¹ These sources are valuable because they permit a glimpse of the firefighter's own interpretation of his identity and the performance of his job. The men's narratives reveal an innocent, almost child-like belief in tradition, deep emotion that is very close to the surface, and a sense of identity that springs from their roles as heroes willing to sacrifice their lives. While feminist theory tends to see white men as one-dimensional and powerful,

¹⁴⁰ Sarah J. Tracy & Clifton Scott, *Sexuality, Masculinity, and Taint Management Among Firefighters and Correctional Officers: Getting Down and Dirty With "America's Heroes" and the "Scum of Law Enforcement,"* 20 MGT. COMM. Q. 6, 18–24 (2006) (observing that firefighters manage the taint of the dirty parts of the job by reinforcing their own sexuality and the masculine parts of the job).

¹⁴¹ To illustrate this point, I performed a search on Amazon.com for "firefighter books" and discovered that all but one of the first 150 books about firefighters were written by men (excluding children's books about firefighters and romance novels).

masculinity theory acknowledges that while men as a group are powerful, individual men often feel powerless.¹⁴² The narratives illustrate this tendency.

The narratives barely acknowledge that women or men of color perform important work for the fire service.¹⁴³ Many of the books about firefighters were written after the terrorist attacks on the World Trade Center in New York City on September 11, 2001.¹⁴⁴ In response to those acts of terrorism, many acts of heroism took place. The fire service in New York City lost 343 firefighters on 9/11.¹⁴⁵ All of those lost firefighters were men. Because there are so few female firefighters in New York City, there were no female firefighters lost that day,¹⁴⁶ but three young women in service positions died at Ground Zero—Port Authority Police Captain Cathy Mazza, NYPD Police Officer Moira Smith, and Yamel Merino, a young emergency medical technician.¹⁴⁷ Moreover, female firefighters acted heroically on 9/11 and during the cleanup afterwards; these female heroes have received little attention from the firefighter narratives and the media.¹⁴⁸ By ignoring female heroes, the narratives and the media undermine the concept of women as potential heroes and normalize the failure to treat women as equals in the fire department.

Brenda Berkman made an effort to publicize the heroic acts of female firefighters on 9/11 and afterwards.¹⁴⁹ Her effort created a hostile backlash from male firefighters and their supporters.¹⁵⁰ This backlash assumes that honoring women who acted heroically would degrade the male heroes. Such an assumption relies on the concept that the ideal hero is male and masculine and that there is no room for variation.

The narratives demonstrate that firefighting is difficult and hazardous work that leads to significant acts of heroism. Firefighters on the engine

¹⁴² See Dowd, *supra* note 16, at 211.

¹⁴³ See, e.g., FIREFIGHTERS: STORIES OF SURVIVAL FROM THE FRONT LINES OF FIREFIGHTING (Clint Willis ed., 2002); DAVID HALBERSTAM, *supra* note 58; RICHARD PICCIOTTO, LAST MAN DOWN: A FIREFIGHTER'S STORY OF SURVIVAL (2003); DENNIS SMITH, FIREFIGHTERS: THEIR LIVES IN THEIR OWN WORDS (1988).

¹⁴⁴ See, e.g., HALBERSTAM, *supra* note 58; PICCIOTTO, *supra* note 143; SMITH, *supra* note 143.

¹⁴⁵ PICCIOTTO, *supra* note 143, at vi.

¹⁴⁶ For example, on the Upper West Side of New York, Engine 40, Ladder 35 lost twelve of the thirteen firefighters who went to fight the fires at the World Trade Center. All were men. One had a Hispanic last name. The other eleven were white. The firehouse had no women at all. See HALBERSTAM, *supra* note 58, at 1, 5, 17–19.

¹⁴⁷ SUSAN HAGEN & MARY CAROUBA, WOMEN AT GROUND ZERO: STORIES OF COURAGE AND COMPASSION, at xii (2002) (honoring the women heroes who died at Ground Zero).

¹⁴⁸ *Independent Lens: Taking the Heat: The First Women Firefighters of New York City* (PBS television broadcast Mar. 28, 2006).

¹⁴⁹ *Id.*

¹⁵⁰ Janet H. Cho, *Firefighters Hail Women's Response on September 11; Female Role Untold, Pair Say*, CLEVELAND PLAIN DEALER, Oct. 12, 2001, at B4; Kay Miller, *The Invisible Women Firefighters of Ground Zero*, MINNEAPOLIS STAR TRIB., Jan. 13, 2002, at A1; *Independent Lens: Taking the Heat*, *supra* note 148.

crew enter unfamiliar, smoke-filled buildings in intense heat. They carry heavy equipment and wear oxygen masks, which make it difficult for them to breathe and maneuver. They must stoop or crawl in the building; they can be trapped by the fire at any moment. As they work to put out the fire, their colleagues on the truck climb onto the roof of the burning building and poke holes in the roof to let the heat, smoke, and gasses out.¹⁵¹ Both the engine and the truck crews work together on rescuing or recovering victims "which means working one's way through this foreign environment in darkness and heat, unsure what you may find, taking care not to become trapped or disoriented."¹⁵² In *A National Report Card on Women in Firefighting*, Hulett, Bendick, Thomas, and Moccio explain the psychological importance of the environment for drawing firefighters to the job and defining their identities: "It is the mystique of interior structural firefighting that lures most recruits to city fire departments, and it remains the psychological focus of the urban firefighter's job."¹⁵³

Traditionalist firefighters belong to a distinct breed.¹⁵⁴ They love their work for the adrenaline rush they experience when they enter a burning building or hold the "nob" for the first time,¹⁵⁵ for the ability to help others,¹⁵⁶ for the respect they get from others for their work, and for their sense of self-dignity.¹⁵⁷ They see their jobs as a "calling," a spiritual experience.¹⁵⁸ The firehouse offers an extended family, friendship, and human connection.¹⁵⁹ Firefighters spend time in close communion with other firefighters in the firehouse, cooking meals and working out.¹⁶⁰ Similar to the military, there are strict codes of behavior in the firehouse, including the importance of doing one's part without being asked.¹⁶¹ Firefighters are bound together by the understanding that at any time they may sacrifice their

¹⁵¹ CHETKOVICH, *supra* note 63, at 22–23.

¹⁵² *Id.* at 23.

¹⁵³ HULETT, BENDICK, THOMAS & MOCCIO, *supra* note 81, at 11.

¹⁵⁴ Carol Chetkovich distinguishes traditionalists and change agents in her study of the Oakland Fire Department. While not limited to one race, the traditionalists were mostly white and Hispanic men who had family ties to firefighting; the change agents were mostly women and men of color who had less traditional views of firefighting. See CHETKOVICH, *supra* note 63, at 48–56.

¹⁵⁵ The "nob" is the nozzle at the end of the large hose from which the water gushes to fight the fire. The firefighter who works the nob enters the building first and fights his or her way into the fire. It is a rite of passage to be given the nob. See HALBERSTAM, *supra* note 58, at 60–61, 84–85; PICCIOTTO, *supra* note 143, at 159–60; see also CHETKOVICH, *supra* note 63, at 35–36; SMITH, *supra*, note 143, at xviii (1988) (explaining that it was an honor to hold the nozzle in a fire).

¹⁵⁶ HALBERSTAM, *supra* note 58, at 138.

¹⁵⁷ See SMITH, *supra* note 143, at xviii.

¹⁵⁸ See CHETKOVICH, *supra* note 63, at 28; HALBERSTAM, *supra* note 58, at 9; SMITH, *supra* note 143, at xx.

¹⁵⁹ HALBERSTAM, *supra* note 58, at 5–8.

¹⁶⁰ See PICCIOTTO, *supra* note 143, at 12.

¹⁶¹ HALBERSTAM, *supra* note 58, at 8–9; see also CHETKOVICH, *supra* note 63, at 30 (explaining that new firefighters are expected to help with cooking and clean up without being asked).

lives for their “brothers.”¹⁶² They help each other outside of the firehouse, often doing renovation projects in each other’s homes.¹⁶³ They live in the same working class neighborhoods and attend the same churches.¹⁶⁴ Their families spend time together.¹⁶⁵ The brotherhood extends to firefighters all over the nation. After 9/11 when 343 firefighters lost their lives,¹⁶⁶ firefighters drove to New York from all over the country to express their respect, their solidarity, and their grief.¹⁶⁷

Firefighting is a tradition in many families, passed on from father to son.¹⁶⁸ It has deep ethnic and working class roots in many urban areas.¹⁶⁹ Many (especially white male) firefighters reminisce that they always wanted “to be a fireman.”¹⁷⁰ As children, they had family members who took them to the firehouse to hang out with the men.¹⁷¹ Even if they had no family members in the fire service, many report that as poor or working class young boys they went to the fire station to talk to the firemen.¹⁷² For some youth, visiting the firehouse was an escape from the possibility of juvenile delinquency or gang membership.¹⁷³ The men, who the children saw as heroes, treated the children well.¹⁷⁴ The children were attracted to the atmosphere in the firehouse, the trucks and engines, and the bells and whistles.¹⁷⁵

The narratives do not acknowledge that more and more firefighters engage in fire safety and home security inspections, perform investigations of the causes of fires, and minister to the safety and health of individuals at fires and accident scenes.¹⁷⁶ Many cities have transferred their emergency medical services to the fire department.¹⁷⁷ Sociologists classify much of the work, including care for indigents who lack their own health caregivers, as “dirty work.”¹⁷⁸ They note that firefighters’ job is undergoing a “shifting

¹⁶² HALBERSTAM, *supra* note 58, at 8.

¹⁶³ *See id.* at 166–67.

¹⁶⁴ *See* PICCIOTTO, *supra* note 143, at 5.

¹⁶⁵ HALBERSTAM, *supra* note 58, at 8–9.

¹⁶⁶ PICCIOTTO, *supra* note 143, at vi–xxiv.

¹⁶⁷ *Id.* at 228.

¹⁶⁸ HALBERSTAM, *supra* note 58, at 6.

¹⁶⁹ *Id.*

¹⁷⁰ SMITH, *supra* note 143, at 30.

¹⁷¹ HALBERSTAM, *supra* note 58, at 6.

¹⁷² *Id.*

¹⁷³ SMITH, *supra* note 143, at 26.

¹⁷⁴ HALBERSTAM, *supra* note 58, at 6.

¹⁷⁵ SMITH, *supra* note 143, at 26.

¹⁷⁶ *See, e.g.,* HALBERSTAM, *supra* note 58; PICCIOTTO, *supra* note 143; SMITH, *supra* note 143 (describing the more dangerous parts of firefighting).

¹⁷⁷ Denise M. Hulett, Marc Bendick, Sheila Y. Thomas & Francine Moccio, *Enhancing Women’s Inclusion in Firefighting in the USA*, 8 INT’L J. DIVERSITY ORG. COMMUNITIES & NATIONS 189, 190 (2008) (stating that 67.9% of the calls are for medical assistance, not fire suppression, and that 65% of fire departments have taken over their locality’s emergency ambulance services).

¹⁷⁸ *See* Tracey & Scott, *supra* note 140, at 16 (explaining that firefighters call indigents “shitbums” and caring for them may be the antithesis of masculinity, heroism, and emotional and physical strength).

balance” between fire and medical emergency calls.¹⁷⁹ This shift requires a diverse set of skills and understanding “which the traditional occupational self image ignores,” including medical treatment and caregiving, skills more likely associated with medical professionals and social workers.¹⁸⁰ But firefighter narratives ignore these parts of the job because they believe that they do not demand the masculine heroism that fighting fires does.

Firefighters suffer a line-of-duty death rate that is nearly four times that of the average occupation in the American workforce.¹⁸¹ Posttraumatic stress disorder (“PTSD”) in firefighters is 16.5%, 1% higher than the rate of PTSD in Vietnam Veterans.¹⁸² Moreover, the idyllic picture of firefighting and friendship in the firehouse painted by white firefighters does not always accurately reflect the experience of firefighters of color and female firefighters. The next subsection analyzes how firefighters construct their masculine identities on the job by engaging in hazing and harassment of some male and most female firefighters.

B. Masculinity Performances: Race, Class, and Gender in the Fire House

Firefighters engage in masculine performances at work. These performances include verbal harassment and hazing of probationary firefighters, and often lead to a sense of solidarity among the men. The performances, however, can harm those who do not or cannot comply with the prescription of masculinity expected of firefighters. That prescription says that firefighting is a spiritual “calling” and that the brotherhood stands above all.¹⁸³ It values hard work and dedication, and sees outsiders, including racial minorities and white women, as lacking the dedication, drive, and ability to perform the job.¹⁸⁴

Firefighters use humor as a means of relieving tension, of gauging other men’s ability to do the job, and, eventually, as a way of forming bonds with other men.¹⁸⁵ This behavior is homosocial, and permits masculine firefighters to express emotion toward one another without fear of being labeled homosexual. In the firehouse, emotions are close to the surface because of the danger and difficulty of the job and the amount of time that firefighters

¹⁷⁹ HULETT, BENDICK, THOMAS & MOCCIO, *supra* note 81, at 11.

¹⁸⁰ *Id.*

¹⁸¹ Hulett, Bendick, Thomas & Moccio, *supra* note 177, at 190.

¹⁸² Janice D. Yoder & Patricia Aniakudo, “*Outsider Within*” the Fire House: Subordination and Difference in the Social Interactions of African American Women Firefighters, 11 GENDER & SOC’Y 324, 327 (1997).

¹⁸³ See CHETKOVICH, *supra* note 63, at 28; HALBERSTAM, *supra* note 58, at 68, 138; PICCIOTTO, *supra* note 143, at 6–7.

¹⁸⁴ CHETKOVICH, *supra* note 63, at 37, 51, 57–58, 71–72, 74, 103–04.

¹⁸⁵ *Id.* at 32–35.

spend with each other in a family-like community.¹⁸⁶ Firefighting, like sports, gives men an outlet to express their emotions.¹⁸⁷ This expression is particularly important to men because society forbids them from expressing emotion.¹⁸⁸

Firefighters also engage in subversive masculinities which highlight the firefighters' class-related attitudes toward other men. In particular, firefighters demean white collar men by disrespecting them. While the men in white collar jobs are more powerful economically, male firefighters gain their own power by questioning the masculinity of the male white collar workers and demonstrating their own superior strength. For example, Captain Picciotto explained in *Last Man Down* that as he worked on 9/11 to evacuate the World Trade Center towers, he had to do some "shirt-tearing of arrogant, entitled white-collar types."¹⁸⁹ He described a "well-dressed broker-type" who continued to work as others evacuated the building.¹⁹⁰ Picciotto recounted, "He might have felt he was free to do as he pleased, that someone like me had no authority over someone like him, but I wasn't leaving anyone behind, and I sure as shit wasn't waiting on this guy's well-dressed ass."¹⁹¹

Male firefighters engage in other behaviors that promote the construction of masculinity in the firehouse. The most remarkable is the sexualization of the job. The equipment enhances heterosexual masculinity; the fire hose that emits a gush of water is reminiscent of the ejaculating penis. In fact, firefighters typically describe the opportunity to work the "nob" as a rite of passage.¹⁹² The firefighter who grabs the nob, the hose from which the water gushes, defeats his fears and enters the dark smoky building before his colleagues to search for the fire. He then experiences an "adrenaline" rush, the pleasure of ejaculation, when delivering the force of the gushing water. One firefighter described the feeling as "better than sex":

And there I was, green, holding the nob, thrilling to the adrenaline rush, grabbing on with everything I had. Man, the sheer force of all that water! The pressure! It was all I could do to hold on, but I held on, and eventually we put that sucker out. . . . I had arrived, and everyone else knew it

¹⁸⁶ See PICCIOTTO, *supra* note 143, at 228–33 (describing the outpouring of emotions from other firefighters in response to 9/11 and his own emotions after 9/11).

¹⁸⁷ See MICHAEL KIMMEL, GUYLAND 129 (2008) (explaining that sports provide an opportunity for men to express their emotions and to cry without being considered effeminate).

¹⁸⁸ *Id.*

¹⁸⁹ See PICCIOTTO, *supra* note 143, at 79–80.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See *id.* at 160. In military academies, freshmen heads are shaved and they are called "knobs," which also is British slang for "penis." See Valerie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 70 (2002).

There are no words, really, to explain the rush of that moment, first time around. The elation. The immediate gratification. The power. The purpose. . . . You. The nozzle man. Everyone else, from chief on down, just a supporting actor to your central role. It's a feeling that's second to none in the whole world. Better than sex.¹⁹³

Firefighters also use sexuality to maintain their masculine identities as they navigate the “dirty work” of firefighting.¹⁹⁴ As discussed here, the “dirty work” includes the more feminine, caretaking aspects of the job relating to emergency medical services, especially those administered to indigents.¹⁹⁵ In a study by sociologists Sarah Tracy and Clifton Scott, the authors found that firefighters managed the taint of the dirty parts of the job by “accentuating and celebrating heterosexuality.”¹⁹⁶ Firefighters engaged among themselves in self-objectification, sexually charged discussions, and sexual horseplay which allowed the firefighters to affirm their identities.¹⁹⁷ In the fire station, they enjoy firefighter pin-up calendars, jokes about “hoses,” and comments about “fire” and “heat” with sexual connotations.¹⁹⁸ These behaviors construct the firefighters’ masculinity. Tracy and Scott note that by “engaging in sexual banter—highlighting male excess and hypermasculine action—for an appreciative internal audience of peers, firefighters attempt a sense of self that is strong, fun, and in control, even if the majority of their work time is dominated in taking care of cleaning up shitbums.”¹⁹⁹

Firefighters also perform for the external audience that sees them as sex symbols. In public, they cater to the popular culture’s view of firefighters as heroic and sexually provocative.²⁰⁰ For example, Tracey and Scott found that the firefighters frequently drove through the upscale parts of town, past restaurants and bars in their big red fire truck, ringing the bell at attractive women on the street.²⁰¹ Women turned toward the fire truck seductively and

¹⁹³ PICCIOTTO, *supra* note 143, at 167–68.

¹⁹⁴ Tracy & Scott, *supra* note 140, at 13–17.

¹⁹⁵ *Id.* at 19–24.

¹⁹⁶ *Id.* at 22.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 23.

²⁰⁰ When I quickly perused Amazon.com, I found that my search results (using the terms “firefighter books”) confirmed that firefighters openly flaunt their sexuality by posing for pin up calendars. For example, my results revealed a New York City Firefighters 2010 Calendar with shirtless shots of twelve young male firefighters. See BATTMAN, NEW YORK CITY FIREFIGHTERS 2010 GOLD STANDARD (2009). The public reacts to this self-objectification. I also found a series of romance novels with covers demonstrating muscular young white men firefighters in tight or open shirts. See BELLA ANDRE, HOT AS SIN (2009); BELLA ANDRE, NEVER TOO HOT (2010); BELLA ANDRE, WILD HEAT (2009); see also Tracey & Scott, *supra* note 140, at 24.

²⁰¹ Tracy & Scott, *supra* note 140, at 23–24.

smiled and waved as they passed by.²⁰² Tracy and Scott observed that “this practice serves as an overlapping celebration of masculinity, heterosexuality, and occupational identity.”²⁰³ Tracy and Scott explained that even though there are a number of “dirty tasks” which they characterize as feminine tasks, firefighters maintained their masculinity by downplaying those tasks and emphasizing their sexuality and the heroic nature of firefighting. They concluded:

[F]irefighters engaged in a variety of “dirty” tasks. The most difficult were those associated with caring, feminized EMS service, especially when firefighters were denied an audience that could affirm a preferred “rock star” identity. However, larger discourses of masculinity and sexuality allowed firefighters to frame their work as valorous and important. Through continual talk about firefighting, they were able to emphasize heroic masculine work and appreciate a spillover effect that moderated the dirt of lower status feminized duties. Furthermore, they enjoyed a public audience that reaffirmed their prestige, as well as an audience of their peers with whom they could engage in sexual banter, storytelling and (non-EMS) shop talk, again upholding a preferred identity and deflecting taint.²⁰⁴

Firefighters also construct their masculinity by treating their female colleagues as inferior, through sexual harassment and derogation of the women’s abilities.²⁰⁵ Because the hegemonic masculinity is the preferred powerful position and because it identifies itself in opposition with femininity, women, especially those working in traditionally male environments, suffer from the masculinity prescriptions.²⁰⁶ In blue collar workplaces like the firehouse, men use sexual humor and harassment to preserve the job’s masculinity and to construct their own masculine identities by participating in aggressive practices at work that mistreat their female co-workers.²⁰⁷

Women do not achieve acceptance among their male colleagues merely by adopting the masculine behavior identified with the job of firefighter. Although the job is perceived to require an aggressive, hard-driving individual, a woman who acts in such a “masculine” manner will suffer much harsher judgment about her job performance than a man who acts aggressive and hard-driving.²⁰⁸ This places white women in a double bind because the

²⁰² *Id.*

²⁰³ *Id.* at 23.

²⁰⁴ *Id.* at 24.

²⁰⁵ HULETT, BENDICK, THOMAS & MOCCIO, *supra* note 81, at 7–9.

²⁰⁶ See McGinley, *supra* note 18, at 1217.

²⁰⁷ *Id.*

²⁰⁸ See Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 109–12 (2009) (describing cognitive bias and leadership studies about women and men that demonstrate that subconsciously both men and women judge women in “men’s jobs” more harshly).

adoption of masculine practices does not qualify them for the job and may, conversely, subject them to criticism.²⁰⁹ Women of color must respond to different stereotypes. Black women are stereotyped as tougher and, in traditionally male jobs, are expected to bear more physical labor than white women.²¹⁰ Studies show that black female firefighters are treated as beasts of burden.²¹¹ African American women are often viewed as angry and aggressive, and may have to tone down their reactions in order to be respected and heard.²¹² In contrast, Asian women are often cast as passive persons who have difficulty asserting their power at work.²¹³

There are class, race, and gender issues that simmer below the surface in the fire department. In the large cities, firefighters continue to be largely white men even though the demographics of the cities have become much more diverse.²¹⁴ In New York, because of the high cost of living in the city, the majority of the firefighters who work in Manhattan have moved to the outer boroughs, to towns north of New York City, or to New Jersey.²¹⁵ In the more affluent areas of the city, firefighters protect the lives of persons who are significantly wealthier than they, and defend property that they cannot afford themselves.²¹⁶ From their descriptions of their jobs, it is clear that New York City firefighters are keenly aware and somewhat resentful of the class differential.²¹⁷ This resentment is channeled into a masculinity per-

²⁰⁹ See, e.g., Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 583 (2002); Alice H. Eagly, Mary C. Johannesen-Schmidt & Marloes Lvan Elgen, *Transformational, Transactional, and Laissez-Faire Leadership Styles: A Meta-Analysis Comparing Women and Men*, 129 PSYCHOL. BULL. 569, 571–73 (2003) (demonstrating that women in leadership positions in what are considered men's jobs are perceived to be either incompetent or unlikeable); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that judging a woman more harshly than a man in a man's job because she does not live up to feminine stereotypes violates Title VII).

²¹⁰ See Yoder & Aniakudo, *supra* note 182, at 332.

²¹¹ *Id.*

²¹² This is obvious from the public attitudes toward Michelle Obama early on in Barack Obama's presidential campaign. See Ann C. McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 DENV. U. L. REV. 709, 722–24 (2009) (discussing the public reaction to Michelle Obama early on in her husband's campaign for President of the United States and the changes she made in order to appear less angry and aggressive); Verna L. Williams, *The First (Black) Lady*, 86 DENV. U. L. REV. 833 (2009) (concluding that Mrs. Obama has to perform her gender in a less aggressive manner in order not to be considered an "angry black woman").

²¹³ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1272 (2000).

²¹⁴ See, e.g., HALBERSTAM, *supra* note 58, at 5–6.

²¹⁵ See, e.g., PICCIOTTO, *supra* note 143, at 5.

²¹⁶ *Id.*

²¹⁷ See HALBERSTAM, *supra* note 58, at 2 (explaining that firefighters cannot afford to live in Manhattan because of changes in the city); PICCIOTTO, *supra* note 143, at 5–6, 76, 81, 121 (explaining that firefighters cannot afford to live in the city, conveying his class resentment of a broker he encountered in the World Trade Center, and describing his blue collar upbringing); SMITH, *supra* note 143, at xx (describing the "upper echelons" of New York City as governing the working class by the "divine right of rulers").

formance by exercising power and authority over the less manly “well-dressed broker type.”²¹⁸ Social scientists have conducted a number of studies of race and gender in fire departments. The next subsections analyze these studies.

1. *Probies in Oakland: Gender, Race, and Class Performances*

In *Real Heat*, Carol Chetkovich describes her study of gender and race and their effects on probationary employees (“probies”) in the Oakland, California Fire Department.²¹⁹ Although the City of Oakland has almost three times the population of New Haven, its demographics are similar to those of New Haven.²²⁰ Traditionally, urban fire departments were staffed almost exclusively by men, the vast majority of whom were white.²²¹ By 1997, however, as a result of a lawsuit and consent decree, Oakland had diversified its fire department considerably.²²² The force in that year was 57% white, 29% African American, 8% Hispanic, 5% Asian and 1% Native American.²²³ Eight percent of the members were women.²²⁴ The first African Americans were hired in the 1920s, but they worked in segregated firehouses.²²⁵ The first women began serving in 1980, at a time when there were only fifty female firefighters nationwide in urban fire departments.²²⁶ While the racial and ethnic composition of the workforce closely approximated the goals set forth in the 1986 consent decree governing the fire department, the percentage of women in the department fell far short of the goals of the consent decree.²²⁷

The study found that structures, practices, and attitudes in the firehouse disadvantaged white women and persons of color but that men of color were less disadvantaged than white women and women of color.²²⁸ Hazing and

²¹⁸ See PICCIOTTO, *supra* note 143, at 76–78 (describing his encounter in the World Trade Center with a well-dressed white man who was typing on his computer and who refused, at first, to abandon the building).

²¹⁹ CHETKOVICH, *supra* note 63.

²²⁰ In 2008, Oakland had over 365,000 inhabitants; its black population was approximately thirty-one percent and its Hispanic population was approximately twenty-six percent. See U.S. Census Bureau, Oakland City, California, ACS Demographic and Housing Estimates (2008), http://factfinder.census.gov/servlet/ADPTable?_bm=Y&-context=adp&-qr_name=ACS_2008_1YR_G00_DP5&-ds_name=ACS_2008_1YR_G00_-tree_id=308&-redoLog=true&-_caller=geoselect&-geo_id=16000US0653000&-format=&-lang=en.

²²¹ CHETKOVICH, *supra* note 63, at 19.

²²² *Id.* at 19–20.

²²³ *Id.* at 19.

²²⁴ *Id.* at 20.

²²⁵ *Id.* at 19.

²²⁶ *Id.* at 19–20.

²²⁷ *Id.* at 20.

²²⁸ *Id.* at 70–71, 156–57. This conclusion is supported by another study on women and minorities in the fire departments nationwide. See Hulett, Bendick, Thomas & Moccio, *supra* note 177, at 193–94 (concluding that racial minorities represent only 55.5% of their expected numbers in fire departments and female firefighters represent only 21% of

attitudes concerning the motivations of female and black firefighters were harmful to women and African Americans. However, the male probationary firefighters, regardless of race or ethnicity, had a clear idea of how to handle the hazing.²²⁹ This was because they had experienced similar behavior before, either as members of fraternities, on team sports, or in other close-knit work groups.²³⁰ But while black men were familiar with the game, it made them uneasy.²³¹ They understood that they had to earn respect as a firefighter, but they were concerned about being treated in a manner that disrespected them as men.²³² The white men had no such similar concerns.²³³ All men understood intuitively that it was necessary to draw the line at egregious behavior.²³⁴ For example, Steven, a white male probationary employee, explained that he reached his limit when another firefighter called him a “sissy” and implied that Steven was a “pussy.”²³⁵ Steven responded by inviting his attacker to fight.²³⁶ Steven’s response protected his masculinity because the attacker compared Steven to a woman.²³⁷ In a macho world like the firehouse the worst thing one can be is a girl. Of course, this attitude places men who are effeminate and women at a distinct disadvantage.

While the constant teasing and practical joking can actually enhance the *esprit de corps* by creating brotherly solidarity, teasing and joking may also be used intentionally to cover up bias and to exclude persons based on their race, gender, or class, or may have the effect of treating women and members of racial minorities differently.²³⁸ This is particularly true because a firefighter’s identity as a worker is bound historically with his race, his gender, and his class.

Traditionalist firefighters resented probationary firefighters who they believed were not as hard-working and dedicated to the job.²³⁹ Notably, their definition of those who were hard-working and dedicated was often related to race and gender.²⁴⁰ While all probationary firefighters were attracted to the job because of its excitement and challenge, combined with material benefits, white and Hispanic male firefighters were more likely to have a connection to firefighting through family members or close personal friends, and were more likely to see firefighting as a lifelong goal and a calling.²⁴¹

their expected numbers, and that women of all races report a higher rate of gender-related problems than racial minorities report race-related problems).

²²⁹ CHETKOVICH, *supra* note 63, at 62–66.

²³⁰ *Id.*

²³¹ *Id.* at 67–68.

²³² *Id.* at 67.

²³³ *Id.*

²³⁴ *Id.* at 64–66.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *See id.*

²³⁸ *Id.* at 36.

²³⁹ *Id.* at 50–51.

²⁴⁰ *Id.* at 51.

²⁴¹ *See id.* at 40–47.

In contrast, African American men and all women, who had fewer contacts with firefighting before entering the academy, saw firefighting as a job, not a calling.²⁴² One black probie described members of the department (mostly white males) as having an “appetite” for fires, and he noted that recruits would “salivate” when they discussed fires and that they could not wait to begin to fight fires.²⁴³ He apologized for his different attitude, which he hoped would not give the impression that he did not want to do his job.²⁴⁴ Women too had less exposure to the job before taking the examination and did not see firefighting as a lifelong goal.²⁴⁵ These differences reflect varying definitions of masculinity that are intertwined with race, class, and gender. While the white ethnic males see firefighting as a calling and resent those who do not, black firefighters considered themselves more qualified for the job because much of the work of firefighters (fighting fires and responding to medical emergencies) occurred in neighborhoods that were predominately black.²⁴⁶ Thus, the black firefighters believed they were more prepared to understand the culture of the neighborhoods and the persons they served.²⁴⁷

Some of the more traditional white and Hispanic men in the group resented those who had not shown their commitment through years of testing or training or work in other departments.²⁴⁸ They expressed anger at affirmative action for allowing firefighters to serve who did not have the commitment, the experience, or the ability to do the job.²⁴⁹

Chetkovich concluded that although the black men were disadvantaged, women, white or of color, were in an even more difficult position in the fire departments.²⁵⁰ She characterized the men as speaking “from inside of the circle,” and women as “always at the margins.”²⁵¹ Chetkovich noted that the most difficult part of the training for the women was dealing with the hostility of some of their male classmates.²⁵² She noted, “[i]n an apparent effort to discourage and demoralize, men sometimes offered their negative opinions in stage-whispers, ostracized women, and dramatized the difficulties of the work.”²⁵³

²⁴² *Id.* at 45–46.

²⁴³ *Id.*

²⁴⁴ *See id.* at 45–46.

²⁴⁵ *Id.* at 46–49.

²⁴⁶ *Id.* at 46.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 50–51.

²⁴⁹ *Id.*

²⁵⁰ *See id.* at 54.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* This description is reminiscent of behaviors of male recruits in the police academy. *See generally* Anastasia Prokos & Irene Padavic, “*There Oughta Be a Law Against Bitches*”: Masculinity Lessons in Police Academy Training, 9 GENDER, WORK & ORG. 439 (2002) (describing the sexist and male-dominated training that police recruits receive).

The behavior directed at the women is a performance of working class white male masculinity. Many of the traditionalist men believed that women did not belong in the field, and they saw the presence of white women and persons of color as an affront to the masculine identity that they derived from their job as firefighters.²⁵⁴ Male firefighters made little effort to lend a helping hand to the women to make their success more likely.²⁵⁵ Although these men had advantages based on experience and exposure, they did not recognize their privilege.²⁵⁶ Instead, they defined women as inherently unqualified.²⁵⁷ The men were often unwilling to consider that there might be alternatives to manage the job besides sheer upper body strength.²⁵⁸ In sum:

[W]omen as a group confronted a deep-seated and widespread resistance. They found themselves to be less welcome, subject to greater scrutiny and suspicion, and judged more harshly than their male counterparts. And even in those places where an individual woman was tolerated, there was simply no way for her to be “one of the guys.”²⁵⁹

2. *Black and White Female Firefighters: A Comparison in Subordination and Privilege*

Janice Yoder and Patricia Aniakudo studied African American female firefighters nationally.²⁶⁰ In a subsequent study, Yoder and Lynne Berendsen studied white female firefighters nationally, and compared the results with those of the earlier study of African American female firefighters.²⁶¹ Both black and white women experienced insufficient training,²⁶² overt hostility from co-workers,²⁶³ the “silent treatment,”²⁶⁴

²⁵⁴ See CHETKOVICH, *supra* note 63, at 49–52, 105–06, 156, 188–89.

²⁵⁵ *Id.* at 106. *But see id.* at 117–18.

²⁵⁶ *Id.* at 106–07.

²⁵⁷ *See id.* at 86.

²⁵⁸ *Id.* at 103–06.

²⁵⁹ *Id.* at 157.

²⁶⁰ Yoder & Aniakudo, *supra* note 182, at 324.

²⁶¹ Janice D. Yoder & Lynne L. Berendsen, “*Outsider Within*” the Firehouse: African American and White Women Firefighters, 25 PSYCHOL. WOMEN Q. 27 (2001).

²⁶² Yoder & Aniakudo, *supra* note 182, at 329.

²⁶³ Yoder & Berendsen, *supra* note 261, at 30.

²⁶⁴ *Id.* The silence began on the first day of work for many of the black women, but what began as exclusion by other firefighters resulted in the black women’s self-exclusion, a determination to keep to themselves. *See* Yoder & Aniakudo, *supra* note 182, at 334. Consequently, these black women did not experience any of the “brotherhood” or emotional attachment to their colleagues that the white male firefighters describe as a special benefit of the job. *Id.* Seventy-nine percent of the white women reported that their coworkers either ignored them or gave them the silent treatment but the silent treatment of white women occurred mostly in their beginning years and decreased as they remained and earned promotions. Yoder & Berendsen, *supra* note 261, at 30. Black women did not experience improved communications or a decrease of the silent treatment as they gained tenure in the department. *Id.*

close supervision and frequent punishment,²⁶⁵ and a lack of collegial support.²⁶⁶

For example, colleagues allegedly told black women directly that they did not belong and that they would never make it.²⁶⁷ Black female firefighters reported that peers sought transfers in order to avoid pairing with them and one black woman stated that a captain fought to keep her off of his shift.²⁶⁸ Another black woman claimed that she was denied materials for a promotional exam.²⁶⁹ A white woman reported that male co-workers put a noose on a teddy bear that she had at work and hung it in her closet.²⁷⁰

Black and white female firefighters were also subject to stereotypes, but the stereotypes they experienced differed. Negative stereotypes of the black women characterized them as welfare recipients and “beasts of burden.”²⁷¹ As a result, they were expected to shoulder heavier loads and to do more chores.²⁷² White female firefighters were considered fragile, a stereotype that led to the perception that they had insufficient stamina to do the job.²⁷³ In order to counter the stereotype, white women worked harder and covered up their injuries.²⁷⁴

Racism and sexism were always present and never severable for black women. When researchers asked black women to identify which discriminatory behaviors occurred because of their race and which occurred because of their sex, black women protested that it was impossible to separate the discriminators’ motives based on race or sex because the discrimination occurred because of their identity as black women.²⁷⁵ The black women viewed themselves as the lowest persons on the totem pole by virtue of both their gender and race.²⁷⁶ This finding confirms the view of intersectionality

²⁶⁵ Yoder & Berendsen, *supra* note 261, at 31. Black female firefighters also reported that they were subject to much closer supervision and punishment than white men. Yoder & Aniakudo, *supra* note 182, at 330–31. Some black women asserted that their assignments were designed to encourage them to leave the fire service. *Id.* at 30. Two noted that they had been assigned to blatantly racist areas of large cities; others were assigned to firehouses dominated by white men. *Id.* These assignments appeared to be made intentionally to isolate and discourage them. *Id.* at 330–31. White women suffered similar close and punitive supervision during their early years in the fire department and believed they were treated this way because they were women. *Id.* at 331. A number of white women also complained that later in their careers they were subject to similar treatment after they had complained about unfair treatment. Yoder & Berendsen, *supra* note 261, at 31.

²⁶⁶ Yoder & Aniakudo, *supra* note 182, at 331–32; Yoder & Berendsen, *supra* note 261, at 31–32.

²⁶⁷ Yoder & Aniakudo, *supra* note 182, at 329–30.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See Yoder & Berendsen, *supra* note 261, at 30.

²⁷¹ Yoder & Aniakudo, *supra* note 182, at 332.

²⁷² *Id.*

²⁷³ See Yoder & Berendsen, *supra* note 261, at 32.

²⁷⁴ *Id.*

²⁷⁵ Yoder & Aniakudo, *supra* note 182, at 335–36.

²⁷⁶ *Id.* at 336.

theory that posits that discrimination law does not adequately address the harms suffered by black women because sex discrimination assumes the perspective of a white woman and race discrimination assumes that of a black man.²⁷⁷ The Yoder and Aniakudo and Yoder and Berendsen studies demonstrate that harms suffered by black women are of a different kind and intensity from those suffered by white women.²⁷⁸

Most white women, in contrast, recognized that they were disadvantaged because of their sex, but did not realize that they enjoyed privilege because of their race.²⁷⁹ Moreover, while virtually all black women reported suffering discrimination, a few white women, especially those who were married to white men on the force, were able to escape discriminatory behaviors.²⁸⁰

The authors of these studies concluded that both white and black female firefighters suffered discrimination at the hands of their male (and sometimes female)²⁸¹ co-workers, but the discrimination differed along racial lines. While both suffered from insufficient instruction and close supervision, black women generally continued to suffer rejection throughout their tenure at the firehouse whereas discriminatory behaviors were less problematic later on in the careers of white women.²⁸² The authors concluded that "it may be White women's ability to trade on their racial/ethnic bonds with dominant White men that underlies, at least to some degree, their ability to overcome initial negativity."²⁸³ This possibility is not open to black women.²⁸⁴ Even the black men at times benefitted because of the presence of the black women.²⁸⁵ The presence of the black women raised the status of the black men within the firehouse because it provided them the opportunity to engage with the white men in male solidarity.²⁸⁶

PART IV. *RICCI* IN ITS POLITICAL CONTEXT

While *Ricci* presented important civil rights issues, none of the litigants, lawyers, judges, or justices involved could have predicted its future

²⁷⁷ See, e.g., Kimberle Crenshaw, *Whose Story Is it Anyway?*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 404 (Toni Morrison ed., 1992).

²⁷⁸ Yoder & Aniakudo, *supra* note 182, at 334; Yoder & Berendsen, *supra* note 261, at 30-32.

²⁷⁹ Yoder & Berendsen, *supra* note 261, at 34.

²⁸⁰ *Id.* at 30.

²⁸¹ Some of the white women who had become supervisors admitted that they perpetuate a pattern of close and punitive supervision of women by making more demands on women to prove themselves. *Id.* at 31. One explained that she engaged in this mistreatment of her women subordinates in order to ensure that she and other women in general were not criticized. *Id.*

²⁸² Yoder & Berendsen, *supra* note 261, at 30.

²⁸³ *Id.* at 35.

²⁸⁴ *Id.*

²⁸⁵ Yoder & Aniakudo, *supra* note 182, at 334.

²⁸⁶ *Id.*

political importance. Only a few days after the Supreme Court granted the petition for certiorari, President Obama was inaugurated as the first black president of the United States. On May 26, 2009, President Obama nominated then-Judge Sonia Sotomayor, a member of the Second Circuit panel on the *Ricci* case, to the Supreme Court.²⁸⁷ If confirmed, Judge Sotomayor, who is of Puerto Rican descent, would be the first Hispanic member of the Supreme Court.²⁸⁸

Within days of the nomination, Republican politicians refused to disavow allegations by a conservative radio talk show host that Judge Sotomayor was a racist.²⁸⁹ The allegations responded to a comment that Sotomayor made in a 2001 speech, stating, “a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”²⁹⁰ Republicans opposing the nomination also raised questions about the panel decision in *Ricci* which they argued, because of its result and its short per curiam opinion, demonstrated that Judge Sotomayor was biased against whites.²⁹¹

When *Ricci* was argued before the Supreme Court, the Obama administration urged the Court to vacate and remand the case to the lower court for factual development.²⁹² It argued that a defendant who sets aside a test that has a disparate impact must have a good faith reasonable belief that using the test would be illegal.²⁹³ The Supreme Court rejected the Obama administration’s arguments.²⁹⁴ It overturned the lower court’s grant of summary judgment to the plaintiff, and granted summary judgment to the defendant.²⁹⁵ It held that a valid defense for failing to certify the test results existed only if the City had a strong basis in the evidence to support its fear that it would be subject to liability under a disparate impact cause of action brought by the black and Hispanic firefighters.²⁹⁶ The Court then applied the strong basis in evidence test, and concluded that the defendant did not demonstrate that it had a strong basis in evidence for its belief that it would be liable based on disparate impact theory.²⁹⁷ The Court’s conclusion that the defendants’ test

²⁸⁷ Peter Baker & Jeff Zeleny, *Obama Chooses Hispanic Judge for Supreme Court Seat*, N.Y. TIMES, May 27, 2009, at A1.

²⁸⁸ *Id.*

²⁸⁹ Peter Wallsten, *More in GOP Make Race Focus of Sotomayor Nomination; They Allege She Wouldn’t Be Fair to White Men*, BOSTON GLOBE, June 1, 2009, at A6.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Transcript of Oral Argument at 27–43, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

²⁹³ *Id.*

²⁹⁴ *Ricci*, 129 S. Ct. at 2681.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 2675. This test, which is derived from equal protection doctrine, is much more stringent than the good cause standard advocated by Justice Ginsberg in the dissent, *id.* at 2699 (Ginsberg, J., dissenting), or the reasonable good faith test that the Department of Justice advocated. See Transcript of Oral Argument at 27–43, *Ricci*, 129 S. Ct. 2658 (No. 07-1428).

²⁹⁷ *Ricci*, 129 S. Ct. at 2677.

was job related and consistent with business necessity, and that there were no less discriminatory alternatives as a matter of law, ignored significant evidence in the defendants' favor, and usurped the fact finding role of the trial court.²⁹⁸ First, the New Haven Civil Service Board ("CSB"), which was responsible for certifying the results, made the decision after hearing evidence that raised questions about whether the written test itself was relevant to the job of New Haven firefighters.²⁹⁹ Second, the evidence raised questions about whether the sixty percent/forty percent relative weighting of the written and oral tests was job related and a business necessity.³⁰⁰ Third, there was evidence that a different weighting would produce a less discriminatory alternative.³⁰¹ Finally, the Court ignored important testimony before the CSB that demonstrated that less discriminatory alternatives were available. The evidence showed that virtually all written tests have a disparate impact on minorities, that a neighboring city had reached less discriminatory results using a different weighting system, and that other fire departments used assessment centers to judge firefighters' qualifications for promotions.³⁰² Additionally, there was some evidence that the white firefighters had better and earlier access to study materials than their black and Latino counterparts.³⁰³

Other scholars have made searching and well-reasoned critiques of the Supreme Court's reasoning in *Ricci*,³⁰⁴ but I will not address those here. Suffice it to say that the strong basis in evidence test as applied to the facts in *Ricci* virtually prohibits any employer from disregarding results of a flawed test. For the purposes of this Article, I will focus on how *Ricci* and the political reaction to it constructed the job of firefighter as masculine and heroic and defined white male masculinity as more heroic, more hard-working and superior to black male masculinity. I will then suggest how well-intentioned employers can follow *Ricci* while maintaining a diverse workforce.

²⁹⁸ Justice Alito's concurrence, joined by Justices Scalia and Thomas, is particularly troublesome in this respect because it sets forth a theory that the City decided against certification of test results as the result of pressure from a prominent black cleric in the community. *Id.* at 2684–87 (Alito, J., concurring). This theory raises factual questions that should have been considered by the trial court.

²⁹⁹ *Id.* at 2704 (Ginsburg, J., dissenting).

³⁰⁰ *Id.* at 2704–05.

³⁰¹ *Id.* at 2703–07; *see also Ricci v. DeStefano*, 554 F. Supp. 2d 142, 155–56 (D. Conn. 2006).

³⁰² *Ricci*, 554 F. Supp. 2d at 156.

³⁰³ *Ricci*, 129 S. Ct. at 2692–93 (Ginsburg, J., dissenting).

³⁰⁴ *See, e.g.,* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1495870>; Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: White(ning) Discrimination, Race-ing Test Fairness* (UCLA Sch. of Law Research Paper No. 09-30, Loyola-LA Legal Studies Paper No. 2009-49, 2009), available at <http://ssrn.com/abstract=1507344>.

A. *The Sotomayor Hearings*

It was a perfect storm. The Supreme Court decided *Ricci* on June 29, 2009, and confirmation hearings for Judge Sotomayor's appointment took place in mid-July.³⁰⁵ Republicans on the Senate Judiciary Committee invited plaintiffs Frank Ricci and Ben Vargas to testify on a panel on Minority Issues at the Senate Judiciary Committee's hearings on Judge Sotomayor's nomination.³⁰⁶ Ricci's and Vargas' testimony was compelling, and they were treated as heroes not only because they saved lives in their work, but also because they represented right against wrong in the lawsuit.³⁰⁷ Ricci read from a prepared text in a halting manner, following with his finger in order to compensate for his dyslexia, a reading disability.³⁰⁸ He stated that he studied extremely hard for the test, reading, making note cards, and meeting with panels to practice for the oral interviews.³⁰⁹ He hired someone to read the books to him.³¹⁰ He took time away from his family to study for months.³¹¹ He was a virtual absentee father and husband.³¹² Vargas had a similar story. Born in a Hispanic family, he wanted his three sons to know that they would rise or fall on their own merits.³¹³ If they worked hard, they could achieve.³¹⁴ He took his books with him everywhere.³¹⁵ He studied for three months.³¹⁶ His wife took time off from her work as a teacher so he could study, and he even went to a hotel to study to avoid distraction.³¹⁷ Even so, he took the pictures of his three boys with him because he was doing this for them.³¹⁸

Both Ricci and Vargas testified that they wanted to be treated equally, that it had been years since they took the tests, and that they had not once been able to tell their story in a public forum because the lower court did not give them a trial.³¹⁹ They were now vindicated because the Supreme Court had given them a favorable decision.³²⁰

³⁰⁵ The following discussion is based on the videotape of the Senate Judiciary Hearings, Day 4, Minority Issues Panel of the Sotomayor Hearings before the Senate Judiciary Committee. Ricci, Vargas, and others testified. *Sotomayor Confirmation Hearing, Day 4, Minority Issues Panel* (CSPAN television broadcast July 16, 2009), available at <http://www.c-spanarchives.org/program/287762-104>.

³⁰⁶ *See id.*

³⁰⁷ *See id.*

³⁰⁸ *See id.*

³⁰⁹ *See id.*

³¹⁰ *See id.*

³¹¹ *See id.*

³¹² *See id.*

³¹³ *See id.*

³¹⁴ *See id.*

³¹⁵ *See id.*

³¹⁶ *See id.*

³¹⁷ *See id.*

³¹⁸ *See id.*

³¹⁹ *See id.*

³²⁰ *See id.*

Their testimony highlighted their strong belief in the American Dream. Ricci had worked hard and succeeded despite his disability. He deserved the promotion. Vargas added the classic immigrant tale of hard work and accomplishment, loyalty to country, and gratitude for the American way. Ricci and Vargas both tapped into the "man as breadwinner" concept of masculinity which views the man as the head of the family whose main responsibility is to provide for his family.³²¹ While Ricci worked diligently to overcome an obvious reading disability, Vargas worked hard to overcome his immigrant background and to assure a future in "the greatest country in the world."³²² Their wives' roles were subordinate to and supportive of the men's.³²³

Feminist and critical race theory might view these narratives with suspicion. The men argued that they were victims of discrimination because the City of New Haven failed to certify the results of the test.³²⁴ If we look at this case in historical context, feminists might argue, Ricci belongs to the group that historically had power and that has used this power to the detriment of women and persons of color. Tests like the New Haven firefighters' exam have historically been used to benefit those in power. Vargas belongs to a group that is historically victimized by discrimination, and, therefore, his presence in the lawsuit with the white men could be seen as nothing more than a "sell out." This view, however, tends to essentialize men in a way that is unfair and unproductive.

Masculinity theory adds another dimension to this analysis. It explains that although men as a group are powerful, and have historically oppressed outsiders, individual men do not always feel powerful.³²⁵ This feeling of powerlessness derives from the competition among men to conform to an ideal of the hegemonic masculinity, an ideal that most men cannot achieve because of their class, race, age, sexual orientation, or other failure to conform.³²⁶ Young men prove their masculinity through sexual exploits and sexual banter.³²⁷ As men age, they often trade sexual exploits for proof of earning power, status at work, and the ability to support their families as proof of masculinity.³²⁸ This proof demonstrates their masculinity to other men as well as supporting their own sense of self worth.

³²¹ This concept applies differently to men and women. A man whose hard work causes him to neglect his family is, in essence, a hero because he is sacrificing for his family. A woman whose hard work causes her to neglect her family is considered to be overly ambitious (e.g., Sarah Palin). See JOAN WILLIAMS, *UNBENDING GENDER* 70 (2000).

³²² See *Sotomayor Confirmation Hearing*, *supra* note 305.

³²³ See *id.*

³²⁴ See *id.*

³²⁵ See Kimmel, *supra* note 21, at 194–96.

³²⁶ *Id.*

³²⁷ See Collinson, *supra* note 28, at 190–191 (describing the sexual banter of shop workers in England as a means of proving their masculinity).

³²⁸ *Id.* at 191–92.

Ricci's testimony illustrates this concept well. While he belongs to a group that historically has exercised its power over others, Ricci's dyslexia makes him vulnerable. In his firefighter uniform, he seemed like a boy scout whose mother had just scrubbed behind his ears.³²⁹ It appeared that he did not intend to harm others who did not do as well as he in the exam. He intended to encourage all who take the exams to study hard as he did in order to assure their success. While Ricci's reading disability might diminish the masculinity of an ordinary man, viewers understood that it did not diminish his masculinity because he risks his life for others daily in one of the toughest and most dangerous jobs on the planet. Ricci stressed the danger—the more masculine part—of the job. He told the audience that 100 firefighters die every year battling fires.³³⁰ Despite difficult odds, he had the courage to fight for his rights and the rights of others to well-deserved promotions. The combination of the masculinity of the job of firefighter and the courage that it took for Ricci to pursue the lawsuit confirmed his masculinity despite the feminine vulnerability that his reading disability displayed.

Like the Court,³³¹ Ricci equated test results with merits. He defended the test as job related and asserted that if others had studied hard they would have passed.³³² He argued that New Haven should not endanger its citizens by declining to promote the most qualified persons.³³³ He explained the dangers and complexity of fire rescues and stated that there was no time for "do overs."³³⁴ It was not about race, but merit and fairness and equal opportunity for all.

Vargas, too, presented as a "real man." He was born in Puerto Rico, but had come to the United States as a child and had worked his way up in the fire department.³³⁵ Because he worked and studied hard for the Captain's exam, he earned the promotion.³³⁶ He was thankful that his views were vindicated, and he wanted his three sons to learn that this is the "greatest country in the world."³³⁷ He was proud of his heritage, but he wanted to be rewarded for his merit and hard work, not his national origin.³³⁸

Both Ricci and Vargas testified to their disappointment that the Second Circuit panel decided their case with a per curiam opinion, depriving them of the opportunity to demonstrate that they had been treated unfairly, but their confidence in the American justice system was revived when the Supreme Court handed down its opinion.³³⁹ Ricci mentioned that the lawsuit caused

³²⁹ See *Sotomayor Confirmation Hearing*, *supra* note 305.

³³⁰ See *id.*

³³¹ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664, 2681 (2009).

³³² See *Sotomayor Confirmation Hearing*, *supra* note 305.

³³³ See *id.*

³³⁴ See *id.*

³³⁵ See *id.*

³³⁶ See *id.*

³³⁷ See *id.*

³³⁸ See *id.*

³³⁹ See *id.*

him to miss events in his son's childhood, but that the "price of democracy is vigilance."³⁴⁰ He noted that the case was a civics lesson for his son.³⁴¹

Senators responded warmly to Ricci and Vargas. They congratulated them, expressed their support and noted their heroism.³⁴² They thanked them for their public service and their belief in the nation.³⁴³ Republicans criticized then-Judge Sotomayor for her "wise Latina" comment, for her involvement as a board member of the Puerto Rican Legal Defense and Education Fund, and for the panel's opinion in *Ricci*.³⁴⁴ The panel's opinion illustrated their fears that Sotomayor's beliefs were out of the mainstream.³⁴⁵ Then-Judge Sotomayor had a compelling story, but Republicans characterized her message as insisting that there should be proportional representation of women and persons of color in employment.³⁴⁶ This attitude, Republicans implied, was undemocratic and un-American.³⁴⁷ It contrasted with that of Ben Vargas, another Puerto Rican American, who testified that he joined the *Ricci* lawsuit as a plaintiff in order to prove to his children that if they work hard they can succeed. They should not assume that they deserve a promotion merely because of their heritage.³⁴⁸

B. *The Discourse Behind the Case*

As Ricci and Vargas testified, TV cameras spanned the room.³⁴⁹ A host of beefy white male firefighters dressed in full regalia sat in the audience, supporting their colleagues.³⁵⁰ Something was missing. There was no evidence of women or minority firefighters in attendance.³⁵¹ We never heard from any black or Hispanic firefighters who passed the test, but did not achieve promotion. We never heard from the women who did not apply for promotions. What stories might these men and women tell that the Senate ignored? Was it insulting to black and Hispanic firefighters to be told indirectly that their own laziness prevented them from passing the test or achieving a higher rank on the list for promotions? That they did not love their country? Didn't the testimony further the stereotype of the lazy man of color? Did the black and Hispanic firefighters agree that the test was job related? That there were no less discriminatory alternatives available for selecting firefighters for promotion? Would the Supreme Court reach the

³⁴⁰ See *id.*

³⁴¹ See *id.*

³⁴² See *id.*

³⁴³ See *id.*

³⁴⁴ See *id.*

³⁴⁵ See *id.*

³⁴⁶ See *id.*

³⁴⁷ See *id.*

³⁴⁸ See *id.*

³⁴⁹ See *id.*

³⁵⁰ See *id.*

³⁵¹ See *id.*

same conclusion if all of the persons who made the promotion list had been women and the City had set aside the test because it imposed a disparate impact on men? What if all of those making the promotion list had been black and the City had set aside the list because of a disparate impact on whites? What can masculinity theory tell us about the case? What can it tell employers about how to proceed from here?

Masculinity theory explains that men's expression of their masculinity will differ depending on their race, class, age, disability, and sexual orientation.³⁵² Because of the history of the New Haven Fire Department and other fire departments nationwide,³⁵³ fire departments have been a work site where white men construct their masculine identities by emphasizing the heroic aspects of the job and deemphasizing the caretaking aspects of the job.³⁵⁴ They use humor and hazing of probationary firefighters to assure the masculine identities of the job.³⁵⁵ And they have used harassment and hostility toward female firefighters to discourage women from continuing in the job and to establish the job itself as one that only men can do.³⁵⁶

The record does not provide information as to whether the New Haven Fire Department members engaged in masculine performances and practices, including sexual harassment, in order to assure their own masculine identities and the identity of the job. Neither does it explain whether white male members of the department used harassment and racial slurs to establish their predominance over men of color.

But we do know that these behaviors are prevalent in fire departments across the nation.³⁵⁷ There is no reason to believe that New Haven is different from these other departments, especially given that women represent only four percent of firefighters in New Haven, barely above the national average, and black and Hispanic firefighters are also underrepresented in the force.³⁵⁸ We also know that in New Haven, female firefighters have had almost no success in moving into supervisory positions.³⁵⁹ Finally, we know that black firefighters in New Haven had to sue in order to be accepted into the department and into supervisory positions.³⁶⁰

From the case and the testimony before the Senate, it is clear that the image of a firefighter who is worthy of promotion to lieutenant or captain is male, heterosexual, white or, on occasion, Hispanic. The case, the testimony, and the Senate Judiciary Committee's reaction to the testimony made black male and all female firefighters invisible. No one questioned why there were no women on either side of the case. No one asked why there is

³⁵² See discussion *supra* Part I.

³⁵³ See discussion *supra* Part II.

³⁵⁴ See discussion *supra* Part III.

³⁵⁵ See discussion *supra* Part III.

³⁵⁶ See discussion *supra* Part III.B.

³⁵⁷ See discussion *supra* Part III.B.

³⁵⁸ See discussion *supra* Part II.

³⁵⁹ See discussion *supra* Part II.

³⁶⁰ See discussion *supra* Part II.

only one woman lieutenant and no women captains. No one asked why the black men who took the test scored significantly better on the oral part of the test than on the written portion. No one questioned whether the test results would necessarily locate the persons who would be best for the jobs. All equated test results with merit and with hard work. No one wondered why the union, which should represent all firefighters, sought to join the lawsuit on behalf of the white male plaintiffs.³⁶¹ No one asked whether entering burning buildings was the only or the most important job of the fire department, even though the emergency medical work has taken on a greater and greater percentage of the work that fire departments do.³⁶² No one wondered why the testimony did not even allude to the caretaking and medical work of firefighters or the importance of understanding and knowing the poor communities in which the firefighters operated.³⁶³

While the black male and all female firefighters were made invisible by the case and the testimony, the fact that Ricci's and Vargas' testimony lionized a particularly traditional form of heterosexual masculinity was also invisible. Masculinity research explains that because masculinity is considered natural, the practice of masculinity is often invisible.³⁶⁴ Thus, as the national audience viewed, we approved of the narratives of Ricci and Vargas. Those narratives placed men at the head of their families, in the traditional role as breadwinner and protector. Imagine if Ben Vargas had instead been Brenda Vargas whose husband took time off work to care for their children so she could study for the test. What if, instead, it had been Ben Vargas' gay partner who had taken time off to take care of the children? In either event, it is likely that Vargas would not have received the same accolades. Likewise, what if instead of Ricci, a black single mother testified? Once again, it is likely that she would not have garnered the same approval from the committee or the national audience that Frank Ricci did.³⁶⁵

Masculinity theory concludes that there are masculine structures and practices that harm non-conforming men and women.³⁶⁶ Here, relevant structures include the history of the New Haven Fire Department, the current composition of the fire department itself, the promotion process, the lawsuit, the Supreme Court's response, and the Senate Judiciary Committee's hearing, all of which favored the status quo of men living a traditional "manly" lifestyle and doing a traditional "manly" job. Masculine practices include the many behaviors, visible and invisible, that make it more difficult for women

³⁶¹ See Allen & Bazelon, *supra* note 87.

³⁶² See Tracy & Scott, *supra* note 140, at 13–24.

³⁶³ See CHETKOVICH, *supra* note 63, at 46; Tracy & Scott, *supra* note 140, at 19–24.

³⁶⁴ See discussion *supra* Part I.

³⁶⁵ The black single "welfare mother" is culturally viewed as "responsible for creating a family that can only be perceived as pathological compared to the normative . . . family structure." Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 277, at 323, 335. She is the "root of greater black pathology." *Id.*

³⁶⁶ See discussion *supra* Part I.

and non-conforming men to achieve promotions in the fire department. These practices have a purpose or effect of assuring that the job of firefighter remains masculine and honorable.

But masculinity theory also recognizes that although men as a group benefit from the “patriarchal dividend,”³⁶⁷ individual men often feel powerless in their own lives and jobs. Masculinity theory explains this sense of powerlessness by pointing to the relentless struggle and competition that men endure in order to prove their masculinity.³⁶⁸ Masculinity theory notes that boys and men must constantly strive to be “real men,” to achieve society’s concept of what it is to be a man.³⁶⁹ Most men cannot achieve this goal, and often men who realize they cannot do so respond by using subversive masculinities—such as hypermasculinity³⁷⁰—to affirm their masculinity.³⁷¹ In this case, both Ricci and Vargas are members of groups whose masculinity is subordinated to the more powerful hegemonic masculinity. Ricci has a serious reading disability, and Vargas is an immigrant from Puerto Rico. Instead of engaging in subversive masculine practices, such as violent forms of hypermasculinity, in order to prove their manhood, Ricci and Vargas adhered to the more acceptable traditional masculine norms which describe men’s identities as breadwinners and heads of their families. They got married, had children, and worked hard. We find them sympathetic because they followed the script. But this script is not equally available to women and some men.

The next subsection discusses how this narrative and masculinities theory can provide some pragmatic solutions for lawyers and managers in fire and police departments considering future application of the *Ricci* case.

CONCLUSION: LEARNING FROM *RICCI* AND MASCULINITIES THEORY

What does this narrative, combined with a study of masculinity theory, tell us about how to proceed? A narrow reading of the Supreme Court opinion suggests that employers will have to produce strong evidence of a potential disparate impact claim only when they have already created expectations in the plaintiffs by administering what appears to be a job-related test.³⁷² In *Ricci*, the Court held that the employees who took the promotional exams had “legitimate expectations” that the tests would be used to determine pro-

³⁶⁷ The “patriarchal dividend” is the “advantage men gain from the overall subordination of women.” CONNELL, *supra* note 25, at 79.

³⁶⁸ *See id.*

³⁶⁹ *Id.*

³⁷⁰ David Collinson found that the younger blue collar men emphasized their sexual prowess while the older men emphasized their roles of breadwinners and heads of family in order to prove their masculinity. *See* Collinson, *supra* note 28, at 191 (observing masculinities displayed by blue collar workers in shop culture).

³⁷¹ *Id.*

³⁷² *Ricci v. DeStefano*, 129 S. Ct. 2658, 2676–77 (2009).

motions.³⁷³ While I would contest this characterization because I believe that there are factual questions concerning whether the *Ricci* tests were job-related and consistent with business necessity,³⁷⁴ the Court disagreed. It required a strong basis in evidence to refute what appeared to be a presumption that the tests, if not intended to discriminate, were job-related. Apparently because there was evidence that the test was created with the help of a professional consultant and no evidence that its purpose was to discriminate against racial minorities, the Court concluded that the City could not meet the strong basis in evidence test. In making this determination, the Court emphasized the extensive preparation that the successful test takers engaged in, which, according to the Court, made their expectations and the tests themselves legitimate.³⁷⁵ The successful test takers' expectations that the results of the exams would be certified were "legitimate," according to the majority, because the plaintiffs relied upon them and studied for the test.³⁷⁶ Because of the importance of the employee expectations, it follows that had the City concluded before administering the test that it was not job-related and consistent with business necessity or that there might be a less discriminatory alternative, it would have been legal for the City to decide not to administer the test.³⁷⁷ It would also have been legal for the City to use a different assessment mechanism altogether.³⁷⁸

Given this interpretation of the case, employers in the future will have considerable latitude in fashioning assessment methods for firefighting and supervisory positions within fire departments before the test is administered and results reached. Thus, the most important lesson learned from the decision is that employers may take race, gender, and other factors into account before they create the assessment if their purpose is to create a job-related test that produces a diverse workforce. However, once they administer a particular assessment mechanism, it will be nearly impossible for them to prove after the fact that the test should be disregarded. This is because an employer who administers a test or assessment creates "legitimate expectations" among those who take the test.³⁷⁹

Because of the Court's emphasis on the "legitimate expectations" of those taking a test, it is essential that employers desiring a competent, diverse workforce establish assessment methods beforehand that will not have

³⁷³ *Id.* at 2681.

³⁷⁴ See discussion *supra* note 11.

³⁷⁵ *Ricci*, 129 S. Ct. at 2681.

³⁷⁶ *Id.* at 2677.

³⁷⁷ *Id.* ("Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.").

³⁷⁸ *Id.*

³⁷⁹ *Id.*

a disparate impact on women or racial minorities. In *Ricci*, Dr. Christopher Hornick, an industrial/organizational consultant with twenty-five years' experience in police and firefighting testing, testified before the CSB that many fire departments across the country use assessment centers to gauge who should be promoted.³⁸⁰ The assessment centers allow those grading the applicants to measure important intangibles such as leadership and command presence that are necessary to successful completion of the job.³⁸¹

Thus, it would appear that assessment centers are preferable methods of measuring job skills while simultaneously permitting cities to promote a diverse population. While assessment centers have successfully encouraged racial diversity, there is no evidence in the record that they will also benefit women. Both leadership and command presence may have masculine connotations and employers must be cautious when using these qualities to judge their firefighters. In creating assessment centers, employers should, therefore, consider the history of the industry, the history of the particular employer, masculinity theory, and qualitative empirical research that demonstrates how masculinities or other invisible structures and practices within the workforce can harm promotional opportunities for minority segments within the workforce, and in particular, women.

While assessment centers appear to enable selection of a more diverse group, masculinities theory would add a precautionary statement. To the extent that assessment centers depend on a masculine definition of leadership and command presence, they may undervalue the applications of women or men who present in a manner that does not conform to gender norms. Thus, although assessment centers appear to be more job related than a pencil and paper test, those creating the centers must consider alternative definitions of leadership and command presence that are broad enough to incorporate women and gender non-conforming men. Employers must be cautious in establishing the assessment mechanisms to assure that they do not incorporate a bias toward "the masculine."

Leadership studies demonstrate that female leaders are judged adversely because most people identify leadership with masculine qualities.³⁸² Even when a woman's work performance is equal to that of her male colleagues, male group members evaluate the woman's work as less competent.³⁸³ And in jobs that have traditionally been held by men, both men and women judge a woman as less likeable than an equally competent man.³⁸⁴ Female leaders face a double bind: they can be either competent or likeable,

³⁸⁰ *Id.* at 2693 (Ginsburg, J., dissenting).

³⁸¹ *Id.*

³⁸² Eagly & Karau, *supra* note 209, at 583; Eagly, Johannesen-Schmidt & van Elgen, *supra* note 209, at 571-73.

³⁸³ Martha Foschi, Aaron S. Wallen, Daniella Fuchs & Melina M. Tamkins, *Gender and Double Standards in the Assessment of Job Applicants*, 57 SOC. PSYCHOL. Q. 326, 335, 337 (1994).

³⁸⁴ Eagly & Karau, *supra* note 209, at 576.

but not both.³⁸⁵ This research suggests that fairly judging women's leadership performance in an assessment center is feasible only with awareness of the shortcomings of the process and a plan for overcoming the inherent biases in the measure.

In "*Who's the Man?*": *Masculinities Studies, Terry Stops, and Police Training*, Frank Rudy Cooper explains that enacting command presence wrongfully in the police department can lead to masculinity contests and violence.³⁸⁶ Command presence, then, is often interpreted to require masculine traits.³⁸⁷ Cooper explains, however, that proper command presence requires police to eschew hypermasculine behavior by acting with restraint when their authority is questioned and using communication skills to diffuse potentially violent situations.³⁸⁸ He advocates training that develops "calmness, self-respect, the ability to tolerate ambiguous situations, and the ability to apply legal concepts in concrete situations so that the officer can respond flexibly in the field."³⁸⁹ These recommendations dispute the hypermasculine, violent interpretation of the term "command presence" that is accepted as necessary in some police departments. While the command presence required of a police officer may differ from that required of a firefighter, Cooper's advice is valuable to employers establishing assessment centers because it will enable employers to make visible the invisible race and gender biases in the assessment that assume that command presence and leadership skills describe a particular masculine type of man. Ricci suggests that employers creating requirements for jobs in firefighting or supervisory positions should also consider the following in creating their assessment mechanisms:

- The history of firefighting nationally and the means by which firefighters got their jobs;
- The history of firefighters in the specific location;
- Whether there is a history of particular ethnic groups dominating firefighting in the area;
- Whether firefighting jobs have been handed down from fathers to sons;
- The percentage of women and men of color in firefighting jobs and in supervisory roles;
- Whether there is hazing of probationary and other employees that may serve to solidify the white, male identity of those who conform, but also to ostracize outsiders;

³⁸⁵ Madeline E. Heilman, Aaron S. Wallen, Daniella Fuchs & Melina M. Tamkins, *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416, 426 (2004).

³⁸⁶ Cooper, *supra* note 17, at 726–32.

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 733–36.

³⁸⁹ *Id.* at 736.

- Whether there is a history of racial or sexual or gender harassment in the department;
- Whether the tests evaluating an applicant's qualifications incorporate all parts of the job, both those considered "masculine" and those regarded as "feminine," including the ability to deliver emergency medical services, investigate fires, etc.;
- Whether the department values "fire buffs"—those who love fires—over those who have a connection to the community served;
- Whether women in the department have had access to equipment that fits well and to private bathroom, locker, and sleeping facilities;
- Whether there is an ordinance that requires firefighters to live in the city they serve;
- If there is no such ordinance, whether those living in the city may have better connections to the community and whether those connections should be considered positive job qualifications;
- Whether the union represents the interests of both the majority and the minority.

After considering these questions, and in consultation with experts, an employer should create assessment mechanisms that eliminate discrimination among firefighters and select supervisors based on a variety of qualifications and characteristics that are important to the job of firefighting. In order to achieve a truly diverse and qualified workforce, the employer should work to eliminate the invisible practices that disparately harm women, men of color, and men who do not conform to gender norms. Eliminating discriminatory practices and creating incentives to value all parts of the job should help break the monopoly of white men on the fire department. Furthermore, employers should notify all employees in advance that the assessment will include a broad range of job-related skills that are representative of the types of work performed by firefighters. This advance notice should not only produce a more diverse workforce but should also create a sense of fairness for all members of the community whose skills will be assessed.

