Clear and Convincing Evidence

Measurement of Discrimination in America

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Chapter Eight

USE OF TESTING IN CIVIL RIGHTS ENFORCEMENT

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INTRODUCTION

This chapter discusses the use of testing as a civil rights enforcement technique. It is based on the experience of the Washington Lawyers' Committee for Civil Rights Under Law over the past 20 years. The chapter is organized in three sections: (1) a brief review of the Washington Lawyers' Committee's overall litigation program and its experience with the use of testing; (2) a more detailed analysis of the application of testing methodology to employment discrimination; and (3) suggestions concerning future use of testing techniques for enforcement.

The Washington Lawyers' Committee's Experience with Enforcement-Oriented Testing

The Washington Lawyers' Committee for Civil Rights Under Law is a private, nonprofit organization established in 1968 by leaders of the private bar in the District of Columbia to address issues of discrimination and poverty. It is one of a number of local lawyers' committees formed in response to the publication of the report of the National Advisory Commission on Civil Disorders (1968). Over the past 24 years, the committee has mobilized hundreds of lawyers to provide legal services to thousands of civil rights claimants in both individual cases and class actions. While the committee's work has included cases in almost all areas of civil rights practice, its litigation has concentrated on discrimination in employment and housing.

More than 100 suits concerning discrimination in employment have been won at trial or settled on favorable terms. These cases have involved more than 30 federal agencies and dozens of private employers and labor unions. More than $50 million has been secured in back

and front pay for thousands of minorities and women. Injunctive relief has opened employment opportunities for even more individuals. In addition, the committee operates a specialized Intake Program to assess the claims of individuals who believe they have confronted discrimination in their employment. Last year, the program responded to more than 900 requests for assistance.

In addition, for more than 15 years, the committee has provided assistance to individuals in the Washington, D.C., area who seek to challenge discrimination in residential housing. While most cases have involved discriminatory refusals to rent on the basis of race or sex, the committee has also handled landmark cases challenging discriminatory advertising practices and successfully challenged the conversion of a high-rise apartment in Silver Spring, Maryland, to an all-adult building.[1]

In 1978, the committee began to provide counsel to an organization based in Richmond, Virginia—Housing Opportunities Made Equal (HOME). Established in the early 1970s, HOME was among the first private fair-housing organizations to use testing techniques as part of a comprehensive fair-housing enforcement strategy. HOME has become a model program in providing housing counseling to minority home seekers and in using paired testers to audit general housing practices and investigate specific complaints of discrimination. Among the most significant cases that HOME initiated was *Havens Realty Corp. v. Coleman*,[2] in which the Supreme Court reached the landmark unanimous decision upholding the standing of testers and fair-housing organizations to bring suit under the 1968 Fair Housing Act.

Drawing on its experiences with HOME, the committee assisted a group of local clergy in establishing an analogous fair-housing organization in the Washington metropolitan area in 1983. Over the past nine years, this organization, the Fair Housing Council of Greater Washington (FHCGW), has developed an extensive program of community education, outreach, and complaint counseling. Among other things, the FHCGW has used testing techniques to conduct five major audits of rental practices throughout the Washington metropolitan area. The FHCGW has also been involved in more than 30 lawsuits using testers as plaintiffs, either alone or in combination with bona fide applicants, to challenge discriminatory housing practices.

The results of these cases clearly illustrate the enormous impact that testing can have in winning fair-housing cases and securing meaningful relief. The FHCGW's litigation record reflects a steady increase in the monetary value of settlements achieved in cases employing tester-generated evidence. In the mid-1970s, fair-housing case settlements involving a payment of several thousand dollars were generally considered substantial victories. But by 1990 the FHCGW had secured more than a dozen settlements or verdicts of over $20,000 each, and recoveries in several cases have exceeded $100,000. In the majority of these cases, tester evidence was a decisive factor in achieving a successful result. Tester evidence provided a level of proof almost never attainable in other cases. In addition, the ability of the FHCGW to initiate cases exclusively on the basis of testing evidence meant that enforcement was no longer dependent on receipt of complaints from individual victims. Cases could be initiated proactively.

The FHCGW has also used testing to monitor compliance with settlements in earlier cases. Perhaps just as important, testing undertaken by the FHCGW as part of an annual survey has been a means of keeping the issue of housing discrimination in the forefront of public debate. Over the past five years, each of the FHCGW's highly publicized annual reports has generated a supportive editorial response from the *Washington Post* and extensive coverage in the print and electronic media.

The Washington Lawyers' Committee has also worked closely with the National Fair Housing Alliance (NFHA), an organization that has made a vital contribution to the development of testing techniques in fair-housing enforcement. The alliance is a membership organization of more than 50 private fair-housing agencies around the country assembled to pool their experience and capabilities to promote equal housing opportunity. The committee has assisted the alliance in (1) securing general legal assistance, (2) providing legal training to the staff of member organizations, and (3) preparing and submitting briefs as an amicus curiae to support member organizations in cases presenting important legal issues.

Particularly through its effective communications network and its Washington office, the alliance serves an indispensable role in apprising fair-housing groups throughout the country of legal and policy developments of mutual interest. The NFHA has also worked closely with officials of the Department of Justice and the Department of Housing and Urban Development (HUD) who are charged with fair-housing enforcement. These agencies have shown increasing interest in and support of the use of testing as an enforcement technique.

During the summer of 1988, the Washington Lawyers' Committee worked with the Southeast Vicariate Cluster, a coalition of church groups in Southeast Washington, and a team of social scientists at Howard University to adapt testing methodology to the problem of

discrimination in the provision of taxicab service in the District of Columbia. This work involved substantial research using paired teams to test for discrimination involving (1) the refusal of service because of a passenger's race and (2) the refusal to transport passengers to predominantly black neighborhoods. Over the course of 2½ months, 292 tests were conducted by trained, carefully matched teams of black and white testers. The results revealed statistically significant disparities in the rates at which black testers were passed by in comparison with whites and at which service was denied to testers seeking to travel to predominantly black areas in the city. For example, black testers were passed by by cabs in 20 percent of the tests, while white testers were passed by in only 3 percent of the tests.[3] Testers were also nearly twice as likely to be denied transportation to predominantly black areas of the District than to destinations of comparable distance in predominantly white areas.[4]

As a result of this testing program, litigation was undertaken against three cab companies whose practices reflected particularly high levels of discrimination. These suits were settled on the eve of trial, after the court denied several dispositive motions by the defendants. The settlement included a substantial monetary payment—nearly $50,000—and significant injunctive relief. Perhaps most significant, during the course of the litigation the court ruled for the first time in this country that cab companies could be held liable for the discriminatory conduct of their drivers.[5]

Early in 1990, the Washington Lawyers' Committee, after discussions with local attorneys who have substantial experience in the fields of employment and civil rights enforcement, moved to establish a new private organization that would utilize testing to address equal employment issues. Through the collective efforts of Peter Edelman, associate dean of Georgetown Law Center; Inez Smith Reid, former D.C. corporation counsel; William Robinson, dean of the District of Columbia School of Law; and Leroy Clark, a former general counsel of the Equal Employment Opportunity Commission (EEOC), a new organization was established named the Fair Employment Council of Greater Washington (Fair Employment Council). The Washington Lawyers' Committee and the firm of Arnold & Porter serve as general counsel to the Fair Employment Council.

As initially formulated by its board, the activities proposed for the Fair Employment Council to undertake included the following:

1. A comprehensive analysis of basic demographic and work force data concerning the Washington metropolitan area to identify any occupations and industries in which minorities and women appear to be underrepresented.
2. Pursuit of testing audits to identify the extent to which discrimination influences hiring decisions in various sectors of the regional economy.
3. In appropriate circumstances, initiation of litigation and administrative actions to address discriminatory practices identified by the council's testing and research activities.
4. Provision of lawyer referral services to individuals who may have been affected by discriminatory practices disclosed through the council's testing and research.
5. Issuance of an annual report assessing the state of fair-employment practices and equal employment opportunity law enforcement efforts in the Washington metropolitan area.
6. Initiation of public education and outreach activities to acquaint community groups and public and private civil rights organizations with the council's programs.

Over the past year, the Fair Employment Council has made considerable progress in implementing these programs. Its activities have included adaptation of testing methods originally used by the Urban Institute in its research to the demands of enforcement-oriented testing; identification of an initial set of industries and occupations on which to concentrate testing activities; recruiting, training, and fielding a staff of black and white testers who have completed more than 200 tests; and initiation of two lawsuits based on testing results, along with preparation of additional suits. Of the two suits already filed, one alleges racial discrimination and one sex discrimination.

METHODOLOGICAL CONSIDERATIONS IN ENFORCEMENT-ORIENTED EMPLOYMENT TESTING

Of all the activities undertaken by the Fair Employment Council to establish testing as a major enforcement tool in employment discrimination, none is more important or more complex than the adaptation of testing methodology to the special needs of enforcement. The methodology used in research-oriented employment testing is described elsewhere in this volume.[6] The methodology for enforcement-oriented testing shares with it many common elements. Both can be defined as social science procedures that create laboratory-like controlled

conditions for recording candid responses to human characteristics. As social science methodologies, both reflect a fundamental style that emphasizes objectivity rather than advocacy and a focus on promulgating facts rather than conclusions. In search of laboratory-like control, both rely on pairs of testers selected, trained, and equipped with credentials making them comparable in job-relevant respects and isolating the characteristic being tested.

Nevertheless, there are important ways in which procedures designed for research-oriented and enforcement-oriented testing should differ. We consider, in turn, nine specific ways in which these differences are manifested. They can be grouped into general categories relating to (1) the development of testing staff, (2) applications for jobs and records of test experiences, and (3) targeting of and follow-up from tests.

Development of Testing Staff

Several of the differences between research-oriented and enforcement-oriented testing methods relate to the development of the testing staff.

Selection of Testers

The first of the adjustments to research-oriented testing methodology pertains to the selection of testers. Research-oriented testing imposes a number of requirements on the characteristics of persons selected to serve as testers. These requirements demand that the testers be objective, approaching their job as a research activity and without preconceptions of what they will find; that they be observant, alert to relevant details of job application procedures and their treatment during these procedures; that they be meticulous record keepers so that their experiences will be completely and accurately documented; that they follow directions punctiliously; and that they be able convincingly to portray a job applicant with the credentials they are assigned.

Enforcement-oriented testing also requires all these characteristics. In addition, however, enforcement-oriented testing may call upon testers to serve as plaintiffs and witnesses in litigation. Such roles impose at least three additional considerations in selecting testers. First, the personal backgrounds of testers must be free of any difficulties that might reduce their credibility as witnesses. Second, testers must be sufficiently articulate to present their experiences clearly in written statements and oral testimony. Third, because litigation may require several years for resolution, testers must be willing to remain in contact with the testing program and return occasionally to participate in legal proceedings over an extended period.

The location of capable, dedicated individuals to serve as testers requires considerable time and effort but, in our experience, is readily achievable. Often, several dozen candidates must be screened for each tester hired. For the Fair Employment Council, the search process generally has worked best when it has (1) hired students from local universities; (2) identified candidates through personal referrals rather than open advertisements; (3) described the position as that of a research assistant; (4) hired individuals who are at least 20 years of age; and (5) selected individuals who possess more education and skills than the applicant they will portray.

Comparability of Testers

Another difference between research-oriented and enforcement-oriented testing concerns the attractiveness of each tester to potential employers. In a research study, the design typically specifies that the protected-class tester and non-protected-class tester should be equivalent in job-relevant characteristics. Where that is not possible, it is appropriate to alternate randomly which tester in the pair has the stronger credentials.

In an enforcement test, that approach would be acceptable, but it might leave ambiguity regarding the inferences to be drawn from differences in treatment of the testers. Giving the protected-class tester a slight edge, however, helps ensure that differences in treatment to the detriment of the protected-class tester create an inference of discrimination. Accordingly, in enforcement-oriented testing, the protected-class tester might apply for a job before the control tester and the record of his education and experience might be somewhat stronger than the background presented by the control tester.

Training of Testers

Differences also arise in the course of tester training. In both enforcement and research work, thorough training of testers is essential to the success of the program. Enforcement testers spend several days in classroom training, receiving instruction in the theory and context of testing, preparing resumes, being coached on how to be an effective job applicant, practicing the completion of application forms and participation in interviews, and becoming adept at procedures for recording data. During this time, testers who will be paired work closely with and observe each other, developing a sense of teamwork and fostering a convergence of their personal styles. This classroom train-

ing is followed by several days of practice tests conducted under close supervision. While this training is very similar to techniques used to prepare testers in research-oriented programs, enforcement-oriented training should cover additional areas. Additional topics include the use of testing results to enforce the civil rights laws and the nature of the legal processes in which testers may become involved.

Compensation of Testers

Differences may also arise between research-oriented and enforcement-oriented testing in the terms on which testers are retained. Since employment testing requires testers to make substantial commitments of time and effort, it is generally advisable to hire testers rather than to rely on the efforts of volunteers. This conclusion, however, does not end the inquiry.

In both the research and enforcement contexts, it is crucial that testers be compensated in ways that do not make their earnings contingent on the results they report. Data generated by tests must be free of any inference that testers were motivated to report discrimination to benefit personally. Therefore, in the Fair Employment Council's testing program, testers are paid a fixed salary regardless of how many tests they complete or what results they find. Additionally, those testers who become plaintiffs in litigation agree in advance that any damages awarded to them as a result of litigation will be assigned to the Fair Employment Council.

Recording Test Experiences

Once testers are trained, they are ready to begin applying for jobs and reporting their experiences. Differences in methodology also arise in this area.

Degree of Supervision

Differences arise between research-oriented and enforcement-oriented testing in the degree of supervision provided to testers during their fieldwork. In research-oriented testing, testers are typically in regular contact with their field supervisor to receive assignments. But during the course of each test, the supervisor is consulted primarily when unusual problems arise. The emphasis is on following a standardized procedure so that all pairs of tests reflect parallel experiences so that the results can be aggregated in a statistical analysis.

In enforcement-oriented testing, on the other hand, concern with the completeness and clarity of the record in each test predominates over interest in uniformity among all tests. In enforcement-oriented testing, each tester should be mindful of taking actions that are comparable to those likely to be undertaken by his partner while still following the natural flow of each job application process. As a result, for example, testers might call back an employer about a job opening once in one test and six times in another test; a research-oriented testing program might specify a standardized number of callbacks.

These multiple goals—tailoring tester conduct to the particular circumstances of each job application, maintaining a clear and complete record of the test experiences, and ensuring that each tester acts in ways comparable to his partner—sometimes make heavy demands on testers. It may be necessary for judgments to be made while tests are in process. Thus, enforcement-oriented testers are instructed to maintain regular contact with their field supervisor, calling at each step in the job application process for instructions on how to proceed. As a consequence of this closer supervision, enforcement tests are more time-consuming, complicated, and expensive than typical research-oriented tests.

Recording the Data Generated by Tests

Yet another difference involves the extent and nature of data recorded from tests. For both research-oriented and enforcement-oriented testing, of course, objectivity, accuracy, completeness, and contemporaneous recording of data are important. Furthermore, both types of testing typically expect testing partners to record their experiences independently and not discuss these experiences with each other until after they have been documented.

The different ways in which test results are used in research and enforcement testing require some different record-keeping techniques. Because the emphasis in research-oriented studies is often on statistical analyses of testing results, their data collection procedures often use structured questionnaires with objective, scalable questions. At the Fair Employment Council, tabulations of test results are performed. However, where data collection will be used for enforcement-oriented testing, the goals are, first, to develop a record from which determinations can be made whether to undertake litigation and, second, to create a clear and complete record that will support claims of discrimination pursued in litigation. In pursuit of these goals, en-

forcement-oriented testing may warrant the use of semistructured record forms and essaylike narrative witness statements.

Types of Information Recorded from Tests

An issue related to the types of records created by the testers is which results or data from the job application process are worth measuring. In the research-oriented tests conducted by The Urban Institute, the focus of analysis was on the "bottom-line" question whether the tester was offered a job. Differences in treatment during the application process were not extensively recorded.[7] This emphasis on the bottom-line test result reflected both the practical consideration that when fewer variables are gathered, more tests can be accommodated within a limited budget, and the conceptual consideration that how a candidate is treated during the application process may be relatively unimportant if he eventually is offered a job.

When testing is used for enforcement purposes, however, the test experiences must be recorded in more detail. Litigation based on tester evidence usually rests on the legal theory of disparate treatment, alleging that the protected-class tester and the non-protected-class tester were treated differently for reasons unrelated to their fitness for employment. Disparities in the treatment of the testers throughout the application process, therefore, are legally relevant and should be thoroughly documented. Evidence of the ultimate disparity—that one tester was offered a job while the other was not—should be supplemented with a record as complete as possible concerning treatment during each phase of the application process that may have led to this outcome. The sorts of variables bearing on the treatment of testers that might be recorded include: what information is demanded of applicants (e.g., are references checked, what tests are required); how job interviews are conducted (e.g., the length of interviews, the characteristics of interviewers, what questions are asked); the flow of information (e.g., what information is provided spontaneously, what must be requested); how applicants are treated (e.g., how long must the tester wait, what hospitality is offered, what names are used); how jobs are described (e.g., to what extent are career advancement opportunities emphasized); and so forth.[8]

Targeting of and Follow-up from Tests

Targeting of Test Subjects

The manner in which the subjects to be tested are selected also differs between enforcement-oriented and research-oriented testing. In research studies, such as those conducted by the Urban Institute, the goal of identifying the existence and assessing the extent of discrimination in a population of job openings requires the use of a random sampling strategy to obtain a representative sample. Enforcement-oriented testing focuses on a different objective. The goal of eliminating discrimination that adversely affects protected classes suggests a more targeted sampling approach

The Fair Employment Council, for example, often gives testing priority to industries or occupations in which two conditions coincide. The first condition is that a substantial number of valuable job opportunities are available in the sector. The second condition is that there is reason to suspect that discrimination will be encountered there. To apply the first of these criteria to the Washington area, data on wage rates, job prerequisites, levels of employment, and rates of growth in various industries are examined. To apply the second criterion, a variety of information is consulted, including records of past litigation, complaints, and tips concerning specific employers, as well as theoretical reasoning from the social and behavioral sciences. For example, it has been hypothesized that racial discrimination may be more prevalent at firms serving upper-class customers and in jobs involving public contact.

The principal benefit of such targeting is the efficient use of scarce testing resources. The use of targeting, however, may limit the extent to which conclusions can be drawn from test results about the extent of discrimination in the general population of job openings. For that reason, tests of random samples of job openings, such as those conducted by the Urban Institute, remain essential complements to enforcement-oriented efforts.

Follow-up to Tests

The different uses of test results drawn from enforcement-oriented and research-oriented testing may lead to different steps following the completion of those tests in which disparate treatment is observed. In research-oriented testing, the goal of testing a representative sample of jobs requires that each job vacancy be the subject of only one test. In enforcement-oriented testing, however, it is often appropriate to perform repeated tests of the same job vacancy, or at least of the same employer. The goal of repeated tests is to assess and document the nature and extent of the discrimination in anticipation of litigation, principally to determine whether the observed differences in treatment were isolated or reflect a pattern or practice of discriminatory behavior.

In short, enforcement-oriented testing is a methodological first cousin to research-oriented testing, not an identical twin. While maintaining an unwavering commitment to objectivity and rigor, enforcement-oriented testing requires a modified design to generate information necessary for its potential use in litigation.

USES OF TESTING TO CHALLENGE EMPLOYMENT DISCRIMINATION

Once developed, the techniques of testing can be used in a variety of ways to audit employment decision making. Each application of testing serves a different purpose. Together, the array of applications affords a broad, effective means of detecting and challenging discrimination in employment. Each application of testing warrants separate consideration.

Surveying the Work Force

Testing can be used to survey the work force of a community to determine the extent to which discrimination influences employment decisions. The results of such surveys can yield insights about the factors that affect employment selections in the entire, or a sector of the, business community. This, of course, is the role and effect of the Urban Institute studies discussed in other chapters in this volume.[9]

The results derived from these surveys can inform a variety of public deliberations. Enforcement agencies can use such results to measure the effectiveness of their efforts and to direct their resources to those segments of the community where disparities in treatment are most pronounced. Similarly, legislatures can rely on testing results to assess the effectiveness of discrimination prohibitions and the sufficiency of resources deployed to redress any discrimination that is detected.[10] As a highly controlled, objective means of collecting aggregate information concerning employer decision making, testing surveys afford an invaluable opportunity to explore the behaviors and prevailing mores of a community of employers.

Monitoring Compliance with Injunctive Relief

Employment discrimination litigation in which plaintiffs are successful often concludes with the issuance of orders, constituting injunctive relief, by the court or agency before which the case was heard. Such orders might direct the employer to refrain in the future from any discriminatory activity and might direct the employer to undertake steps to remedy the effects of past discriminatory conduct. These might include affirmative recruitment, special training programs, and hiring and promotions guided in part by goals and timetables. While these orders carry the force of law, compliance with them cannot always be assumed. Employers who find the path of discrimination appealing or convenient or who do not take measures required to curb discrimination may repeat the behavior that originally gave rise to litigation. Supervision of an employer's conduct to ensure compliance with injunctive provisions can both discourage a resurgence of unlawful conduct and detect discriminatory conduct when it recurs. Such supervision, known as monitoring, is essential to achieving the permanent elimination of discrimination from the workplace.[11]

Most monitoring entails a review of records maintained by the employers subject to the injunctive provisions. Typically, these records consist of counts of the number of employees or applicants subject to the decision making being monitored and their race, gender, or other basis on which discrimination was alleged to have occurred. Statistical measures can be applied to these numbers to compare the composition by protected characteristic of those actually selected with the composition of those who could be expected to have been selected. Differences between the composition of those selected and those whose selection could be expected can be measured to determine if they are statistically significant and therefore can be attributed to discrimination, or are attributable to chance and therefore of no legal consequence.[12] Thus, most monitoring relies on statistical measures of the results of a substantial number of decisions to determine whether the decision making at issue comports with injunctive provisions.

Such monitoring techniques suffer from several limitations. First, they depend on records that employers themselves generate and therefore are susceptible to distortion if the information collected is, by inadvertence or willfulness, inaccurate. Second, the information to be collected requires someone, often each employee or applicant, to identify his race, age, disability, or other characteristic for which monitoring is being conducted, invading the privacy of some and creating the impression for others that discriminatory practices are being committed. Third, such monitoring depends on an ability to detect discrimination from differences between actual and predicted results from an aggregate of selection decisions, allowing isolated incidents

of discrimination affecting a small number of selections to evade detection. Thus, although traditional monitoring techniques are a powerful vehicle for the enforcement of injunctive provisions, they suffer from a number of significant limitations.

Testing affords a mechanism for monitoring compliance with injunctive relief that is less subject to these limitations.[13] First, it can be conducted by the parties engaged in monitoring the employer's conduct, reducing the employer's role and, therefore, the risk that the information collected could be inaccurate. Second, testing eliminates the need to identify the race, gender, or other protected characteristic of employees or applicants for employment. Instead, monitoring is conducted through the use of testers whose race, gender, or other characteristic is specified by the party conducting the monitoring. Third and most important, testing can detect differences in treatment in isolated occasions and discriminatory practices that affect only a small number of employment decisions. No statistical measures are necessary to evaluate the results of these tests. Rather, each test affords direct insight into the employer's conduct. Discrimination can be detected from individual selection decisions, and no aggregation of the results from multiple selection decisions is necessary.

Such testing, of course, will be largely limited to monitoring the selection of applicants for employment and other decisions pertaining to those who seek to enter an employer's work force. These include hiring decisions themselves, as well as decisions to refer applicants for employment and other activities that precede the decision to hire. Testing is not likely to be of use in monitoring compliance with injunctions regarding promotions, imposing discipline, discharging employees, or any other decision making involving incumbent employees.[14] But, within this range of employment decision making, testing offers a powerful means of monitoring compliance with injunctive provisions. It can be employed either in conjunction with or in place of conventional monitoring techniques.

The use of testing to monitor compliance can, but need not, be memorialized in the consent decree or other order in which the injunctive provisions are established. Disclosure to the employer and the court or agency of plans to use testing to monitor compliance has the advantage of putting the employer on notice and, perhaps, encouraging voluntary compliance. It also places the court or agency on notice that monitoring will be accomplished through testing and that, in the event noncompliance is detected, testing evidence may be used to support such an allegation. On the other hand, the use of testing to monitor compliance without advance disclosure to the employer and court or agency may increase the chance that the employer will furnish candid reactions to the testers. In either event, when testing is used as a means of monitoring compliance with injunctive provisions enforcing the civil rights laws, the costs of testing may be subject to reimbursement by the employer.[15]

Investigating Allegations of Employment Discrimination

When discrimination occurs today it is typically subtle and clandestine. Direct evidence of discrimination is rare and, where such direct evidence exists, corroboration is even more rare. As a result, applicants for employment who suspect they have been discriminated against are not likely, without the benefit of discovery, to be able to confirm the employer's discriminatory intent. Testing can be enormously helpful in the investigation and evaluation of allegations of hiring discrimination.

Detecting discrimination in hiring decisions has traditionally been very difficult, and even when discrimination is suspected, it is rarely challenged. Most applicants for employment never observe the treatment of other applicants, much less the treatment of other applicants who may have comparable credentials. Thus, unless the mistreatment is overt, applicants who have been subject to discriminatory treatment lack any means of determining that the treatment they received was unlawful. Moreover, when discrimination is suspected, most applicants lack the evidence with which to mount an effective challenge to the unlawful conduct. And even those who may have the necessary proof to support a claim of discrimination often are reluctant to shoulder the burdens of litigation, particularly when their first priority remains finding a job.[16] Accordingly, testing is a particularly important vehicle for detecting the existence of discrimination in hiring decisions.

Testing can be used to corroborate as well as dispel allegations of discrimination that have been leveled against an employer. The denial of employment for reasons suspected to be discriminatory can be investigated by deploying pairs of testers to determine whether they receive different treatment attributable to discrimination. Neither the denial nor the offer of employment to the tester with the same characteristic as the complainant, of course, is necessarily determinative of the merits of the original discrimination allegations. But the denial of employment to the protected-class tester and offer of employment to the non-protected-class tester may suggest a more extensive investigation. And when the testers experienced differences in treatment

that mirror the allegations of discrimination, an inference of discrimination may be drawn.[17] Indeed, when differences in treatment of the testers resemble the allegations of discrimination, tester evidence is admissible in subsequent litigation to show the employer's habit of committing discrimination.[18]

The use of testing to investigate the possibility of employment discrimination has several other advantages. First, testing can be used to identify the specific points in the application or selection process where discrimination manifests itself. Testing affords opportunities to examine the minute, discrete components of the hiring process. For example, rather than accept unexamined the allegation that the interviewer was hostile to a minority candidate, testing permits a comparison of specific questions asked of minority and nonminority applicants. Testing also permits assessment of whether protected-class and non-protected-class applicants are scrutinized equally, such as in the thoroughness of background investigations or the administration of drug testing, and whether they are afforded the same opportunities to demonstrate job-related skills. With testing, therefore, allegations of discrimination can be framed with more specificity than otherwise, and employers can respond to such allegations with comparable precision.

Second, testing permits investigation of hiring practices of particular employers without the pendency of a claim of discrimination. Leads about the presence of discrimination, as well as allegations of discrimination leveled by persons without colorable claims, can be investigated thoroughly and accurately. Thus, testing can be targeted at an employer whose work force reflects a significant underrepresentation of minorities or women. Similarly, employers against whom multiple claims of discrimination have been lodged, even if none of the claims can be supported with admissible evidence, can still be tested. And governmental enforcement agencies can use testing as a component of their systemic investigations.[19] Because testing can detect discrimination in the hiring process without the initiation of formal legal proceedings or discovery, the technique is a particularly versatile enforcement device.

Third, and perhaps most important, employers may, and should, use testing to detect discrimination in their own organizations. Voluntary compliance with the Equal Employment Opportunity (EEO) laws, of course, is the preferred means of avoiding discrimination. Testing affords employers a means to scrutinize hiring decisions in their own organizations without the threat or the pendency of expensive and embarrassing litigation. The use of testing for such a purpose would by no means be a novel development. Retail companies routinely use testing techniques to monitor the service they provide to their customers. The same methods can be deployed inexpensively and discreetly to detect the presence of discrimination and rectify problems before they precipitate any litigation.

Challenging Hiring Discrimination

None of the applications of testing described above affords the opportunity to challenge discrimination directly where it is detected by the testing. But testing can be used for that purpose as well. Relying on legal principles well established in testing for discrimination in housing and public accommodations,[20] testers suffering discrimination during a test may themselves serve as plaintiffs in litigation challenging that discrimination. While this use of testing must be carefully conducted to survive the rigors of litigation, it provides a powerful weapon to combat discrimination and is probably the most economical means of enforcing the civil rights laws.

In this use of testing, testers initiate litigation when they have been subjected to disparate treatment creating the inference of discrimination and harming the protected-class tester. The testing techniques used here are largely the same as those employed in other adaptations of testing to the field of employment, except as noted earlier. However, two additional demands arise form the particular legal requirements that typically govern EEO claims.

First, whenever possible, each pair of testers should proceed with its tests until one tester is offered employment. Other uses of testing do not necessarily impose this requirement. Testers who bring claims in their own name as a result of their tests must have had a right infringed that is protected by the statutes invoked by their litigation. Therefore, before undertaking testing that may lead to litigation on behalf of testers, the laws on which litigation would rely should be consulted to ensure that the rights they protect will be implicated by the testing. Most often, those laws protect against the denial of employment opportunities on prohibited grounds, and, therefore, testers who might avail themselves of such laws should persist in their tests until at least one tester is offered employment.[21] Then, the tester disadvantaged by the differences in treatment can assert in the litigation that he was denied an offer of employment and suffered harm prohibited by law for which the law provides a remedy.

Second, for similar reasons, whenever possible testers should be supervised in their testing activities by someone other than the law-

yers who would represent them in the litigation. Supervision can be furnished by a testing coordinator or even a separate organization, such as the Fair Employment Council. Otherwise, the lawyers representing the testers might be called upon to serve as witnesses in the litigation, a role incompatible with their service as counsel of record.

In 1990, the EEOC issued policy guidance to its regional offices directing them to accept claims of employment discrimination brought by testers.[22] After examining the principle of standing to sue and the application of testing in the field of fair housing, the EEOC concluded that testers denied equal employment opportunities for a reason prohibited by EEO laws have been harmed and may challenge the discrimination themselves. This development constituted the first endorsement by a government agency of the use of EEO testing as an enforcement technique. The EEOC's interpretation of EEO laws is entitled to substantial deference by the courts when they are faced with cases brought by EEO testers.[23] Moreover, the only federal court to consider this issue endorsed the pursuit of claims by testers under Title VII of the Civil Rights Act of 1964.[24] Thus, there is reason to hope that courts will be receptive to EEO claims brought by testers.

In the wake of the EEOC's endorsement of testing, a handful of claims have been brought on behalf of EEO testers. The Fair Employment Council has brought the only two cases in the courts based on EEO testing evidence.[25] In addition, a number of charges have been filed with the EEOC.[26]

The first of the Fair Employment Council's cases was filed in May 1991 in the U.S. District Court for the District of Columbia against the Washington, D.C. franchise of a nationwide employment referral agency, Snelling & Snelling. Titled *Fair Employment Council v. BMC Marketing Corp.*,[27] the case relies on two tests conducted on consecutive days in December 1990. In both tests, the testers were male college students whose only material differences were their race. They had been selected and paired to present similar behavioral characteristics, and they had biographies designed for them that presented credentials similar in all respects relevant to the office-type jobs they sought. In each test, the black tester entered the test site first. In the first test, while the black tester was waiting to be interviewed, his white partner was offered a referral that ultimately led to a job offer. In the second test, the black tester was never even given the chance to submit an application for a job referral. Instead, he was told that there were no jobs available for candidates with his credentials. Minutes later, his white partner presented similar credentials and was offered a referral that led to a job offer. The litigation has been brought on behalf of the two black testers and the Fair Employment Council, invoking 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, and the D.C. Human Rights Act.

The second case was filed by the Fair Employment Council in June 1991 against another employment referral agency. This case, titled *Fair Employment Council v. Molovinsky*,[28] was filed in D.C. Superior Court. Here, the protected-class testers were females deployed in response to a complaint of sexual harassment brought to the EEO Intake Program of the Washington Lawyers' Committee. Two tests were conducted in which each team comprised a male and a female tester. The female testers were each approached, as the initial complainant had been, about engaging in a sexual relationship with the proprietor, and each was offered a waiver of a referral fee if she consented to the advance. Their paired male testers were simply asked to pay a fee for the referral. The case has been brought on behalf of the initial complainant, the two female testers, and the Fair Employment Council, invoking the D.C. Human Rights Act.

For the most part, testers who pursue claims of discrimination should be entitled to the same types of remedies as are normally available to victims of discrimination. Testers may suffer harm from being exposed to discrimination regardless of their ultimate intentions to decline any offer of employment extended to them. For example, if a tester is exposed to an unexpected racial epithet or, as actually occurred, confronted by unwanted sexual advances in the course of seeking employment, there should be no doubt that the tester has suffered harm. More subtle forms of discrimination, such as being asked to wait while a white partner with comparable credentials is offered a job referral or being denied the chance to apply for a referral while a white partner is welcomed and offered a job referral,[29] have the capacity to cause real and substantial harm.

Accordingly, EEO testers who pursue claims of discrimination should be entitled to declaratory relief, establishing that the conduct that led to the differential treatment was discriminatory. Similarly, testers may be entitled to injunctive relief to ensure that they are never again exposed to discrimination from the employer they tested.[30] An organization that is dedicated to promoting equal employment opportunity, such as the Fair Employment Council, and that oversees testing as part of its broader EEO program, should likewise have standing to obtain both declaratory and injunctive relief.[31] In addition, both EEO testers and an organization overseeing their activities should have standing to obtain damages for the harm caused by a tested employer's discriminatory conduct.[32] Where damages are available under civil

rights laws, typically both compensatory and punitive damages may be sought. Compensatory damages afford relief for lost employment opportunities as well as for embarrassment and humiliation caused by the discrimination and have been awarded to testers and organizations overseeing their activities.[33] In contrast, punitive damages are intended to punish the discriminator and deter it and others from engaging in such conduct in the future. Entitlement to punitive damages is based largely on an assessment of the discriminator's conduct, and therefore the fact that the victim of the discrimination was a tester has little bearing on the availability of punitive damages.[34]

Equal employment laws that afford only equitable relief, however, may not provide for award of back pay for the denial of employment opportunities. Some statutes, such as Title VII, have in the past limited any monetary recovery to the job benefits actually lost as a result of the discrimination.[35] Such "make-whole relief," as it is often termed, may not permit the recovery of lost salary or other benefits if the applicant discriminatorily denied employment never intended to accept the employment offer. In the only reported case ever to consider this issue, the U.S. Court of Appeals for the Fourth Circuit reached this very conclusion.[36] The court nonetheless affirmed the award of declaratory and injunctive relief to the testers as well as the award of attorneys' fees.[37]

CHALLENGES TO THE USE OF TESTING AS AN ENFORCEMENT TOOL

Despite the power of testing as a basis to challenge discrimination, or perhaps because of that power, the use of the technique as a prelude to litigation has drawn considerable fire. These challenges largely consist of, first, assaults on the legal soundness of claims brought on behalf of testers and, second, suggestions that the use of testing generally, and especially as a basis for litigation, is improper and even unethical because it involves deception.

The legal challenges advanced to date have called into question the standing of testers and of any organization that supervises testers to recover relief under the civil rights laws.[38] Principally, these arguments contend (1) that the testers cannot have suffered harm because they were aware of the risks of discrimination when they undertook their tester positions; (2) that the testers' intention to decline offers of employment rendered the discriminatory denial of a job offer harmless; and (3) that the organization overseeing the testing program suffered no harm and therefore lacks standing as a plaintiff. Each argument and the response to it are discussed more fully below.

First, opponents of the pursuit of EEO claims by testers contend that testers voluntarily incur any injury they suffer and, therefore, that the testers and not the discriminating employer are actually the cause of the harm.[39] For more than 30 years, the U.S. Supreme Court has held otherwise. Beginning with *Evers v. Dwyer*,[40] the Supreme Court concluded that a black man who chose to sit in the white section of a segregated bus solely to test the lawfulness of the segregation policy suffered harm protected by the civil rights laws. A decade later in *Pierson v. Ray*,[41] the Supreme Court found that a black man had been harmed when he was arrested after entering the segregated section of a bus station with the purpose of testing the legality of the segregation policy. Then, in *Havens Realty Corp. v. Coleman*,[42] the Supreme Court once again found that black testers who inquired about housing to test for discriminatory practices were harmed by being misled about the availability of that housing. Together, these authorities establish that testers do not surrender their rights to be free from discrimination simply because they voluntarily approach test sites with the intention of testing for discrimination.[43]

Second, opponents argue that since testers have no intention of accepting an offer of employment, they have suffered no harm when a job offer is withheld, even for discriminatory reasons.[44] Once again, for good reason, the courts have held otherwise.[45] Testers have the same right as other applicants to be informed truthfully about the availability and nature of jobs and the same right to negotiate for employment as applicants who intend to accept job offers.[46] Regardless of testers' ultimate plans to decline offers of employment, the denial to them of referrals to potential employers constitutes an act of discrimination.[47]

Third, the standing of organizations such as the Fair Employment Council has been challenged on the grounds that even if their testers have suffered discrimination, the organizations have suffered no resulting harm.[48] In *Havens Realty Corp. v. Coleman*, however, the Supreme Court laid this challenge to rest by prescribing a blueprint for organizations that oversee testing to establish standing in their own right. So long as significant resources must be diverted from other program activities to "identify and counteract" the discriminatory practices, the Supreme Court concluded, the organization has suffered harm sufficient to confer standing.[49] Organizations such as the Fair Employment Council, whose programs encompass such activities as

the delivery of services to the community, public education, and research, should readily enjoy standing when legal actions they initiate based on test results require a significant diversion of resources from other operations.[50]

In addition to these legal arguments, opponents of the use of EEO testing as an enforcement tool have contended that its use of deception renders it offensive to public policy and even unethical. This line of attack often compares testing to the use of entrapment in the criminal justice field. While raising a legitimate concern where testing is used irresponsibly, these broad attacks on civil rights testing do not withstand scrutiny.

In particular, the analogy to entrapment is in error. The entrapment defense is invariably used in criminal cases in which a defendant contends that the prosecution induced the commission of a crime by direct involvement in a criminal enterprise.[51] Civil rights enforcement testing, as employed by fair-housing groups for many years and in recent months by the Fair Employment Council, is different from most undercover law enforcement. In civil rights testing, testers are instructed not to suggest a discriminatory outcome of their test. When an intent to discriminate is expressed, it is initiated by the test subject.

Given this distinction, it is not surprising that courts have regularly approved the use of civil rights testing in cases extending back many years. The Supreme Court upheld tester claims in civil rights cases involving the right to travel on buses (*Evers v. Dwyer*), to enter bus stations (*Pierson v. Ray*), and to have equal access to housing (*Havens Realty Corp. v. Coleman*). Lower courts have reacted in similar fashion to arguments that tester evidence is tainted. For example, the Fifth Circuit allowed a challenge to the all-white admission's policy of a day camp by plaintiffs whose only purpose was to integrate the facility.[52] In the only reported case to address employment testing, the Fourth Circuit upheld a challenge to a company's hiring practices by women who sought employment only to detect and challenge discriminatory practices (*Lea v. Cone Mills Corp.*).

The acceptance of tester evidence by the courts is no doubt attributable in part to the strong national policy favoring vigorous enforcement of our civil rights laws. This position has been well expressed by the Seventh Circuit in a fair-housing rental case that relied on tester evidence. In endorsing the use of testers, the court stated:

> It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and homeowners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination. The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination.[53]

FUTURE OF ENFORCEMENT-ORIENTED TESTING

On the basis of its experience with civil rights enforcement generally and its specific work with programs using testing, the Washington Lawyers' Committee offers several suggestions that may be helpful in considering the future use of this technique by private and public agencies.

First, with the obvious qualification that testing cannot supplant other forms of complaint investigation and enforcement activity, we strongly believe that testing can make—and indeed has already begun to make—an enormous difference in the quality of civil rights enforcement in our country. As we have discussed above, this success has been particularly evident in the field of fair housing. However, we also have seen the great value of testing in tackling discrimination elsewhere, such as in the delivery of taxi service. While experience is limited at this point, we are greatly encouraged by the progress made in adapting testing techniques to employment hiring practices. We foresee similar applications in public accommodations and other areas where discrimination may continue to flourish.[54]

It is important to emphasize that testing has already proved helpful in ways that go well beyond litigation. For example, the annual audits conducted by groups such as the Fair Housing Council of Greater Washington and the recent studies conducted by the Urban Institute in the housing and employment areas have done a great deal to focus public attention on the existence of civil rights denials quite apart from any individual cases of discrimination. It is very important that this type of research testing be continued.

By the same token, testing has proven an indispensable aid in monitoring compliance with previously negotiated settlements and court orders in fair-housing cases. The Washington Lawyers' Committee intends to make use of this technique in areas such as public accommodations, where a number of major cases have recently been con-

cluded. Similar opportunities will no doubt present themselves in the employment field.

As stated earlier, whether used as an enforcement strategy or as a research tool, testing is best conducted as part of a comprehensive approach to addressing civil rights issues. Apart from obvious concerns about the standing of organizations to pursue litigation if they exist solely to do enforcement testing, we are convinced that groups with multifaceted programs offer the best hope for addressing discriminatory practices and opening meaningful opportunities for full participation in our society. This is equally true whether the goal is equal employment, fair housing, access to public accommodations, or the vindication of other civil rights. We strongly support a combination of approaches in each of these areas, linking testing for enforcement and research purposes with community outreach, education, and client counseling. In the EEO field, we are particularly impressed by the potential for organizations like the Fair Employment Council to develop cooperative relationships with job counseling and vocational programs in the public schools. This work would likely couple the identification of areas in the job market that may be expanding with coaching potential applicants in effective job-seeking techniques.

Among the tasks that the Fair Employment Council would like to pursue, given sufficient funding, is refinement of its testing methodology. To date the organization's testing activities have concentrated on jobs for which the necessary hiring qualifications are relatively limited. As the council moves ahead with its program, there will be a need to consider more sophisticated forms of testing involving job categories with more elaborate qualifications. Testing should also be developed to detect discrimination against all people protected by the equal employment laws. And it will always be important continually to subject all aspects of the testing methodology to careful review and revision to reflect the lessons learned from additional testing.

It is also essential to emphasize the need for establishing effective mechanisms for regular communications between public and private agencies engaged in the use of testing techniques. In the field of fair housing, where the technique has been well accepted by the courts and many local groups are operating extensive testing programs, a national clearinghouse and training capability is particularly important. The National Fair Housing Alliance (NFHA) is a natural model for facilitating this type of exchange. This type of communication will be all the more significant as federal agencies such as HUD become more involved in financially supporting testing initiatives.

As testing techniques in the employment field are refined and standards subjected to review by the courts, the need for information exchanges and technical assistance will become more and more important. The very facts that the Rockefeller Foundation and the Urban Institute recently sponsored a conference on testing, and that the Fair Employment Council has received so many requests for information, confirm the need for these services. The Washington Lawyers' Committee and the Council stand ready to provide assistance in this area. The primary constraints on their ability to deliver these services have been limited resources and the need to give full attention to pending program commitments, including litigation of the test cases now before the courts.

Quite appropriately, HUD funding has become a primary source of support for testing efforts in the field of fair housing. We strongly support continued and increased funding of private housing testing programs.

In the area of EEO testing, we foresee a similarly important role for the federal government. As noted earlier, the EEOC has already issued helpful policy guidance, establishing that it will accept complaints from testers and tester organizations. The EEOC has also filed a brief as an amicus curiae in support of the claims of EEO testers in the first federal court litigation to use employment testing evidence. In addition, it is currently considering proposals to fund a program to train private and public agencies to utilize employment testing techniques. These are all extremely encouraging developments.

In addition to the vital role of the federal government in supporting development and expansion of civil rights enforcement testing, there are significant ways in which private foundations can contribute to the effective development and application of this strategy. Most important, foundations can help by providing general support to organizations such as the NFHA and the Fair Employment Council, which furnish research and technical assistance for local private agencies around the country. It is important that such groups secure sufficient general support to ensure that their programs are not restricted by categorical funding. Such restricted funding, while useful, generally does not allow for the flexibility necessary to address the range of responsibilities these groups must discharge. An acute example of this problem can be seen in the NFHA's current situation, in which virtually all its funding is derived from a HUD grant limited to education and outreach functions.

It is equally important that organizations such as the NFHA maintain a degree of financial independence, since, among other respon-

sibilities, they must be capable of objectively evaluating the performance of federal enforcement agencies. Accordingly, private foundation funding is crucial to the preservation of this independent role. The same considerations apply to equal employment enforcement.

As testing gains acceptance as an enforcement technique, attention will increasingly focus on such questions as whether particular types of testing are best conducted by public or private agencies and, if the government does undertake testing, what roles federal, state, and local agencies should play. We hesitate to suggest any hard-and-fast rules in this area, but we believe that several basic considerations should be kept in mind.

It is not clear whether the opportunities for private testing groups to initiate complaints and litigation, which can lead to the award of damages and other forms of relief, are available through testing operated by the government. As a general rule, we believe there are advantages in pursuing civil rights claims in multiple forums, with public and private agencies working in concert. At the same time, there are likely to be occasions in which government agencies need to deploy testers on extremely short notice and therefore would benefit from retaining them on staff. Before these staffing decisions can be made, considerations of cost efficiency and the need to control the quality of testing also must be weighed. While the appropriate mix of private agency and government-directed testing needs further study, we are certain that there will be a major role for private groups in this field.

Apart from the long-term policy issues that must be considered, we can suggest several immediate steps that should greatly improve the ability of government enforcement agencies and private organizations to use enforcement testing to the best advantage.

Because testing is often most effective when employed in connection with the investigation of bona fide complaints, consideration should be given to ways in which individuals filing complaints of discrimination with HUD, the EEOC, or equivalent state and local agencies could be promptly informed of the availability of private organizations and attorneys to undertake appropriate testing procedures.

The importance of involving testing agencies and independent attorneys as soon as possible cannot be overemphasized. Most government enforcement agencies are required to inform respondents of pending complaints soon after they have been filed. Because knowledge of pending complaints may prompt a respondent to change its practices or destroy evidence of illegal conduct, it is essential, whenever possible, that testing take place before a respondent learns that it is the subject of an investigation. To the best of our knowledge, no federal or local agencies currently refer complainants to private organizations for counseling and testing before informing the respondent that a complaint has been filed.

Looking to the future use of testing, we strongly support the creation of a mechanism for regular meetings and discussions of testing issues among representatives of the principal private and public agencies that share an interest in this technique. While the list of organizations that should be included in this type of network is open to expansion, we suggest at a minimum the initial participation of representatives from federal agencies such as the EEOC, HUD, and the Department of Justice; private agencies such as the NFHA, the Fair Employment Council of Greater Washington, and the Washington Lawyers' Committee; and staff from state and local enforcement agencies and their national organization, the International Association of Official Human Rights Agencies.

Finally, we would like to emphasize that the development of testing as a civil rights enforcement technique must be accompanied by an assurance that responsible groups are available to provide high-quality technical assistance and coordination. The assurance of quality in the delivery of testing services is essential to minimize the possibility of adverse legal rulings and unprofessional conduct. Of course, it is impossible to predict with certainty the outcome of any legal challenges enforcement testing might face. Nonetheless, we are greatly encouraged by the progress that has been made to date in marshaling the legal arguments to support enforcement testing and in assembling the network of public and private agencies that is necessary to ensure that the potential for enforcement testing is fully realized.

Notes

1. See *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984). *Betsey* was one of the first applications to fair housing of the disparate impact theory developed under Title VII of the Civil Rights Act of 1964.
2. 455 U.S. 363 (1982).
3. See Ridley et al. (1989, 17).
4. Ridley et al. (1989, 21, 27).

5. See *Floyd-Mayers v. American Cab Co.*, 732 F. Supp. 243 (D.D.C. 1990).

6. See chapter 1, as well as Bendick (1989) and Bendick et al. (1991).

7. For example, in the Urban Institute's most recent study of the hiring process (Turner et al. 1991), data on the treatment received by testers during the application process are found principally in an appendix to the report, as annex C, and there the main effort is to summarize numerous variables into a single numerical scale.

8. While this information may be essential to litigation that ensues, such detailed records also present a unique opportunity to conduct research of the behavioral manifestations of discrimination. See Essed (1991).

9. See chapter 1.

10. For example, with assistance from the Urban Institute, the U.S. General Accounting Office (1990, 29–31) conducted a study to test the extent to which employers' hiring decisions are influenced by the national origin of applicants. The test results, finding widespread discrimination, were subsequently relied on by Congress in its decision to extend the life of provisions of the Immigration Reform and Control Act prohibiting discrimination on the basis of citizenship.

11. See, for example, *Northcross v. Board of Educ.*, 611 F.2d 624, 637 (6th Cir. 1979), cert. *denied*, 447 U.S. 911 (1980); *Richmond Black Police Officers Ass'n v. City of Richmond*, 548 F.2d 123 (4th Cir. 1977).

12. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–52 (1989); *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 (1977); *Palmer v. Shultz*, 815 F.2d 84, 90–97 (D.C. Cir. 1987).

13. To ensure that testing is a useful monitoring technique, the consent decree or order should provide that the court or agency will retain jurisdiction to ensure compliance with its terms. See *United Steelworkers v. Libby, McNeil & Libby*, 895 F.2d 421 (7th Cir. 1990). Then, in the event testing yields results from which a violation of the decree or order can be detected, the plaintiffs can bring the matter to the attention of the court or agency immediately and request relief from violation of an order. See generally *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 442–44 (1986).

14. Of course, discrimination in one set of employment decisions, such as denials of promotion, may be relevant in determining whether the same employer engaged in discrimination in another set of employment decisions.

15. See *Brewster v. Dukakis*, 786 F.2d 16, 18–19 (1st Cir. 1986); *Willie M. v. Hunt*, 732 F.2d 383, 387 (4th Cir. 1984). Where the use of testing is memorialized in the consent decree or order, provision for the employer to subsidize the program can also be reflected. See, for example, *United States v. Genvill Ill. Corp.*, No. 90-C-0644 (E.D. Ill. Feb. 12, 1990) (Department of Justice consent decree included a requirement that defendant pay $51,000 to a private fair-housing organization for training and monitoring); *United States v. La Fonge Ass'n*, No. 89-1729 (D.N.J. May 30, 1989) (Department of Justice consent decree included a requirement that defendant pay $50,000 to a private fair-housing organization for general enforcement).

16. The record of charges lodged with the EEOC is consistent with these observations. In 1986, for example, of 48,756 charges filed alleging race discrimination, only 4,147 involved refusals to hire. Nor has this ratio changed. In 1990, 47,394 charges were filed alleging race discrimination and only 3,714 involved refusals to hire. The Washington Lawyers' Committee's equal employment opportunity (EEO) Intake Program likewise has received only a paltry number of hiring claims. While the Intake Program reviewed in excess of 900 EEO claims last year, only about 50 claims involved in any way a challenge to a hiring decision.

17. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Lowe v. City of Monrovia*, 775 F.2d 998 (9th Cir. 1985).

18. See rule 406 of the Federal Rules of Evidence.

19. Following the Washington Lawyers' Committee's administration of tests of taxicabs operating in the District of Columbia and the ensuing litigation against three companies that showed that race frequently affected the delivery of service, the District of Columbia Department of Human Rights inaugurated an ongoing program to test the delivery of taxi service and, where necessary, initiate charges against companies shown to discriminate. See Wheeler (1990).

20. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (recognizing that testers denied housing may bring claims on behalf of themselves under the Fair Housing Act); *Pierson v. Ray*, 386 U.S. 547 (1967) (endorsing the use of testing to challenge a segregated bus station under 42 U.S.C. § 1983); *Evers v. Dwyer*, 358 U.S. 202 (1958) (approving claim brought by tester challenging segregated bus).

21. Mere differences in treatment during the application process, without one tester receiving an offer of employment, may leave the harm the other tester suffered somewhat speculative.

22. U.S. Equal Employment Opportunity Commission (1990).

23. Interpretation given statutes by the agencies charged with enforcing those laws are often entitled to deference. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971); *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

24. See *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971).

25. In addition to filing suits in these two cases, the Fair Employment Council filed charges with the EEOC alleging violations of Title VII, relying on the same tester evidence.

26. See "NAACP Uses 'Testers' " (1990).

27. No. 91–0989-NHJ (D.D.C. filed May 2, 1991).

28. No. 91–7202 (D.C. Super. Ct. June 7, 1991).

29. These are, of course, the circumstances of the two tests on which *Fair Employment Council v. BMC Marketing Corp.* is based.

30. For example, injunctive relief was awarded to three testers in *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971).

31. See, for example, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

32. The harm to the organization that warrants an award of compensatory damages stems from a different injury than the kind suffered by the testers themselves. See *Haven Realty Corp.*, 455 U.S. at 363; *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27–29 (D.C. Cir. 1990), cert. *denied*, 111 S. Ct. 508 (1990).

33. See, for example, *Bryant v. Kay Bros. Builders*, No. B-86-534 (D. Md. Feb. 18, 1988) (awarding compensatory damages to housing testers); *Davis v. Mansards*, 597 F. Supp. 334, 347 (N.D. Ind. 1984) (fact that plaintiff is tester "does not affect the measure of her actual damages . . . [i]n 1984, no one should have to toughen themselves to racial discrimination—a tester has no reason to expect mistreatment at the hands of ostensibly fair-minded businesspeople"); *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1060–61 (E.D. Va. 1987) (awarding damages to fair-housing organization for diversion of resources); *Davis v. Mansards*, 597 F.Supp. at 348 (same).

34. See *Smith v. Wade*, 461 U.S. 30, 54 (1983). Courts have endorsed the award of punitive damages to testers denied fair-housing opportunities. See, for example, *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.* (Apr. 5, 1991), 1991 U.S. Dist. LEXIS 4435 No. 88-C-9695.

35. The Civil Rights Act of 1991 provides for the award of compensatory and punitive damages to persons claiming intentional discrimination under Title VII against private employers. 42 U.S.C. §1981A.

36. See *Lea v. Cone Mills Corp.*, 301 F. Supp. 97, 102 (M.D. N.C. 1969), *aff'd.* 438 F.2d 86, 88 (4th Cir. 1971).

37. 438 F.2d at 88.

38. See Defendant BMC Marketing Corp.'s Motion to Dismiss Pursuant to Rule 12(b)(1) and 12(b)(6), *Fair Employment Council v. BMC Marketing Corp.*, No. 91–0989-NH] (D.D.C. filed July 9, 1991) ("BMC's Motion to Dismiss"); Brief of Amicus Curiae of the Equal Employment Advisory Council in Support of the Defendant's Motion to Dismiss, *id.* ("EEAC's Amicus Brief"); Answer, at 4, *Fair Employment Council v. Molovinsky*, No. 91–7202 (D.C. Super. Ct. June 26, 1991).

39. See BMC's Motion to Dismiss, at 5 n. 4, 22 n. 9; EEAC's Amicus Brief, at 26–27 (both cited in full in note 38 *supra*).

40. 358 U.S. 202 (1958).

41. 386 U.S. 547 (1967).

42. 455 U.S. 363 (1982).

43. This argument was advanced by the plaintiffs in *Fair Employment Council v. BMC Marketing Corp.*, *supra* note 38. See Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, at 13–14 ("Plaintiffs' Opposition"). In addition, the EEOC addressed this point in a powerful brief it filed as an amicus curiae in *Fair Employment Council* in opposition to the motion to dismiss. See Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Opposition to the Motion, at 8–9 ("EEOC's Brief").

44. See BMC's Motion to Dismiss, at 19–21 (*supra* note 38).

45. See *Watts v. Boyd Properties, Inc.*, 758 F.2d 1482, 1485 (11th Cir. 1985); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977); *Coel v. Rose Tree Manor Apts., Inc.*, No. 84–1521 (E.D. Pa. Oct. 13, 1987), 1987 U.S. Dist. LEXIS 9212 ("testers have the same right to truthful information" about the availability of possible contracts under Section 1982 "as anyone else" and "the same right to negotiate" for such contracts); *Village of Bellwood v. Gorey & Assocs.*, 664 F. Supp. 320, 324–26 (N.D. Ill. 1987) (testers denied housing opportunities under Section 1982 could seek relief for "direct and palpable injuries to their individual persons"); *Biggus v. Southmark Management Corp.*, No. 83-C-4024 (N.D. Ill. June 13, 1985), 1985 Westlaw 1751 (testers had standing under Section 1981 although they had no intention of leasing an apartment); *Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838, 842 (E.D. Wis. 1980) (testers had standing under Section 1981 even when they had no intention of renting apartment).

46. These arguments were advanced by the plaintiffs in *Fair Employment Council v. BMC Marketing Corp.*, supra note 38 (see Plaintiffs' Opposition, at 15–19) and by the EEOC in the same case (see EEOC's Brief, at 10–13).

47. See Complaint for Declaratory Judgment, Permanent Injunctive Relief and Damages, paragraphs 7, 10–13, 20–22, 26–29, in *Fair Employment Council v. BMC Marketing Corp.*, supra note 38; Complaint for Declaratory Judgment, Permanent Injunctive Relief and Damages, paragraphs 1, 8, 19, 24, 34, in *Fair Employment Council v. Molovinsky*, supra note 38.

48. See BMC's Motion to Dismiss, at 4–11; EEAC's Amicus Brief, at 10–15 (*supra* note 38).

49. 455 U.S. at 363, 379. See also *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28 (D.C Cir. 1990), *cert. denied*, 111 S. Ct. 508 (1990); *Pacific Legal Found. v. Goyan*, 664 F.2d 1221, 1224 (4th Cir. 1981).

50. See Plaintiffs' Opposition, at 20–25 (supra note 38).

51. See *United States v. Russell*, 411 U.S. 423, 435 (1972); *Sherman v. United States*, 356 U.S. 369 (1958).

52. See *Smith v. Young Men's Christian Ass'n*, 462 F.2d 634 (5th Cir. 1972).

53. *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983).

54. For an interesting discussion of the use of testing to detect differences in treatment of automobile purchasers, see Ayres (1991).

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