

University of Michigan Journal of Law Reform

Volume 28

1994

Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky

Leroy D. Clark

Catholic University, Columbus School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J. L. REFORM 1 (1994).

Available at: <https://repository.law.umich.edu/mjlr/vol28/iss1/2>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

EMPLOYMENT DISCRIMINATION TESTING: THEORIES OF STANDING AND A REPLY TO PROFESSOR YELNOSKY

Leroy D. Clark*

In this Article, Professor Clark addresses the legal issues surrounding the use of testers—individuals who deliberately apply for employment to detect sex and race discrimination. He surveys three theoretical justifications for granting standing to organizations that run testing programs. Professor Clark then responds to a previous article by Professor Yelnosky, disputing some of his conclusions. Professor Clark indicates that testing is just as necessary in higher-level employment as lower-level employment; shows that testers can obtain meaningful relief from the courts; analyzes the impact of the 1991 Civil Rights Act amendments; and encourages Congress to authorize the EEOC to run tester programs that are exempt from laws which prohibit misrepresentation of applicant credentials.

INTRODUCTION

April 6, 1987, *Nightline*: Ted Koppel asks Al Campanis, then the general manager of the Los Angeles Dodgers, whether racial prejudice accounts for so few Blacks occupying executive positions in professional baseball. Campanis replies: "No. It's just that they may not have some of the necessities to be a field manager or general manager."¹

A public uproar followed this awkwardly candid effort to "explain" away racial discrimination on the grounds that Blacks lacked the business and administrative acumen required for front office jobs. Higher-ups in the Dodgers organization apologized and Mr. Campanis was fired.² The event was stunning,

* Professor of Law, Catholic University, Columbus School of Law. B.A. 1956, City College of New York; LL.B. 1961, Columbia University School of Law. I wish to acknowledge the excellent research assistance of Ms. Sheryl Miller, a recent graduate of the Catholic University Law School. I also benefitted from the careful reading and comments of Ms. Claudia Withers, Executive Director of the Fair Employment Council of Greater Washington. The views expressed herein, however, should not be deemed to be the views of Ms. Withers or of the Fair Employment Council.

1. Bill Dwyre, *Campanis Questions Ability of Blacks*, L.A. TIMES, Apr. 7, 1987, pt. III, at 1.

2. Grahame L. Jones, *Dodgers Fire Campanis Over Racial Remarks*, L.A. TIMES, Apr. 9, 1987, pt. I, at 1.

not so much because it evidenced a stereotypical undervaluation of Blacks' capacity to fill certain jobs, but because the unsophisticated Mr. Campanis did not realize he was giving fairly open evidence of those sentiments.

Indeed, the hallmark of racial discrimination in employment today is its covert, silent, and unnoticed existence. Older whites, who either lived in the South or were otherwise knowledgeable about pre-1960s racial discrimination, know that American society has changed dramatically: open and approved signs of racial segregation largely have disappeared. Younger whites—under age thirty—have little direct experience with racial apartheid, and in fact may feel victimized when they hear of Blacks benefitting from affirmative action.³ Most whites do not occupy positions of power that allow them to exclude Blacks from employment opportunities, and those with such power probably rationalize their racial bias on “qualifications” grounds.⁴ In addition, those with such power, unlike Mr. Campanis, generally hide racial animus. Whites probably are never told when they have obtained a position for which a Black was more qualified. The current invisible character of racial discrimination in employment probably explains the wide disparity in public opinion polls between white and Black perceptions of the continued presence of racial discrimination in employment.⁵

3. While polls between 1942 and 1956 showed that “younger people were more likely than older people to favor [racial] desegregation,” *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 118 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter *COMMON DESTINY*], Richard Cohen reported a recent poll by the Anti-Defamation League which showed that the racial attitudes of persons under 30 are closer to those of older persons, and in some instances younger persons are more intolerant. Richard Cohen, *Generation of Bigots*, *WASH. POST*, July 23, 1993, at A23. The Anti-Defamation League's poll asked whites whether Blacks prefer to remain on welfare rather than work. Of those polled in the 50-year-old and older group, 42% responded in the affirmative, as compared with 29% in the 30–49 age group, and 36% in the under-30 group. Over 68% of those under age 30 thought that Blacks “complain too much about racism.” This was a higher percentage than either other age group. *ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HIGHLIGHTS FROM AN ANTI-DEFAMATION LEAGUE SURVEY ON RACIAL ATTITUDES IN AMERICA* 22–25 (1993). Cohen's editorial added the comment that the younger age group is “pathetically ignorant of recent American history” and is resentful of affirmative action programs. Cohen, *supra*.

4. Black teenagers typically have been unemployed at twice the rate of white teenagers. CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 124 (1992). Jencks suggests that many employers may believe that they are making “efficient” decisions when they avoid hiring young Blacks, particularly Black males, because they believe that they would make unruly and unreliable employees. *Id.* at 123.

5. A 1989 nationwide poll showed that 51% of whites believed that Blacks are not promoted as rapidly as whites to supervisory jobs. A much larger percentage of

Yet, the evidence on the macroeconomic level reveals that racial discrimination in employment remains prevalent. Since 1977, the Black unemployment rate has been twice the rate of whites.⁶ Moreover, a college degree has not neutralized the disparity in unemployment: Black college graduates have an unemployment rate 2.24 times that of white college graduates.⁷ This is a greater gap than that between white and Black high school graduates.⁸ Holding constant those factors which may explain differences between the races—such as education, experience, and other job qualifications—racial minorities are overrepresented in lower-level occupations, and often receive lower wages than non-minorities performing the same work.⁹

Although today ample data demonstrate that racial discrimination endures in employment, the situation was even worse prior to the passage of Title VII of the Civil Rights Act of 1964,¹⁰ which barred employment discrimination based on race. Upon the adoption of Title VII, some commentators were skeptical about its efficacy in eradicating racial discrimination. They predicted that determined employers would mask discrimination by claiming that the applicant lacked the requisite job qualifications and that plaintiffs would not be able to prove otherwise.¹¹

Blacks (83%), however, believe that Blacks are not promoted as rapidly as whites. LOUIS HARRIS & ASSOC., NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., *THE UNFINISHED AGENDA ON RACE IN AMERICA* 28 (1989); see also JAMES R. KLUEGEL & ELIOT R. SMITH, *BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE* 179–213 (Peter H. Rossi et al. eds., 1986) (setting forth results of authors' data and analysis, comparing it to other surveys, and attempting to provide a theory to explain the disparity in Black and white attitudes in regard to equal opportunity).

6. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 102–03 (1992); cf. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 42 (1987) (citing differences in Black and white employment rates as great as 21.5%).

7. HACKER, *supra* note 6, at 104.

8. *Id.*

9. COMMON DESTINY, *supra* note 3, at 146–47.

10. Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993)).

11. See Ralph K. Winter, Jr., *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. CHI. L. REV. 817, 832–33 (1967). These predictions were not merely unsupported speculations: the record of accomplishments under employment discrimination laws in some states was poor. See MICHAEL T. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 19–60 (1966); Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22, 22–24 (1964).

As experience with Title VII has matured, the courts have developed interpretations which help neutralize covert discrimination in hiring, although the present solutions are insufficient. For example, in *Griggs v. Duke Power Co.*¹² the Supreme Court held that a plaintiff can make out a prima facie case of a Title VII violation without direct evidence of discriminatory intent, when an employment practice unrelated to job performance results in a statistically significant pattern of exclusion—known as disparate impact—of minorities or women.¹³ Moreover, the Court held in *Watson v. Ft. Worth Bank & Trust Co.*¹⁴ that a prima facie case can be established under a disparate impact claim by showing that a pattern of employment decisions has been largely subjective.¹⁵ These cases, as valuable as they are, will not support charges of racial discrimination in hiring unless the employer has a work force large enough to generate a statistically significant hiring pattern. Thus, *Griggs* and its progeny are not useful with regard to small employers—who, as a whole, generate the bulk of new jobs in the economy¹⁶—but whose work force is too small on an individual basis to present the requisite statistical profile.

The Court's analysis in *McDonnell Douglas Corp. v. Green*¹⁷ provides a useful framework to address hiring discrimination by small employers or discrimination against a single individual. Under *McDonnell Douglas*, a plaintiff can establish a prima facie case of racial discrimination by alleging that (1) she applied for work for which she was qualified; (2) she was turned down; and (3) the employer later hired a person of a different race or sex.¹⁸ Once the plaintiff establishes her prima facie case, the burden shifts to the employer to create an issue of fact by showing some legitimate reason, not based on race or sex, as to why the plaintiff was not hired. The plaintiff must rebut the defendant's reason to prevail.¹⁹

12. 401 U.S. 424 (1971).

13. *Id.* at 432.

14. 487 U.S. 977 (1988).

15. *Id.* at 991.

16. See Steven Greenhouse, *Clinton Plan—Small Businesses Smile*, N.Y. TIMES, Mar. 28, 1993, § 3, at 1.

17. 411 U.S. 792 (1973).

18. *Id.* at 802.

19. *Id.* at 802-04; see *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (holding that the plaintiff can prove that the defendant's proffered reason is a pretext for discrimination). The Court materially increased the plaintiff's burden

Even *McDonnell Douglas*, however, is limited in its usefulness because several factors may deter a potential plaintiff from ever filing a charge. Specifically, an applicant may not know the sequence in which the employer received job applications; may be reluctant to file a charge without clear information that the successful applicant was less qualified; may have no method, except by filing a charge, to obtain such information; or may want to spend time searching for work rather than pursuing a discrimination charge.²⁰ Further, applicants may be fearful that an employer against whom they lodge a complaint can prejudice their search for work with other employers.²¹ Lay persons may not know that retaliation against a person who makes a charge in good faith is unlawful,²² or even if knowledgeable, they may not believe that authorities can enforce the anti-reprisal provision effectively.

The problems applicants confront, both in being aware of and in being equipped to cope with discrimination, may help explain why incumbent employees or those who have been discharged currently file many more charges of discrimination than those who claim discrimination in hiring.²³ Employment gives an individual more information about an employer's practices and possible discrimination, and also provides an incentive to repair a negative employment record. Substantial discrimination in hiring may go unremedied, however, because employers engage in covert discrimination.²⁴

on the pretext issue in *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993). In *Hicks*, the Court held that a plaintiff does not necessarily prevail by proving that the defendant lied and that his proffered reasons were not the basis for the employment action. The plaintiff must go further and convince the fact finder that the defendant's action was motivated by discriminatory intent. *Id.* at 2749.

20. Michael Fix et al., *An Overview of Auditing for Discrimination*, in *CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA* 1, 14 (Michael Fix & Raymond J. Struyk eds., 1993).

21. This may constitute more of a problem for professionals, because their community of potential employers is relatively small.

22. It is unlawful for any employer, employment agency, joint labor-management committee controlling apprenticeships, or labor union to discriminate against any individual "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (1988).

23. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *STAN. L. REV.* 983, 984 (1991) ("While most cases formerly attacked discrimination in hiring, today the vast majority of all litigation suits challenge discrimination in discharge."). Employers who had fairly open practices of discrimination prior to the passage of the statute would have been natural targets for plaintiffs.

24. One commentator is so convinced of the inefficacy of attaining non-discrimination by litigation with the current tools that he has proposed amendments to

The Fair Employment Council of Greater Washington (FEC), an organization created in 1990, has instituted a creative response to the problem of covert hiring discrimination.²⁵ The organization promotes civil rights in general, and equal opportunity in employment in particular. It has pioneered employment testing as a new strategy to uncover employment discrimination. Generally, the strategy involves sending a pair of equally qualified testers to apply for the same job, and then observing whether the minority or female applicant receives less favorable results than her white or male counterpart.²⁶

The FEC has had two cases which are useful in considering the key legal issue of standing for parties and organizations acting as testers of employment discrimination. In *Fair Employment Council v. BMC Marketing Corp.*,²⁷ the district court found that the plaintiffs had standing to sue, but the appellate court, on an interlocutory appeal, reversed in part and affirmed in part on the standing issue. In *Fair Employment Council v. Molovinsky*,²⁸ the FEC was sustained on the standing issue and obtained a damage award.²⁹ No interlocutory appeal was taken

anti-discrimination legislation that would require employers to meet quota hiring or pay fines. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991). But see Leroy D. Clark, *The Law and Economics of Racial Discrimination in Employment by David A. Strauss*, 79 GEO. L.J. 1695 (1991) (responding to and critiquing Strauss's proposal).

25. I was one of the original incorporators of the organization. The reader will have to judge whether that has compromised the objectivity of this Article.

26. The FEC uniformly trained all testers regarding interview procedures. Each tester diligently reported her experience in the application process to a FEC staff person. FAIR EMPLOYMENT COUNCIL OF GREATER WASHINGTON, INC., ANNUAL REPORT 1990-1992, at 4. The FEC found that minority and female applicants received less information about available jobs from employers and employment agencies than did their white or male counterparts. *Id.* at 5-6.

27. 829 F. Supp. 402 (D.D.C. 1993), *rev'd in part and aff'd in part*, 28 F.3d 1268 (D.C. Cir. 1994). The case relied on two tests made in December 1990 at employment agencies. *BMC Mktg. Corp.*, 28 F.3d at 1270. In both tests, the white tester received a referral while his Black counterpart did not. *Id.* All testers were male college students who presented similar resume credentials. *Id.*

28. No. 91-7202 (D.C. Super. Ct. Aug. 12, 1993).

29. *D.C. Jury Awards \$79,000 in Damages in Bias Case Using Employment Testers*, Daily Lab. Rep. (BNA) No. 155, at A-15 (Aug. 13, 1993) [hereinafter *D.C. Jury Awards*]. In *Molovinsky*, a woman seeking employment complained to the FEC that she had been subjected to sex discrimination by a local employment agency. The FEC then sent two female testers to the employment agency, where they were offered a waiver of the fee if they submitted to sexual relations with the proprietor. Two male testers were only asked to pay a fee for the referral. Interview with Claudia Withers, Executive Director, Fair Employment Council of Greater Washington, Inc., in Washington, D.C. (Feb. 7, 1994) [hereinafter Withers Interview].

The two female testers each received \$5,000 in compensatory damages, and \$10,000 in punitive damages. The bona fide applicant for employment received \$17,000 in compensatory damages, and \$10,000 in punitive damages. The FEC received \$22,000 in compensatory damages. *D.C. Jury Awards*, *supra*.

on the standing issue in *Molovinsky*.³⁰

Part I of this Article addresses the question of standing for plaintiffs in light of these decisions and current literature on the doctrine. Part II comments critically on an article by Professor Yelnosky,³¹ which concluded that private testers do not qualify for relief that would justify attorneys' fees and that the Equal Employment Opportunity Commission (EEOC or the Commission) currently has no authority to utilize its own testers. Part III addresses the need for legislative amendments to Title VII.

I. THE STANDING ISSUE

The claim that a plaintiff has no standing to bring a lawsuit is a very powerful and efficient defense if it is sustained. It means either that the court lacks a justiciable issue, or that the plaintiff has not alleged legally relevant facts sufficient to identify him as a proper party to maintain the suit. The defendant can assert this claim immediately after receiving the complaint, and if it is sustained, no further proceedings will follow. Because in employment discrimination, an organization's standing to sue could be crucial in encouraging private actions, it will be addressed thoroughly here.

Scholars have found the Supreme Court's development of the law of standing to be unsatisfactory. Commentators appear to follow one of three approaches in describing standing doctrine. The black-letter law approach accepts the traditional concepts used to resolve standing issues, but finds particular decisions contradictory, unpalatable, or hard to justify under the stated rules.³² The public rights model finds the present strictures on

30. Withers Interview, *supra* note 29.

31. Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REF. 403 (1993). Professor Yelnosky and I agree that private parties engaged in testing have standing to sue under Title VII of the 1964 Civil Rights Act. Our only disagreements are over the right of private parties to attorneys' fees and the authority of the EEOC to engage in testing.

32. See, e.g., Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 635 (1985) (criticizing the Burger Court's standing decisions as inconsistent, vacillating, and "at best, erratic"); N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV. 365, 369-70 n.20 (1989) (noting that the Supreme Court itself has described standing

the doctrine dysfunctional and urges a more liberal statement that would open the courts to more plaintiffs and issues.³³ Finally, the functional approach argues that decisions would be more coherent and explainable if the courts were asking the right question.³⁴ This Article demonstrates that the individual testers and their organizational backers have strong bases from which to assert their standing to sue under the last two approaches, but only an arguable claim under the black-letter law approach.

A. *The Black-Letter Law Approach*

Under traditional standing doctrine, two primary considerations require scrutiny. First, Article III of the Constitution limits the judiciary to deciding only matters which constitute "cases" or "controversies."³⁵ Second, the courts have developed prudential principles that attempt to ensure that the party who pursues a claim is the one best suited to do so.³⁶

doctrine as inconsistent and amorphous); Kurt S. Kusiak, Note, *Standing to Sue: A Brief Review of Current Standing Doctrine*, 71 B.U. L. REV. 667, 677 (1991) (claiming that the Court "further complicated" standing with the "zone of interest" test developed in *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)); John C. Yang, Chapter, *Standing . . . In the Doorway of Justice*, 59 GEO. WASH. L. REV. 1356, 1358, 1385-94 (1991) (criticizing the reconstruction of the "zone of interest" test in *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989)).

33. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1392-93 (1988); Heidi L. Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 734-35, 745-55 (1988).

34. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223, 228-29 (1988) (arguing that all standing questions should be resolved as questions on the merits by looking to the underlying constitutional or statutory provisions).

35. Article III provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States . . ." U.S. CONST. art. III, § 2, cl. 1.

The Supreme Court has further defined Article III to require a case which is not moot, *DeFunis v. Odegaard*, 416 U.S. 312, 315-20 (1974), or a case which is ripe, *Steffel v. Thompson*, 415 U.S. 452, 458, 459 n.10 (1974), or a case which does not involve a political question, *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979). None of these doctrines will be explored further, because they are not relevant to the claims explored here.

36. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (stating that litigants must assert their own legal interests "rather than those of third parties"), *cert. denied*, 487 U.S. 1223 (1988).

The Court's primary concern in interpreting Article III is to preserve the separation of powers by preventing the courts from encroaching on Congress's Article I authority or the Executive Branch's Article II powers.³⁷ The courts thus require that the plaintiff prove an "injury in fact" which is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."³⁸ Even when a plaintiff asserts that some "injury in fact" meeting the *constitutional* threshold has occurred, the courts may still refuse to take the case under the doctrine of prudential limitations.³⁹ The courts have imposed prudential limitations on themselves to preserve judicial resources for their most important functions.⁴⁰ It is important to note that this second limitation is not based on the Constitution. Accordingly, Congress can require the courts to disregard prudential considerations by enacting legislation that grants standing to the full extent permitted by Article III.⁴¹

An example makes the significance of prudential limitations apparent. Courts prohibit a person from suing to protect the rights of another who is not a party to the litigation.⁴² Thus, an organization has standing to sue on its own behalf or in a representative capacity to redress injuries suffered by its members.⁴³ An organization does not gain standing to sue on its own behalf merely because it has expended litigation resources to enjoin a defendant's practices that impact on another party if the organization has no representative relationship with that party.⁴⁴

37. See generally *Mistretta v. United States*, 488 U.S. 361, 404 (1989) (holding that permitting Article III judges to join certain commissions does not violate separation of powers doctrine); *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988) (ruling, *inter alia*, that the Special Division's appointment of an independent counsel does not encroach upon Article I).

38. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citations omitted).

39. See *id.* at 756, 761.

40. See *id.* at 752.

41. See *Gladstone v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (holding that § 812 of the Fair Housing Act extends standing to the limits of Article III).

42. See Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 394 (1981) ("The third-party standing rule is clearly not of constitutional magnitude, but rather is a judicially self-imposed 'prudential' limitation on the jurisdiction of the federal courts, including the Supreme Court.")

43. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

44. See, e.g., *United States v. San Francisco*, 979 F.2d 169 (9th Cir. 1992) (holding that a union may not derive standing from members who have chosen separate representation).

Given the above exposition of the current black-letter law, do both of the plaintiffs—the individual testers and the FEC—satisfy the requirements for standing? The formal answer can be found in a simple analogy to the Fair Housing Act.⁴⁵ The Court in *Havens Realty Corp. v. Coleman*⁴⁶ held that individual plaintiffs and a plaintiff organization, Home Opportunities Made Equal (HOME), who were testing for racial discrimination had standing to bring suit against real estate brokers who allegedly operated in a racially discriminatory manner by supplying false information about the availability of housing.⁴⁷ The Court held that the individual minority applicants claimed an injury within the meaning of the statute because they claimed they had been denied truthful information about housing due to their race.⁴⁸

The Court held that HOME had standing to sue on its own behalf, apart from the standing it derived from its members, because the defendants had disrupted their program of seeking racial integration in housing and the organization had to divert resources from finding integrated housing for persons to ferreting out and combatting the defendants' racially discriminatory policies.⁴⁹

A conflict has developed between circuits on the proper interpretation of the *Havens* case regarding the nature of the injury that an organization must allege to have standing in its own right. The appellate court in *BMC Marketing Corp.* interpreted *Havens* to mean that the FEC did not obtain standing because of its testing program. Rather, it held that the FEC's only basis for standing was its showing that the defendant had engaged in racial discrimination against persons who were *not* testers and that, apart from testing, the defendant had "perceptibly impaired" the FEC's programs to achieve racial integration in employment.⁵⁰ The court thus

45. Two student works taking this approach have concluded that testers have standing to sue. Steven G. Anderson, Comment, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1219 (1992); Shannon E. Brown, Note, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117, 1126–27 (1992).

46. 455 U.S. 363 (1982).

47. *Id.* at 373–79. The Federal Fair Housing Act makes it illegal "[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available . . . when such dwelling is in fact so available." 42 U.S.C. § 3604(d) (1988).

48. *Havens*, 455 U.S. at 374–75.

49. *Id.* at 378–79.

50. *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994).

expressly disapproved of the Seventh Circuit Court of Appeals' decision in *Village of Bellwood v. Dwivedi*,⁵¹ which interpreted *Havens* to mean that an organization demonstrated "injury"—and thus standing—by showing that it had to deflect time and money from some of its activities to achieve racial integration in housing into a testing program and subsequent litigation.⁵²

Dwivedi may be a better reading of *Havens* than *BMC Marketing Corp.* *BMC Marketing Corp.* criticizes *Dwivedi* by questioning the basing of standing on the costs incurred in instituting litigation: under such a holding any organization could establish standing in its own right merely by virtue of bringing a lawsuit.⁵³ The *Dwivedi* court's point could be answered by limiting standing. Instead of basing standing on a diversion of resources to litigation per se, standing could be limited to only those organizations which incur the additional costs of hiring and training testers and directing an investigation which uncovers the defendant's discriminatory conduct.⁵⁴ This is "time and money" which otherwise could have been spent on the organization's regular counseling program—thus frustrating the organization's goals.⁵⁵ *BMC Marketing Corp.* acknowledges that *Havens* expressly refers to a "drain on the organization's resources," but argues that this was "simply another manifestation of the injury that those [illegal] practices had inflicted upon 'the organization's noneconomic interest in encouraging open housing.'"⁵⁶ The *BMC Marketing Corp.* court saw the only possible injury to the organization as the hindrance to its racial integration program.

The *BMC Marketing Corp.* court may have felt compelled to reach this outcome because, under the version of Title VII which governed the case, a plaintiff could only secure an

51. 895 F.2d 1521 (7th Cir. 1990).

52. *Id.* at 1526.

53. *BMC Mktg. Corp.*, 28 F.3d at 1277.

54. The district court in *BMC Mktg. Corp.*, in line with the standard of the Seventh Circuit, found that the FEC had standing because it was forced to expend resources to conduct a second test of the defendant to confirm the discriminatory result of the first test. 829 F. Supp. 402, 406-07 (D.D.C. 1993).

55. The appellate court in *BMC Mktg. Corp.* argued in the alternative that the drain on the FEC's resources was not an injury because any loss to its non-tester programs was "self-inflicted": the FEC, not *BMC Marketing Corp.*, determined the use of resources for testing purposes. 28 F.3d at 1276. Nevertheless, it could just as well be argued that the testing was mandated by the defendant's behavior—it was the defendant who adopted a covert form of racial discrimination which could be uncovered only by the FEC's testing investigation.

56. 28 F.3d at 1277 (quoting *Havens*, 455 U.S. at 379).

injunction against prospective racial discrimination.⁵⁷ Under the Fair Housing Act⁵⁸ involved in *Dwivedi* and *Havens*—and under the current Title VII⁵⁹—a plaintiff could also be awarded compensatory damages for his injuries.⁶⁰ It is clear that the *Havens* court granted the organization standing to sue exclusively based on its right to receive money damages for injury done to it as an organization: the court expressly declined to rule on the standing of the organization via the injury to its members, and the request for an injunction had been removed from the case at the request of the plaintiff organization.⁶¹ Moreover, the court in *Havens* quoted the following from the plaintiff's brief: "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to *identify* and counteract the defendant's [sic] racially discriminatory steering practices."⁶² The court then said:

If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-

57. Prior to 1991, plaintiffs were limited under Title VII to claims for back pay and an injunction against future discrimination. 42 U.S.C. § 2000e-5(g) (1988), *as amended* by 42 U.S.C. § 1981a (Supp. V 1993). The Civil Rights Act of 1991 authorized the imposition of compensatory and punitive damages in cases of intentional discrimination. Pub. L. No. 102-166, § 102, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a (Supp. V 1993)). The alleged acts of discrimination by BMC, however, occurred before November 1991. *Landgraf v. USI Film Products*, 114A S. Ct. 1483 (1994), has held that the new provisions are not retroactive.

58. Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1988 & Supp. V 1993)).

59. See *supra* note 57.

60. If, as I argue, an organization has standing to sue under Title VII, the organization also could receive compensatory damages.

61. *Havens*, 455 U.S. at 378-79. One of the plaintiffs in the original suit who had not been dismissed for lack of standing had secured an injunction against the defendant's racial steering practices by the time the case reached the Supreme Court. Thus, the Court acquiesced in the organization's request that injunctive relief be removed from consideration. *Id.* at 370. The plaintiff organization and the defendants had entered into an agreement before the case reached the Supreme Court that the money damages amounted to \$400 for each plaintiff. *Id.* at 371. In discussing whether that agreement had made the case moot, the Court said, "[i]f respondents [including the plaintiff organization] have suffered an injury that is compensable in money damages of some undetermined amount, the fact that they have settled on a measure of damages does not make their claims moot." *Id.*

62. *Id.* at 379 (emphasis added).

seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests⁶³

Thus the court may have seen that two forms of injury were possible: first, the interference with the organization's pursuit of the "abstract goal" of racial integration, and second, the extra "drain on the organization's resources" to "identify and counteract" the defendants' covert and racially discriminatory practices—the latter being compensable by money damages.⁶⁴

Organizations which exist solely to detect discrimination through testing programs would suffer under the black-letter law approach. Under this approach, an organization might lack standing if it does not function as a de facto employment agency for active job seekers, because it would not have separate activities which would be drained by testing. This result would undermine testing for two reasons. First, individuals probably could not successfully conduct testing without support and training from an organization. Second, the law would be creating a perverse incentive which would force such an organization to tack on or invent functions collateral to its primary role. The organization should be able to function primarily or exclusively to aid and foster the building of a case for litigation because organizations like the FEC are non-profit organizations that operate on charitable gifts. Their resources are thus limited by the extent of the gifts, and they could obviously conduct more testing if they could expend resources solely on that activity.⁶⁵

63. *Id.*

64. *Id.* An organization might also receive punitive damages under the Fair Housing Act, 42 U.S.C. § 3613(c)(1) (1988), but to receive such damages the organization would not have to prove any injury to itself as an organization, but only that the defendant's discrimination was "reckless or callous." *See, e.g., Smith v. Wade*, 461 U.S. 30, 56 (1983) (stating the standard of proof for punitive damages); *Ashbury v. Brougham*, 866 F.2d 1276, 1282 (10th Cir. 1989) (same).

65. Under the amended Title VII, an organization could secure reimbursement of the costs of the testing through a claim for compensatory damages, but only if it meets the test for standing and can claim an "injury." *See supra* note 57. In fairness terms, defendants who discriminate should be made to reimburse these costs since they are caused by the defendant's unlawful, covert conduct. Reimbursement would allow the FEC to investigate a greater number of employers and employment agencies which discriminate, thus hastening an end to employment discrimination.

B. The Public Rights Mode

The limitations of the black-letter law approach suggest exploring the standing question under the public rights model. One commentator, Steven Winter, has put forth such a theory and has criticized the black-letter law approach because that approach has an individualist premise that rights are owned distinctly and separately by persons.⁶⁶ Winter argues that this assumption fails to recognize that “[s]ometimes the interests that society chooses to protect are shared by a community.”⁶⁷ Winter notes that in order to bring such a suit, the framers of our Constitution accepted forms of suit by any common citizen against governmental unlawful actions, and that in order to bring such a suit, a citizen did not have to allege an injury from the illegal governmental conduct that was unique in comparison to that suffered by others.⁶⁸ The citizen merely needed the information necessary to prove the governmental illegality.⁶⁹

Winter further argues that nothing about the constitutional norms which govern the justiciability of suits in the courts should bar a legislative body from creating private rights to sue based on the public rights model.⁷⁰ If the defendant’s conduct jeopardizes the public’s interests, then Winter sees no difficulty in allowing any citizen who has the requisite information about such conduct to sue to protect the public.⁷¹ He argues that little distinguishes such legal actions from the various circumstances in which we allow, or require, one person to sue in a representative capacity on behalf of others.⁷² To be sure, some controls are necessary to assure adequate representation, but “these are instrumental considerations that present choices to be made, not moral evils pretermitted

66. Winter, *supra* note 33, at 1480.

67. *Id.*

68. See *id.* at 1406–09 (explaining that a number of laws in force at the framing of the Constitution allowed third party informers to bring an action to enforce the law). *But cf.* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209 (1974) (holding that taxpayers and citizens do not have standing to sue to enjoin members of Congress from simultaneously holding positions in the military reserves in violation of Article I, Section 6, Clause 2 of the U.S. Constitution).

69. Winter, *supra* note 33, at 1408–09.

70. *Id.* at 1513–14.

71. *Id.* at 1490–91.

72. *Id.* at 1480.

by a priori philosophic or constitutional limitations."⁷³ The public rights rationale would permit organizations like the FEC to function solely to generate litigation against a defendant that has engaged in employment discrimination which resulted in injury to the public interest.⁷⁴

Winter's article, however, largely focuses on the standing barrier that the black-letter law approach creates to suing governmental bodies.⁷⁵ Although Winter suggests an expansion of his model to the private sector, the history he uses to support his theory is grounded solely in suits to control governmental bodies. Therefore, the model may not be easily translated into the private sector. It is easier to make the assumption that the public interest is affected by government action than by the action of any private party. Large private employers may be said to affect the public interest when they engage in systematic employment discrimination because they control a large number of employment opportunities. This claim is weaker with respect to small businesses, each of which may hire only one or two persons every two or three years. Moreover, fewer barriers prevent the federal government from creating a cause of action against itself, where to do likewise with regard to private parties would confront constitutional problems.⁷⁶ I therefore am not confident that the

73. *Id.* at 1480-81.

74. Once it was given authority to initiate suit against private parties, the EEOC began to exercise that authority. Under 42 U.S.C. § 2000e-5(f)(1) (1988), the EEOC has the power to institute suits on behalf of aggrieved individuals who have filed charges. Additionally, *id.* § 2000e-6(e), a commissioner of the EEOC may file a charge where any defendant has engaged in a "pattern or practice" of illegal discrimination. MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 478-80 (1988).

75. "All too often, the inevitable consequence of a decision denying standing is 'that the most injurious and widespread Government [sic] actions [can] be questioned by nobody.'" Winter, *supra* note 33, at 1381 (quoting *United States v. Students Challenging Regulatory Action Procedures*, 412 U.S. 669, 688 (1973)).

76. Title III of the 1991 Civil Rights Act created a cause of action against the U.S. Senate for discrimination in employment. Government Employee Rights Act of 1991, Pub. L. No. 102-166, tit. III, 105 Stat. 1071, 1088 (codified as amended at 2 U.S.C. §§ 1202-1224 (Supp. V 1993)). Under a unanimous consent agreement dated April 10, 1992, the U.S. Senate made the provisions retroactive to cover conduct which occurred 180 days prior to the effective date of the Act. *See* 138 CONG. REC. S5563 (daily ed. Apr. 10, 1992). (The Senate Resolution amended sections of Title III of the Act governing the internal procedures that were enacted as part of the Senate's rulemaking authority, and therefore was not a unilateral amendment of a statute passed by Congress). The federal constitutional prohibition against the enactment of ex post facto laws probably would be violated if Congress retroactively sought to make illegal private conduct that was clearly lawful when the conduct occurred. U.S. CONST. art. I, § 9, cl. 2.

public rights model is an appropriate theory to support testing and litigation by organizations like the FEC.

C. *The Functional Approach*

The third theory—the functional approach—might provide a justification for conferring standing on individual testers and the FEC, even when the plaintiffs sue private employers. This theory is attractive because of its simplicity and because it has been well developed by William A. Fletcher.⁷⁷ Fletcher avoids trying to resolve standing issues in a single legal formula such as injury-in-fact, and abandons treating standing as a preliminary jurisdictional issue. Instead, he asserts that “standing should simply be a question on the merits of plaintiff’s claim.”⁷⁸

Some critics of traditional standing doctrine claim that the Supreme Court adheres to Fletcher’s theory in deed if not in word, by making standing decisions through a covert judgment on the merits of the plaintiff’s claim.⁷⁹ The Supreme Court in one arena, at least, appears to have embraced the Fletcher approach explicitly. In *Rakas v. Illinois*,⁸⁰ the Court decided to “dispens[e] with the rubric of standing” when determining whether a defendant in a criminal case had the right to complain of a violation of the search and seizure provisions of the

The federal government, under the Due Process Clause of the Fifth Amendment, probably could forbid racial discrimination in any component of the federal government, no matter how small the unit. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial discrimination violates due process under the Fifth Amendment). Title VII of the 1964 Civil Rights Act limits its coverage to employers with 15 or more employees. 42 U.S.C. § 2000e(b) (1988). Congress may have to exempt some small employers from the legislation because there might be a claim that rights of free association would be jeopardized if they sought to control hiring in “mom and pop” businesses. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34-35 (1959) (arguing that the obligation of a state to comply with the dictates of equal protection of the laws under the Fourteenth Amendment may be conditioned by its obligation to respect rights of freedom of association under the First Amendment).

77. Fletcher, *supra* note 34.

78. *Id.* at 223.

79. See Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22-23 (1982) (describing standing doctrine as a “litany” which the Court reiterates before it “chooses up sides and decides the case”).

80. 439 U.S. 128 (1978).

Fourth Amendment, because such an analysis is "more properly [subsumed] under . . . substantive Fourth Amendment doctrine."⁸¹ Thus, a straightforward decision on the merits of the defendant's claims that his Fourth Amendment rights were violated precludes "any theoretically separate, but invariably intertwined concept of standing."⁸²

As shown by Fletcher and *Rakas*, the merits of the claim are integral to deciding the issue of standing. The purposes and goals of the constitutional provision or the legislation claimed as the basis for a cause of action should dictate the ruling on standing. In *Rakas*, the Court decided that the purpose of the Fourth Amendment was to protect personal privacy.⁸³ Because searches and seizures by government officials are not per se unlawful, only those that reach a certain level of intrusion—unreasonable searches and seizures—are deemed illegal. The nature of Fourth Amendment protections requires that the Court not rule on the "preliminary" issue of standing until it thoroughly analyzes the substantive issues in the case. A challenged search may be rendered completely legal if the owner of the premises gives her consent. One cannot know that personal privacy has been unlawfully or unreasonably invaded unless the victim of the search, and not some third party, is before the Court.

In Fletcher's analysis, he says that the Court has erred in asserting that an individual must suffer an injury-in-fact before Congress can create a statute granting standing to such an individual.⁸⁴ Fletcher says that injury is not a factual question, because all plaintiffs—even in those cases in which the Court withheld standing—can describe some interest of theirs which will be thwarted if they are not granted the relief available under the statute. Injury in Fletcher's terms becomes a legal question of whether the party before the court should be granted the relief requested. Further, Fletcher believes that if Congress has the constitutional authority to create a legal

81. *Id.* at 140.

82. *Id.* at 139.

83. *Id.* at 143.

84. According to Fletcher, the concept of injury-in-fact developed late in the history of the Court's development of standing, in the case of *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970), and the injury concept became a firm constitutional prerequisite in *Warth v. Seldin*, 422 U.S. 490 (1975). Fletcher, *supra* note 34, at 229–30, 239–40. The Court, however, has resolved issues involving standing in many cases prior to these without the use of this concept. *Cf. id.* at 231 & n.60.

prohibition, it should also have substantial plenary authority to decide who should be included in the class of persons that have a cause of action to enforce the statute: no a priori proof of personal injury should have to be made out by that class of persons.⁸⁵ His analysis would deem it inappropriate to demand a showing of injury by individual testers or the FEC if Congress intended them to be in the class of enforcers.

Fletcher shows, quite adequately, that the issue of injury-in-fact often turns on the characterization of the plaintiff's legal interest.⁸⁶ He addresses this through an examination of third-party standing. Here the black-letter law states that a person who is not injured-in-fact has no standing to seek legal protection for another whose rights may have been violated. In at least one line of cases, the doctrine of third-party standing has given way to allow individuals to assert their own rights in the area of discrimination. In *Barrows v. Jackson*,⁸⁷ the Court granted a white person third-party standing to challenge a racially restricted covenant, because the Court felt Blacks excluded from purchasing the property were the only persons injured-in-fact.⁸⁸ Yet later, in *Trafficante v. Metropolitan Life Insurance Co.*,⁸⁹ the Court granted standing to a white resident resisting racial segregation in housing as a party who was injured-in-fact because he had a right to a racially integrated environment.⁹⁰

A similar analysis could be applied to testers and the FEC regarding their right to enforce the laws against discrimination in employment, for they could be characterized as parties seeking to enforce the rights of others. Testers and the FEC have interests which are jeopardized by employment discrimination. For individual testers, it is a desire to obtain correct information on jobs from employment agencies and to avoid the humiliation of racial prejudice. For the FEC, it is an interest in seeing that the resources it expends on ending employment discrimination bear fruit. Like the white plaintiffs above, their interests are merely not as strong as Black persons who are actively seeking employment free of racial discrimination. Nevertheless, that does not per se disable testers

85. Fletcher, *supra* note 34, at 223.

86. *Id.* at 245.

87. 346 U.S. 249 (1953).

88. *Id.* at 257; Fletcher, *supra* note 34, at 245-46.

89. 409 U.S. 205 (1972).

90. *Id.* at 211-12; Fletcher, *supra* note 34, at 245-46.

and the FEC from being designated by Congress as proper parties to enforce the statute where a legal duty that Congress has created is being violated. Fletcher believes that the prime question to be asked is whether Congress would have seen the plaintiffs—testers and the FEC—as appropriate parties to enforce the statute.⁹¹ To be sure, some of the questions raised by the cases on standing must be adverted to. For example, do the plaintiffs have interests which are antagonistic to those of the prime beneficiaries under the statute? In the context of the employment discrimination law, the interests of the testers and the FEC are not only congruent, but the testers and the FEC ferret out covert discrimination that bona fide job seekers may not know exists.

Fletcher believes that one must plumb the goals of federal legislation to determine who should be able to enforce it.⁹² Congress intended to rid the workplace of arbitrary discrimination when it passed Title VII,⁹³ and has not wavered from that goal in the intervening years. It consistently has amended Title VII to strengthen the hand of the plaintiff class in order to more thoroughly eradicate employment discrimination.⁹⁴ Arguably, under the terms posed by Fletcher, if the tester approach is sometimes the only means of effectively enforcing

91. Fletcher, *supra* note 34, at 265.

92. *Id.* at 253.

93. In *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971), the court concluded that the phrase "a person claiming to be aggrieved" in Title VII showed "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.* at 446. The Supreme Court, in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), quoted this language approvingly in holding that Congress had the same intention with respect to the Civil Rights Act of 1968, which outlawed housing discrimination. *Id.* at 209.

94. Congress passed the Pregnancy Discrimination Act, Pub. L. No. 95-555, § 330, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)), as an addition to Title VII's definition section, which specifies that "[t]he terms 'because of sex' or 'on the basis of sex' include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions." *Id.* Moreover, as mentioned earlier, *supra* note 57, the 1991 Civil Rights Act authorized the imposition of compensatory and punitive damages in cases of intentional discrimination. 42 U.S.C. § 1981a (Supp. V 1993). Furthermore, the Civil Rights Act of 1991 mandated that Title VII's prohibitions against employment discrimination apply to corporations incorporated outside the United States which are controlled by an American employer. *Id.* § 2000e-1(c). Finally, the 1991 Act codified the burden of proof framework set forth in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), governing disparate impact cases. *Id.* § 2000e-2(k). This step assures plaintiffs the right to prove discrimination under disparate impact analysis by showing that a neutral criteria or measure used by the defendant disproportionately denies members of the protected class access to an employment opportunity or benefit. See *Griggs*, 401 U.S. at 431-32.

the ban on hiring discrimination, then individual testers and organizations like the FEC should be included as enforcing agents.⁹⁵

II. A RESPONSE TO PROFESSOR YELNOSKY'S ARGUMENT THAT TESTERS HAVE NO CLAIM TO INJUNCTIVE RELIEF OR ATTORNEYS' FEES

In a recent article,⁹⁶ Michael J. Yelnosky questions the ability of lawsuits brought by private parties engaging in testing to ferret out employment discrimination, and also argues that the EEOC presently has no authority to engage in testing for employment discrimination.⁹⁷ This Part will refute a number of Professor Yelnosky's positions.

A. *The Underenforcement Hypothesis*

Professor Yelnosky preliminarily proposed that testing should be limited to lower-skilled, entry-level jobs.⁹⁸ To support this position, he argued, *inter alia*, that the difficulty of proving discrimination against applicants for low-level jobs and the low back pay awards for prevailing plaintiffs in those jobs combine to deter private counsel from taking such cases, thus creating an "enforcement void."⁹⁹ He also argued that employers of higher-skilled persons incur higher costs in processing applications, and that therefore, imposing the costs of processing testers who will ultimately refuse an offer would be unfair to

95. The *Havens* Court, working from a black-letter law approach, did not grant standing to the whites who were a part of the testing because the Court found that they had not alleged the specific injury—rights of association—with sufficient clarity. 455 U.S. at 374–75. Under Fletcher's approach, the whites would have standing because they were an integral and necessary part of the testing process.

96. Yelnosky, *supra* note 31.

97. *Id.* at 459–69.

98. *Id.* at 410–15, 429 n.121.

99. *Id.* at 411–12. The Civil Rights Act of 1991 added the possibility of compensatory and punitive damages for intentional discrimination in employment. 42 U.S.C. § 1981a (Supp. V 1993). Professor Yelnosky acknowledged that it is "too early to tell" if such damages will be substantial and thus undermine his hypothesis of an enforcement void for low paying jobs. See Yelnosky, *supra* note 31, at 412 n.35.

employers.¹⁰⁰ Finally, he indicated that applicants for high-level jobs have greater incentives to sue and are more likely to succeed when they are not hired.¹⁰¹

Several factors make those preliminary assumptions questionable. The overwhelming bulk of employment discrimination suits since Title VII's passage have involved jobs for semi-skilled and unskilled employment, not jobs for professionals, executives, and other higher-skilled persons.¹⁰² This is probably due to the fact that lower-level jobs present *less* difficulty in proving discrimination, precisely because there are fewer subjective variables behind which a discriminating employer can hide.¹⁰³ The tester approach may be more necessary and appropriate for high-level employment because, as Professor Yelnosky acknowledged, "[t]he use of testers can uncover employment discrimination that otherwise is unprovable because of its subtle form."¹⁰⁴

Moreover, state agencies or the EEOC perform basic investigative work and ultimately find that either the case has merit—a finding of "reasonable cause" to believe that discrimination had occurred—or that it lacks merit—"no reasonable cause."¹⁰⁵ If one assumes that the agencies have done a minimally adequate investigative job, few of the cases found to have "no reasonable cause" for suit deserve to be pursued, and cases that are found to have "reasonable cause" will be more attractive to a private attorney.

A more significant flaw in Professor Yelnosky's proposal that testing be limited to lower-skilled employment is that minorities and women already occupy a disproportionate number of low-paid, low-skilled jobs, even when one holds constant levels of education and preparation.¹⁰⁶ Further, Professor Yelnosky's

100. Yelnosky, *supra* note 31, at 412.

101. *Id.* at 415.

102. Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 949 (1982) (suggesting that litigation around blue collar employment may have predominated in the early years of Title VII because there are many more of such jobs and because Title VII did not include academic institutions and the public sector until the 1972 amendments to the Act).

103. *Id.* at 959-78 (arguing that plaintiffs have less success in litigating high-level employment discrimination claims because courts have been too deferential to methods of choosing and evaluating professionals, while courts aggressively challenge blue collar selection procedures).

104. Yelnosky, *supra* note 31, at 413.

105. See 42 U.S.C. § 2000e-5(b) (1988).

106. See David H. Swinton, *The Economic Status of African Americans: Limited Ownership and Persistent Inequality*, in *THE STATE OF BLACK AMERICA* 1992, at 61,

supposition that such jobs provide "the possibility to establish a 'foothold' . . . to move up the socioeconomic ladder"¹⁰⁷ may not accurately describe many of these jobs. Many are dead-end jobs with wages kept depressed by an oversupply of labor and little union protection.¹⁰⁸ Indeed, some economists hypothesize that race and sex discrimination is *less* present in unskilled and blue collar work than for any other kinds of work.¹⁰⁹ This finding accords with what we know are the stereotypes embedded in discrimination against minorities and women: many perceive them as capable of unskilled work, but lacking the capacity for jobs calling for higher levels of intellect or the ability to manage subordinates.¹¹⁰ The tester approach, therefore, could be wasted on the class of employers who engage in the least amount of active discrimination in regard to the least attractive jobs, when the real underenforcement problem could involve higher-level jobs which pay a living wage.¹¹¹

61-118 (Billy J. Tidwell ed., 1992). Black males were less than half as likely as white males to be in executive, administrative, or managerial positions. On the other hand, Black males were "significantly more likely" than white males to be in less desirable jobs such as laborer or service worker. *Id.* at 106.

107. Yelnosky, *supra* note 31, at 415.

108. See WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 106 (2d ed. 1978) (discussing the causes of unemployment among Black workers).

109. Wilson comments as follows:

Jobs in the low wage sector, particularly in urban areas where most blacks are concentrated, have a considerably lower percentage of white workers and a substantially higher percentage of black workers than jobs in the corporate and government sectors It is not surprising therefore that recent studies of unemployment in the urban core reveal that blacks do not experience any special employment barriers in the casual, low-paid, and menial jobs of the low-wage sector.

Id.

The Urban Institute performed a study using testers which found that Black applicants confronted racial discrimination more frequently in applying for white collar positions than for blue collar work. *Urban Institute Research Using Testers Documents Bias Against Black Job Seekers*, Daily Lab. Rep. (BNA) No. 94, at A-4 (May 15, 1991) [hereinafter *Urban Institute*].

Congress certainly views the exclusion of minorities and women from high-level jobs as a priority, for in passing the Civil Rights Act of 1991, they included the Glass Ceiling Act to study discrimination against women and minorities in high-level executive jobs. Glass Ceiling Act of 1991, Pub. L. No. 102-166, tit. II, 105 Stat. 1081.

110. See *supra* note 1 and accompanying text.

111. This is not to suggest that the tester approach should never be used to uncover discrimination in unskilled work. In many cities, young Blacks, especially males, have exceedingly high levels of unemployment. Securing employment for such persons would have double benefits because it might indirectly reduce the levels of crime in Black neighborhoods. Unfortunately, factors other than race discrimination may reduce

Professor Yelnosky asserts that persons with high-level skills do not need the tester approach because they will be more motivated to file suit against hiring discrimination.¹¹² The typical age discrimination case undermines his assertion because the overwhelming majority of the charges allege discrimination in discharge or lay-off and not in hiring.¹¹³ This is true despite the fact that age discrimination complainants are frequently sophisticated managers and professionals, and the fact that once unemployed, older workers look for work for significantly longer periods of time than their younger counterparts.¹¹⁴ Thus, older workers likely experience significant hiring discrimination.

Professor Yelnosky's assertion that persons with high-level skills have more incentive to file discrimination complaints against hiring discrimination is not borne out by the behavior of these white collar unemployed. They are probably more certain of their ability to prove discrimination in layoffs because they often have a record of long service to the company they sued and thus know its internal personnel needs. They may not have that level of information when they apply to a new company, nor will they know the qualifications, or age, of the successful applicants. Proving hiring discrimination against high-level employees over forty years-old might be difficult. That, however, makes it especially ripe for the additional support of a tester approach.¹¹⁵

employment opportunities for ghetto youth, such as the movement of low-skilled work to the suburbs or the disappearance of such jobs through technological advances. See WILSON, *supra* note 6, at 100-04. The flight to the suburbs, however, may be driven by a flight from ethnic minorities and the elderly. See Marley S. Weiss, *Risky Business: Age and Race Discrimination in Capital Redeployment Decisions*, 48 MD. L. REV. 901 (1989) (arguing that capital redevelopment decisions are violations of the anti-discrimination laws).

112. See Yelnosky, *supra* note 31, at 414-15.

113. LAWRENCE A. FROLIK & ALLISON P. BARNES, *ELDERLAW: CASES AND MATERIALS* 116 (1992).

114. *Id.*

115. A premise in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is that an inference of discrimination arises when an employer operates against her own economic interest and does not hire the first qualified applicant for an unfilled job. *Id.* at 802. The tester approach might not yield such clear evidence of discrimination when applied to high-level jobs because employers, even those with no intention to discriminate, may not have a practice of hiring the first minimally qualified applicant. Such employers may develop a pool of applicants first, and then make a choice, reducing the significance of the sequence of applications. Testing for high-level jobs may require giving minorities and women better qualifications than the person with whom they are paired. See the discussion of manufactured credentials, *infra* notes 229-38.

B. Testing High-Level Employment Is Not Too Costly

Professor Yelnosky, after an exhaustive canvass of the applicable law, concludes that private persons have standing to sue based on testing which discloses employment discrimination.¹¹⁶ Despite this conclusion, Professor Yelnosky suggests that a number of limitations should be placed on the right to test, such as his recommendation that employers of highly skilled or professional employees be exempt from such testing because of additional processing costs.¹¹⁷ If one assumes that Congress structured Title VII to permit testing,¹¹⁸ that includes an implicit policy judgment that testing is a legitimate, approved activity and that the benefits of weeding out discrimination outweigh the costs to innocent employers who may be subjected to the process.

The employer who is found to be actively discriminating has no legitimate basis for objecting to the additional costs imposed by testing. The discriminating employer, by definition, is one who, on the basis of race or gender, pays little or no attention to the application of the "disfavored" tester. The costs of processing the "favored" tester and the costs of defending litigation unsuccessfully are more appropriately ascribed to the employer's decision to operate unlawfully.

In order to prevent blameless employers from unjustly incurring costs, and to make testing as effective as possible, testing should focus only on those employers who present some indicia of unlawful discrimination prior to the tests.¹¹⁹ Although

116. Yelnosky, *supra* note 31, at 415-29.

117. *Id.* at 414-15.

118. The author could find no discussion of the tester approach in the legislative history surrounding the initial adoption of Title VII in 1964. Nor do any of the cases approving testing in the housing field cite any legislative history on the precise question. It is not surprising, however, that Congress did not focus on the issue explicitly at that time, because the effectiveness of such an approach would become apparent only when traditional means of enforcement had become frustrated by defendants adopting covert strategies to undermine compliance. Senator Alan Simpson considered introducing an amendment to the 1991 Civil Rights Act that presupposed that the Commission would have the right to use testers, but would have precluded them from using testers who misrepresented their education or other qualifications. 137 CONG. REC. S15,487 (daily ed. Oct. 30, 1991) (statement of Sen. Simpson). The amendment was not officially proposed. *Id.* at S15,488. Given this ambiguous history, the courts are likely to be the instrument for such interstitial lawmaking on the issue of standing.

119. For example, employers could be targeted for testing when they exhibit a profile with no minority or female employees, or serious underrepresentations in certain job categories.

researchers have tested randomly to establish the statistical validity of the results,¹²⁰ testing to develop litigation should not be random. Employers who have demonstrated their non-discriminatory hiring policies should not be targeted. If only a suspect group of employers is the focus of rational testing, the number of innocent employers tested ought to be low, thus reducing the harmful side effects feared by Professor Yelnosky. Moreover, in order to further reduce wasted expenditure, the FEC instructs testers to immediately turn down an employment offer to prevent the employer from losing access to a bona fide applicant.¹²¹

C. Challenges to the Testers' Right to Injunctive Relief, Class Actions, and Attorneys' Fees

Professor Yelnosky believes that the EEOC must be the prime user of the testing approach. He asserts that private testers will not qualify for injunctive relief or worthwhile compensatory and punitive damages, and therefore suggests that the private bar may not take such cases.¹²² He predicts that private testers will obtain, at best, empty declaratory judgments which simply announce that Title VII has been violated, but which do not provide prospective relief of any substance.¹²³

Professor Yelnosky is really revisiting the standing question in an altered form.¹²⁴ The effect of standing doctrine is to

120. The Urban Institute developed a research design to determine the general level of discrimination against Black applicants for employment. See *Urban Institute*, *supra* note 108, at A-4. The researchers needed a representative sample of employers in order to make the finding that in one out of every five cases, a white applicant "advance[d] farther through the hiring process than the equally qualified black applicant." *Id.* at A-4 to A-5. Poorly focused testing in the context of litigation would be highly inefficient four out of five times. *Id.*

121. There may be another class of "innocent" employers—those in which top management has a non-discriminatory policy that is undermined by lower-level managers who make the actual hiring decisions. These employers, however, need not wait to be sued. They could take precautionary steps to avoid litigation by adopting an internal testing program to find out whether lower-level managers are faithfully carrying out their non-discrimination policy, especially if their actual hiring data does not reflect their written policies. The FEC has offered to provide technical guidance to employers who would like to adopt such a regime. Withers Interview, *supra* note 29.

122. Yelnosky, *supra* note 31, at 435–38, 443–45.

123. *Id.* at 439–41.

124. See *supra* Part I for a discussion of standing in this context.

preclude the results which Yelnosky predicts. It prevents the courts from addressing abstract questions about legality which do not have an impact on concrete relationships between parties. As the following analysis shows, courts can find many concrete relationships around which to structure relief.

1. Testers May Obtain Injunctive Relief—Because testers cannot accept employment if offered, they are necessarily precluded from seeking relief either in the form of back pay or a court order that they be hired immediately. The question remains, however, whether testers are entitled to an injunction on a class action basis against the employer to bar him from continuing discriminatory hiring practices. On this point, Professor Yelnosky expressed doubt that courts would be willing to issue injunctions. He observed that a series of courts refused to grant an injunction unless the record contained evidence of widespread, pervasive discrimination.¹²⁵ None of the cases he cites, however, impose such a finding as a strict precondition to granting an injunction,¹²⁶ and he admits that one case expressly denies that proof of a “history of prior discriminatory practices” is necessary before an injunction can be granted.¹²⁷

Professor Yelnosky fails to make the distinction made by Professor Robert Belton in the only volume which is devoted exclusively to remedies under employment discrimination laws.¹²⁸ Belton reads the case law to make an injunction mandatory when a plaintiff produces “abundant evidence of a consistent pattern of past discrimination and the absence of evidence . . . of a reasonable possibility of future compliance.”¹²⁹ In other cases where the plaintiff produces proof that a defendant has intentionally violated Title VII, *Albemarle Paper Co. v. Moody*¹³⁰ “imposes an obligation on the district court to issue an injunctive decree which will . . . bar like discrimination in the future.”¹³¹ Belton indicates that courts should impose a “presumption of entitlement” to injunctive relief once a violation

125. Yelnosky, *supra* note 31, at 436.

126. *Id.* at 436 n.163.

127. *Id.* at 436 n.162 (quoting *Berkman v. City of New York*, 705 F.2d 584, 595 (2d Cir. 1983), which held that relief designed to assure compliance is “appropriate whenever a Title VII violation [is] found, irrespective of any history of prior discriminatory practices or the intent of the defendant”).

128. ROBERT BELTON, *REMEDIES IN EMPLOYMENT DISCRIMINATION LAW* (1992).

129. *Id.* at 207.

130. 422 U.S. 405 (1975).

131. BELTON, *supra* note 128, at 203 (citing *Albemarle*, 422 U.S. at 418).

is proven, and that the court's discretion in "denying injunctive relief in any form" is "limited."¹³² Thus, a better reading of the cases cited by Professor Yelnosky is that an injunction should issue when a clear violation of Title VII is found, unless something in the record either shows that the employer has ended its discrimination in a manner which makes a reoccurrence unlikely or which reveals a structural impediment that would prevent the plaintiff or members of her class from being harmed in the future.¹³³

Professor Yelnosky also reasoned that testers cannot obtain injunctions because testers cannot meet the "personal benefit" requirement for injunctive relief, since they are not searching for employment at the time of the defendant's discrimination.¹³⁴ The analysis of the court of appeals in *BMC Marketing Corp.*¹³⁵ runs counter to his reasoning. The court remanded the case to allow the district court to entertain an amendment of the complaint by the individual plaintiff testers.¹³⁶ If the individuals alleged that they were likely to return to the defendant employment agency in the reasonably near future as bona fide applicants, and that the defendant had a settled policy of racial discrimination, then an injunction could issue.¹³⁷ If the

132. *Id.* at 203, 208.

133. *Id.* at 207. Professor Yelnosky, *supra* note 31, at 436 n.163, cites the following cases in which injunctions were denied: *Spencer v. General Elec. Co.*, 894 F.2d 651, 660-61 (4th Cir. 1990) (denying an injunction in a situation where an employer had fired the supervisor who had sexually harassed the plaintiff); *EEOC v. Financial Assurance, Inc.*, 624 F. Supp. 686, 695 (W.D. Mo. 1985) (denying an injunction in the absence of pressure by the EEOC and the absence of any evidence in the record that the defendant had engaged in similar discrimination in the past).

In some cases cited by Professor Yelnosky, the plaintiff's voluntary action made the prospective injunctive relief clearly inapplicable. In *Hampton v. IRS*, 913 F.2d 180, 182 (5th Cir. 1990), plaintiff alleged that his reassignment was motivated by racial discrimination, but did not contest his subsequent discharge, therefore an injunction ordering his reinstatement was not appropriate. In *Backus v. Baptist Medical Ctr.*, 671 F.2d 1100, 1102-03 (8th Cir. 1982), the plaintiff left the defendant's employ voluntarily during the pendency of the employment discrimination suit and thus could not secure an injunction for reinstatement.

134. Yelnosky, *supra* note 31, at 437.

135. 28 F.3d 1268, 1274 (D.C. Cir. 1994).

136. *Id.* at 1275.

137. *See id.* The court of appeals disagreed with the way the lower court distinguished *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In *Lyons*, the plaintiff was denied an injunction to prevent the local police from continuing the practice of applying a chokehold in their traffic stops and arrests on the grounds that the plaintiff could not demonstrate that he was likely to be the object of such unconstitutional police behavior in the future. 461 U.S. at 111. The lower court in *BMC Mktg. Corp.* held that the tester plaintiffs had established a probability of future injury because unlike an arrest, which must be initiated by the police, the testers "are free to return to BMC

individual testers made the same allegations with respect to an employer, they too should have a right to injunctive relief.

Professor Yelnosky admits that some of the cases he cites for the proposition that injunctive relief would be denied to testers are inconsistent with other Title VII cases.¹³⁸ He also states that "[t]he decisions denying injunctive relief to nonemployee plaintiffs ignore Congress's purpose in empowering Title VII plaintiffs to act as private attorneys general vindicating both their own rights and the rights of others."¹³⁹ Individual testers should be viewed as equivalent to nonemployed plaintiffs: their legal rights have been violated and they should be allowed to perform the quintessential role of "private attorneys general" on behalf of others.¹⁴⁰

2. *Testers Are in the Same Class as Bona Fide Applicants*—Individual testers should be able to bring a class action and secure an injunction to bar hiring discrimination against all those in their class, just as an attorney general would. Professor Yelnosky argues that Supreme Court cases have prohibited classes from being drawn too broadly in Title VII actions, and he assumes that testers could not be in the same class as bona fide job applicants.¹⁴¹

Professor Yelnosky's assumption that testers and bona fide job seekers must be treated as members of separate classes is untenable from a legal or factual standpoint. If injunctive relief were appropriate, as argued above, it could not be limited sensibly to plaintiffs in their testing posture.¹⁴² Clearly, the

at any time in search of nondiscriminatory employment referrals . . . they alone control the decision to initiate contact." *BMC Mktg. Corp.*, 829 F. Supp. at 405. The court of appeals held that the individual tester plaintiffs must additionally allege that they intended to return to the defendant employment agency in the near future, and that the defendants had a settled policy of practicing racial discrimination. See 28 F.3d at 1274. The court of appeals thus read *Lyons* as refusing an injunction, in part because the plaintiff had not alleged that it was a settled policy of the City of Los Angeles to have its police apply excessive and unconstitutional force in arrests. See *id.*

138. "This analysis [denying injunctive relief] is somewhat inconsistent, however, with the courts' treatment of Title VII injunctions in other contexts." Yelnosky, *supra* note 31, at 438 n.164.

139. *Id.* at 438 n.165.

140. *Coles v. Havens Realty Corp.*, 633 F.2d 384, 388 (4th Cir. 1980) (stating that there is no reason why surrogates for those who are victims of discrimination cannot pursue their cause).

141. Yelnosky, *supra* note 31, at 437.

142. Such an injunction would produce an illogical order, enjoining the defendant from refusing an offer of employment to plaintiffs on racial grounds only when they were not seeking employment.

injunctive order would have to protect the plaintiffs against racial discrimination should they, at any time prospectively, elect to become bona fide job seekers. Therefore, the order would naturally protect other prospective bona fide job seekers.

Neither of the two cases Professor Yelnosky cites supports treating testers and bona fide applicants as different classes. *East Texas Motor Freight Systems, Inc. v. Rodriguez*¹⁴³ holds that three Mexican-Americans who were not qualified for promotions—and thus had no legal rights violated because they did not receive promotions—could not represent a class of Mexican-Americans who were qualified and were claiming a denial of promotion on the grounds of national origin discrimination.¹⁴⁴ The case thus holds that persons who have not had any legal rights violated cannot represent persons whose legal rights have been violated. Even Professor Yelnosky acknowledges that if testers have had their rights violated, a declaratory judgment would be appropriate.¹⁴⁵

The question then remains, whether the violations of the legal rights of testers are so distinct and separate from violations of rights of bona fide applicants that they cannot be in the same class. Professor Yelnosky cites *General Telephone Co. of the Southwest v. Falcon*,¹⁴⁶ which holds that a plaintiff alleging discrimination in *promotions* cannot represent a class of persons whose only claim is discrimination in *hiring*.¹⁴⁷ *Falcon* thus is not support for treating testers and bona fide applicants as separate classes because, unlike the individuals in *Falcon*, they are not pursuing interests in two entirely different aspects of the employment process. Both groups are pursuing the same legal rights—either a right to have job information from employment agencies or job offers from employers on a racially non-discriminatory basis. Also, given the realities of the search for employment, testers in this context are not very different from persons who genuinely canvass the employment market. An employed person may inquire about employment opportunities without a firm decision to take a job even if one is eventually offered. Unemployed persons may apply to many employers simultaneously:

143. 431 U.S. 395 (1977).

144. *Id.* at 403.

145. Yelnosky, *supra* note 31, at 439.

146. 457 U.S. 147 (1982).

147. *Id.* at 155, 158–59.

if they accept one offer, additional offers must be declined.¹⁴⁸ Thus, many bona fide applicants are factually indistinguishable from testers from the point of view of the employer.¹⁴⁹

Although Professor Yelnosky cites a statement made in *East Texas Motor Freight Systems, Inc. v. Rodriguez* that a class representative must "suffer the same injury as class members,"¹⁵⁰ all class members are not forced to claim identical damages. Even in a single class of bona fide applicants, all of whom were denied employment on discriminatory grounds, class members could have different monetary damages depending on whether they were employed or unemployed at the time of the discrimination, or whether they subsequently secured other employment in mitigation of damages.¹⁵¹

3. *Testing Organizations May Recover Attorneys' Fees*—Professor Yelnosky does not discuss whether an organization that organizes the testing could have a right, separate from the individuals used in the testing, to secure an injunction and attorneys' fees. In *BMC Marketing Corp.*, the court carefully scrutinized the standing issue and rejected some of the plaintiff's claims to standing,¹⁵² but found that the FEC had standing

148. If a plaintiff must have a fixed commitment to work only for the defendant-employer, then the bulk of job seekers would not have standing. Most assuredly, most third-year law students, who apply to more than one employer for permanent employment upon graduation, would not be protected against race or sex discrimination in hiring.

149. Moreover, bona fide applicants for employment have an obligation to mitigate damages by using "reasonable diligence" to obtain other employment pending the resolution of the charges. See 42 U.S.C. § 2000e-5(g)(1) (Supp. V 1993); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982) (construing identical statutory language to require all unemployed Title VII claimants to use "reasonable diligence in finding other suitable employment"). If a bona fide applicant was employed at the time of the discrimination, or found other employment that was now permanent, and if either job paid well enough to defeat a claim for back pay, under Professor Yelnosky's standards, that person would be identical to a tester, for she would have no right to an injunction since she could show no "personal benefit" from prospective relief.

150. Yelnosky, *supra* note 31, at 438 n.166 (citing *Rodriguez*, 431 U.S. at 403).

151. See, e.g., *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1280 (4th Cir. 1985) (awarding varying amounts of backpay damages to the different plaintiffs in a Title VII employment discrimination suit).

152. The court rejected both the individual's and the organization's claims to standing under 42 U.S.C. § 1981 (Supp. V 1993). *BMC Mktg. Corp.*, 28 F.3d at 1271, 1278-81. This Article is limited to an exploration of the testing under Title VII, so there will be no extended comment on this portion of the court's opinion. It is important to note, however, that the courts dispute whether Congress meant to exercise its full powers under Article III with respect to § 1981 as it did with respect to Title VII. A recent note also opposes many of the arguments made by the court in *BMC Mktg. Corp.* See Michele Landever, Note, *Tester Standing in Employment Discrimination Cases Under 42 U.S.C. sec. 1981*, 41 CLEV. ST. L. REV. 381 (1993).

to sue as an organization if it could prove that the defendant employment agency was disrupting the organization's goal of eradicating employment discrimination.¹⁵³ Because the court's ruling came under the unamended version of Title VII, and the organization could not claim back pay, the only form of relief would be an injunction barring the defendant from prospective discrimination. Thus, the organization would be achieving 100% of its litigation goal and would therefore have a clear right to full attorneys' fees. This is critical, for as this Article has argued, the organization is the primary actor in the testing strategy.

D. Impact of the 1991 Civil Rights Act

The 1991 amendments to Title VII should have an impact on whether individual testers will have access to private attorneys. The amendments give a successful plaintiff a right to compensatory and punitive damages.¹⁵⁴ The substantial recovery that may result from this greater relief could impact the level of attorneys' fees. Professor Yelnosky predicts, however, that such damages will be low in tester cases because in a few cases—each in the housing arena—testers recovered only \$1000.¹⁵⁵ Contrary to this prediction, when the trial court allowed juries to entertain compensatory and punitive damages for the testers led by the FEC, they gave each a total of \$15,000.¹⁵⁶ Further, Professor Yelnosky's extrapolation from housing cases is inappropriate because damage awards for

153. *BMC Mktg. Corp.*, 28 F.3d at 1277-78.

154. 42 U.S.C. § 1981a (Supp. V 1993).

155. Yelnosky, *supra* note 31, at 443.

156. Professor Yelnosky believes that the award was high in *Fair Employment Council of Greater Washington, Inc. v. Molovinsky*, No. 91-7202 (D.C. Super. Ct. Aug. 12, 1993), because the facts were "particularly egregious." Yelnosky, *supra* note 31, at 443 n.185. The defendant sought to get the plaintiff testers to trade sex for job information. See *supra* note 29 for the facts of this case. Professor Yelnosky took note of the \$10,000 in punitive damages, but did not further discover that each of the tester plaintiffs recovered an additional \$5000 in compensatory damages. Withers Interview, *supra* note 29. The appellate court reversed the award of compensatory and punitive damages to the individual plaintiffs in *BMC Mktg. Corp.* on the grounds that the 1991 amendments to the 1964 Civil Rights Act were not retroactive, 28 F.3d at 1272, but the award illustrates what juries might do when compensatory and punitive damages are available under the 1991 amendments.

housing discrimination have traditionally been low.¹⁵⁷ It would not be surprising if juries find that erecting discriminatory barriers to employment is more serious than discrimination in housing, and thus warrants higher damages. A defendant who blocks minorities from access to employment does more damage than one who blocks minorities from housing, because access to employment is determinative of one's whole lifestyle, including where one can afford to live. The typical person looking for housing generally has housing and is simply looking for more convenient or attractive quarters.

The most important impact on a plaintiff's likelihood of recovering attorneys' fees comes from the portion of the 1991 amendments which, in part, reverses *Price Waterhouse v. Hopkins*.¹⁵⁸ In *Price Waterhouse*, the Supreme Court held that, although the defendant had in part relied on a discriminatory factor in denying an employment opportunity, Title VII was not violated if the defendant could establish that it would have made the same adverse decision if it had relied only on legitimate factors.¹⁵⁹ The Civil Rights Act amendments entitle a plaintiff to an injunction and attorneys' fees if the defendant relied on a discriminatory factor regardless of whether the

157. Congress sought to address the problem of low damage awards by amending the Fair Housing Act in 1988 to remove the \$1000 cap on punitive damages. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 8(2), 102 Stat. 1633 (codified at 42 U.S.C. § 3613(c)(1) (1988)). The level of awards for plaintiffs who made bona fide searches for housing became higher after the amendment, but low awards continued in some courts. See James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1077-78 (1989) ("[S]ingle victim settlements and awards during the past few years have generally exceeded twenty thousand dollars Nonetheless, some courts lag far behind the national pattern as they continue to make only symbolic awards reminiscent of an earlier era."). One commentator, taking note that damage awards continue to be an insufficient mechanism for abating housing discrimination, argues for additional affirmative relief. See Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 928-33 (1991) (arguing that courts should fashion injunctions to require defendants to rent or sell the property to a member of the plaintiff's class, if the plaintiff has found other accommodations).

158. 490 U.S. 228 (1989).

159. *Id.* at 258. In *Price Waterhouse*, the female plaintiff had been denied a promotion to partner in her accounting firm. Some of the partners relied on gender stereotypes, but others denied her a partnership because she had poor interpersonal skills. A majority of the Court decided that an employer would not violate the statute if it could prove that even if it had not taken gender into account unlawfully, it would have made the same decision regarding that person. *Id.*

employer is able to prove that it ultimately would have made the same adverse decision on lawful grounds.¹⁶⁰

Professor Yelnosky reads this provision as authorizing an award of attorneys' fees only in "mixed motive" cases and asserts that it did not change the rule that plaintiffs like the testers, "who can prove a violation of the Act, but who are not entitled to significant relief," cannot recover attorneys' fees.¹⁶¹ He cites *Slade v. United States Postal Service*¹⁶² as a case that would remain unaffected by the amended Civil Rights Act in this respect.¹⁶³ The plaintiff in *Slade* argued that he was entitled to attorney fees because he had secured reversal of the district court on some preliminary procedural grounds which allowed the case to go forward on the merits.¹⁶⁴ The court determined that those procedural victories ultimately had not led to a substantive victory for the plaintiff, and therefore rejected the plaintiff's demand for attorneys' fees.¹⁶⁵ I agree with Professor Yelnosky that the 1991 amendments do not require that attorneys' fees be awarded in a case like *Slade*. That case, however, is wholly unlike the case of a tester who *does* prevail on the merits and proves that the defendant was engaged in an intentional refusal to make a job offer solely because of race or sex.

Under the amendments, Congress deemed the prevailing party to be the plaintiff who proved that the defendant relied on a discriminatory factor. Congress not only allowed recovery of attorneys' fees, but also authorized the issuance of an injunction to prohibit the defendant from engaging in future

160. The new amendment provides that if the plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice," 42 U.S.C. § 2000e-2(m) (Supp. V 1993), and the respondent proves that it

would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief . . . , and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under Section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment

Id. § 2000e-5(g)(2)(B).

161. Yelnosky, *supra* note 31, at 445 n.196.

162. 952 F.2d 357 (10th Cir. 1991).

163. Yelnosky, *supra* note 31, at 445 n.196.

164. 952 F.2d at 361-62.

165. *Id.* at 362.

intentional discrimination.¹⁶⁶ Under the amendment, a person who is expressly denied employment but who may have never qualified for employment with the discriminating employer is nonetheless authorized to act as a representative to secure an injunction protecting others against discrimination. The tester duplicates the position of the plaintiff in a mixed motive case in three ways: (1) she proves that the defendant engaged in intentional discrimination and (2) she acts as a representative to protect others from future discrimination (3) even though she is not entitled to a position with the defendant. The tester arguably has an even stronger claim to attorneys' fees because the tester may, unlike the plaintiff in a mixed motive case, recover punitive and compensatory damages under the amended Title VII.¹⁶⁷ Professor Yelnosky's assertion that the 1991 amendment has no effect on a tester's right to attorneys' fees¹⁶⁸ would produce a paradoxical result. Under his interpretation, a plaintiff in a mixed motive case who could have been refused an employment opportunity legitimately but who proved that the defendant introduced a discriminatory factor into the employment process would be entitled to an injunction and attorneys' fees. On the other hand, a plaintiff tester, who proved that the defendant's action resulted solely from discrimination would have no right to an injunction or attorneys' fees. Congress could not have intended such an irrational result.

E. Breach of Contract, Barratry, and Ethical Violations

Professor Yelnosky suggests that state common-law actions and disciplinary proceedings may be brought against testers and their attorneys as a means of deterring the use of testers. Professor Yelnosky sets forth three hypotheses: (1) that testers might be sued for breach of contract;¹⁶⁹ (2) that lawyers representing them may be subject to charges of barratry;¹⁷⁰ and (3) that it may be unethical for the tester, if seen as an agent of the attorney, to make contact with an employer who is represented by counsel.¹⁷¹ Professor Yelnosky seems to raise

166. 42 U.S.C. § 2000e-2(m) (Supp. V 1993).

167. 42 U.S.C. § 1981a (Supp. V 1993).

168. Yelnosky, *supra* note 31, at 430-34.

169. *Id.* at 446-51.

170. *Id.* at 452.

171. *Id.* at 455-58.

these issues only as straw men to be picked apart. Many of his claims regarding potential unethical activity have been refuted in an article published subsequent to his own.¹⁷²

Professor Yelnosky acknowledges that an employer presently does not have a breach of contract action whenever an applicant turns down a job offer. The possibility that some employers may begin to seek "certifications of a bona fide interest"¹⁷³ from job applicants is unlikely to impact the law significantly because few employers would be likely to risk the chilling effect such an action could have on the entire job application process. Testers are not that different from bona fide applicants who ultimately turn down a job offer.¹⁷⁴ Would employers want to invite a lawsuit every time that happened? These employer representatives probably have not thought through the potentially negative consequences for employers if they began to contractualize the job application process. Conversely, such a move might legitimate claims by all disappointed bona fide applicants that the employer had breached its obligation to consider their application in good faith whenever they did not receive an offer. This is hardly a road down which employers will want to venture.

Professor Yelnosky also raises a number of potential state law impediments to organizations who wish to engage in testing.¹⁷⁵ A shorthand response to these claims is that, if federal law gives private parties a right to test to litigate against employment discrimination, then these state law claims will be preempted if they unduly burdened that right.¹⁷⁶ In particular, Professor Yelnosky recognized the possible application of *NAACP v. Button*¹⁷⁷ to the claim of barratry. In that case, the Court held that Virginia violated the First Amendment by using its barratry statutes to bar a lay organization from advising Blacks of their legal rights against racial segregation and referring them to a particular attorney.¹⁷⁸ Such

172. Alex Y.K. Oh, *Using Employment Testers to Detect Discrimination: An Ethical and Legal Analysis*, 7 GEO. J. LEGAL ETHICS 473 (1993).

173. Yelnosky, *supra* note 31, at 448.

174. See *supra* notes 147-95 and accompanying text.

175. See Yelnosky, *supra* note 31, at 446-59, where he discusses the ethical obligation not to deal with another lawyer's client.

176. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding that federal law may preempt state law if the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). See Yelnosky, *supra* note 31, at 471-73.

177. 371 U.S. 415 (1963).

178. *Id.* at 426, 428-29.

litigation was deemed to be a form of political expression.¹⁷⁹ Professor Yelnosky, however, suggests that *Button* might not protect lawyers who counsel testers because “the use of testers is intended to create a cause of action and not simply to encourage individuals to assert existing causes of action.”¹⁸⁰ This distinction is not persuasive. In one sense, the cause of action exists in the employment arena in exactly the same way that a cause of action existed in the context of *Button*. One may safely presume that the defendant employer has regularly engaged in a pattern and practice of racially based refusals to hire Blacks in the same way that Virginia officials regularly refused to allow Blacks to attend public schools with whites. The only difference in the employment arena is that the racial discrimination is covert rather than overt as in *Button*. Discrimination’s covert quality does not mean that a cause of action does not exist, or that it is not an ongoing violation of the law. From this standpoint, the tester is merely collecting evidence to prove an already existent claim. Testing merely enables the right person—one who has been “injured” in standing parlance—to bring suit. This role is not very different from the one played in the context of Virginia’s segregated schools. Only persons who could prove a certain relationship with the defendant school board—current students who were “injured” by the policy—had standing to sue. As a practical matter, in both situations lay persons had to be informed by attorneys that their rights and the rights of those similarly situated were being violated.

Perhaps Professor Yelnosky is arguing that an attorney cannot advise a prospective client about the law of standing because this advice might generate client activity which would “create” a cause of action.¹⁸¹ An attorney does not function unethically in this context any more than an attorney who informed Black parents in Virginia that their children would have to transfer from private schools to the public schools if they wanted to have standing to sue the public school board to end racial segregation. Furthermore, an attorney who gives a lay person legal advice about how to become a “private attorney general” must be protected by Title VII because the statute is

179. *Id.* at 431.

180. Yelnosky, *supra* note 31, at 455.

181. *Id.* at 451.

designed to encourage lay persons to function in that role.¹⁸² Such activity furthers the public interest in attaining a discrimination-free workplace.

Only one case was decided involving testers in the employment context prior to the 1991 amendments. In *Lea v. Cone Mills Corp.*,¹⁸³ the lower court refused to award the plaintiff testers attorneys' fees because attorneys participated in "recruiting the plaintiffs."¹⁸⁴ The court of appeals disagreed, upholding the testers' rights to an injunction and attorneys' fees.¹⁸⁵

F. EEOC Authority with Regard to Testing

The EEOC has issued a policy guideline asserting that testers have standing to sue.¹⁸⁶ The EEOC backed away from exploring whether the agency itself had the authority to use testers after criticism from representatives of the business community.¹⁸⁷

Professor Yelnosky suggests that Congress should amend Title VII to authorize the EEOC to engage in testing because the agency does not have statutory authority to engage in testing before or after a charge has been filed.¹⁸⁸ Moreover, despite Professor Yelnosky's recognition that private parties who test have standing to sue, he also concludes that the EEOC "cannot . . . orchestrate the use of testers by private groups."¹⁸⁹

1. The EEOC's Authority to Coordinate and Utilize Testing by Others—Preliminarily, Professor Yelnosky's analysis does not take into account the provisions governing the EEOC's powers which are pertinent to the issue of whether it can be involved, either independently or in conjunction with others, in a program of testing to carry out its statutory mission.

182. See *Coles v. Willis*, 633 F.2d 384, 388 (4th Cir. 1980) (noting the role of plaintiffs in Title VII as "private attorneys general").

183. 301 F. Supp. 97 (M.D.N.C. 1969), *modified*, 438 F.2d 86 (4th Cir. 1971).

184. 301 F. Supp. at 102.

185. 438 F.2d at 88. One commentator, however, believes that "the *Lea* court's abbreviated analysis provides little to build upon and [that] the tester standing issue is not dispositively addressed." Anderson, *supra* note 45, at 1219.

186. *Policy Guidance*, Notice No. N-915-062, [2 Interpretations] EEOC Compl. Man. (CCH) ¶ 2168, at 2313-15 (Nov. 20, 1990).

187. See Yelnosky, *supra* note 31, at 409 n.17.

188. *Id.* at 468-69.

189. *Id.* at 462.

Yelnosky asserts that the Commission could not support private parties who engaged in testing, an activity that he presumes is lawful and legitimate,¹⁹⁰ although Title VII expressly states that “[t]he Commission shall have power—(1) to cooperate with and, with their consent, *utilize* regional, State, local, and other agencies, both public and private, and individuals.”¹⁹¹

This provision provides a reasonable basis to argue that the EEOC is empowered to work with private individuals, private organizations like the FEC, and even state agencies which do have the authority to engage in testing.¹⁹² Indeed, such a cooperative arrangement could prevent one of the very abuses of testing about which Professor Yelnosky expressed some concern. He indicated that employers who were not engaged in hiring discrimination could claim that the burden of processing applications of testers who actually were not seeking employment was cast upon them.¹⁹³ The EEOC collects data which, if shared with private organizations, would prompt the testers to avoid targeting employers with a profile of hiring minorities and women on a non-discriminatory basis.¹⁹⁴ To read the statute as blocking such cooperation is to impair the efficiency of the testing and to increase the number of innocent employers who are subjected to the process.

190. *Id.* at 415–29.

191. 42 U.S.C. § 2000e-4(g) (1988) (emphasis added).

192. Professor Yelnosky notes that the Massachusetts Commission Against Discrimination used testers in 1993 to enforce their local employment discrimination statutes. See Yelnosky, *supra* note 31, at 406 n.7 (citing *Massachusetts Agency Settles Job Tester Cases*, 1993 Daily Lab. Rep. (BNA) No. 77, at A-18 (Apr. 23, 1993)).

It is even possible that the Commission has the statutory authority to help finance a testing program undertaken by a state agency:

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, . . . within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research *and other projects* of mutual interest undertaken by such agencies

42 U.S.C. § 2000e-8(b) (1988) (emphasis added).

193. Yelnosky, *supra* note 31, at 414–15; see *supra* Part II.B.

194. Professor Yelnosky rightly observes that proof of hiring discrimination for low-level jobs is made more difficult because, “[g]enerally there is little if any paper record.” Yelnosky, *supra* note 31, at 412. The EEOC, however, has the regulatory power to define what records employers must “make and keep” that are “relevant to the determinations of whether unlawful employment practices have been or are being committed.” 42 U.S.C. § 2000e-8(c) (1988). Pursuant to this authority the Commission could begin to require employers with disproportionately low percentages of minorities and women to keep records on hiring decisions to fill the gap.

Testing requires organizational backing to provide training, discipline, and control of the process to produce a clear picture of discrimination.¹⁹⁵ This Article argues that because it is crucial that the testing process be guided in a fair manner, entities such as the FEC should have organizational standing to sue in addition to the persons used as testers. Indeed, as Professor Yelnosky notes, employer representatives have called for the EEOC to establish some "minimum standards of fairness [to] be observed by testers."¹⁹⁶ Congress empowered the EEOC to give "technical assistance and training regarding the laws" it enforces,¹⁹⁷ and this could provide the statutory basis for training private organizations that wish to set up testing programs.

As previously suggested, employers could use the testing process to establish a litigation-free means of uncovering hiring discrimination that may occur at lower levels in the corporation, unbeknownst to superiors in the company.¹⁹⁸ The Commission could aid employers in structuring an internal testing program because it is empowered "to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder."¹⁹⁹

Using testers is an excellent means of gauging the extent of hiring discrimination in employment, as revealed by studies conducted by the Urban Institute.²⁰⁰ The Commission is authorized to engage in research independently or in conjunction with state and local fair employment practice agencies and to publish the results.²⁰¹ Under these provisions, the Commission could conduct a research program using testers to

195. Coordination also could avoid entangling innocent employers in poorly conducted testing.

196. Yelnosky, *supra* note 31, at 407 n.14.

197. "The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission." 42 U.S.C. § 2000e-4(j)(1) (Supp. V 1993).

198. See *supra* note 120 and accompanying text.

199. 42 U.S.C. § 2000e-4(g)(3) (1988).

200. See *Urban Institute, supra* note 109, at A-4.

201. Title VII provides that "[t]he Commission shall have the power— . . . (5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;" 42 U.S.C. § 2000e-4(g) (1988), and that "[t]he Commission may cooperate with State and local agencies charged with the administration of State fair employment practice laws and . . . engage in and contribute to the cost of research." *Id.* § 2000e-8(s).

gauge the level of hiring discrimination nationally or in any given region. Professor Yelnosky's conclusion would mean that the Commission could not use evidence of discrimination gathered in such research to file a charge, or in support of a private individual's charge, no matter how compelling.

2. *The EEOC's Authority to Engage in Testing*—The foregoing reveals the multiple means that empower the Commission to be involved indirectly with a testing program. Professor Yelnosky's conclusion that the Commission is forbidden to use testers directly to uncover or prove discrimination, either before a plaintiff files a charge or after, is also deeply flawed. Professor Yelnosky bases his argument that the EEOC lacks authority to conduct an undercover operation upon a single court decision that determined that the EEOC could not be sued under the Federal Tort Claims Act (FTCA) because the FTCA only authorized suits against criminal law enforcement agencies.²⁰²

The problem with this argument lies in some of its assumptions. First, Professor Yelnosky assumes that the undercover operation conducted in employment testing is identical to an undercover criminal investigation.²⁰³ Second, he assumes that criminal law enforcement agencies have a monopoly on a specific mode of detecting violations of the law. Third, he assumes that a civil law enforcement agency must be given this monitoring authority expressly.²⁰⁴

The activity of the EEOC is unlikely to exceed the bounds of the Fourth Amendment. Professor Yelnosky fails to consider that the judiciary's exertion of constitutional control and its imposition of a standard requiring express statutory authority varies with two factors: (1) the seriousness of the consequences for the citizen, i.e., criminal sanctions as compared to civil penalties; and (2) the degree of intrusiveness of the investigative techniques on citizens' liberty, property, and privacy.²⁰⁵

202. Yelnosky, *supra* note 31, at 462. Professor Yelnosky states that the EEOC lacks "traditional law enforcement powers, such as the power to conduct undercover operations." *Id.* His citation of *EEOC v. First Nat'l Bank of Jackson*, 614 F.2d 1004 (5th Cir. 1980), makes it clear that by "traditional" law enforcement powers, he refers to agencies with criminal law investigative powers and the right to make arrests.

203. *See supra* note 201.

204. "The Commission is permitted to conduct only those investigations identified in the provisions of Title VII." Yelnosky, *supra* note 31, at 461. "Congress did not explicitly authorize the Commission to conduct undercover operations." *Id.* at 462.

205. *Camara v. Municipal Ct.*, 387 U.S. 523, 537 (1967) (upholding the issuance of a warrant for housing inspection on something less than traditional probable

The Fourth Amendment does place strictures on investigations in the civil arena, but because no liberty or incarceration consequences generally exist, civil authorities are given wider investigative scope and need not meet the stringent probable cause thresholds that are a pre-condition to criminal investigations.²⁰⁶ The strongest controls are placed on criminal law enforcement agencies because they have the power to obtain a warrant to search and seize and to arrest—the most intrusive investigative techniques. In contrast, civil agencies such as the EEOC typically lack authority to search or to gain custody over a person.²⁰⁷ Before the activity of either a civil or criminal agency is deemed to be covered by the Fourth Amendment, it must rise to the level of a search or seizure.²⁰⁸ The use of undercover agents who interact with a willing defendant is so remote from an intrusion of the defendant's privacy or property interests that courts do not consider such actions a search or seizure within the definition of the Fourth Amendment.²⁰⁹ Therefore, a law enforcement agency does not need to acquire a warrant prior to engaging in such activity even when it has time to secure one.²¹⁰ The only controls that courts have placed on the use of undercover agents by law enforcement agencies in a purely investigative stage is a prohibition on entrapment. An agency cannot go beyond mere fact-gathering in order to deliberately induce a citizen to violate the law.²¹¹ Professor Yelnosky acknowledges that a properly controlled use of testers poses no risks of entrapment.²¹²

Employment testing is critically different from an undercover operation conducted by criminal law enforcement

cause, in part, because the "inspections are neither personal in nature nor aimed at the discovery of evidence of crime").

206. *Marshall v. Barlows, Inc.*, 436 U.S. 307, 320 (1977).

207. One example is the Occupational Safety & Health Administration (OSHA). BENJAMIN W. MINTZ, *OSHA: HISTORY, LAW AND POLICY* 335-529 (1984).

208. *See Oliver v. United States*, 466 U.S. 170, 177 (1984) (holding that surveillance of activity in an open field is not a search within the meaning of the Fourth Amendment, and thus requires no warrant or probable cause).

209. *United States v. White*, 401 U.S. 745, 749 (1971); *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

210. *See White*, 401 U.S. at 749.

211. The Court limited the government's use of undercover agents after criminal charges have ripened into adversarial proceedings, but the interests protected there are not privacy or property, but rather the defendant's access to counsel. *See Brewer v. Williams*, 430 U.S. 387, 398-99 (1977).

212. Yelnosky, *supra* note 31, at 474-81.

officials. To be valid and useful, testing must be strictly observational and not—as it must be in the criminal context²¹³—an interaction with a putative defendant that creates an impression that a violation of law is being invited. Civil agencies often engage in activity which is, in essence, identical to employment discrimination testing. They put staff in a place where they can observe directly whether the companies governed by the agency are complying with the law in the ongoing conduct of their business.²¹⁴

Professor Yelnosky's assumptions contravene the general standards that courts have developed in interpreting the breadth of a federal agency's investigatory authority. The general rule is that an agency's investigative authority extends to those techniques which are reasonable in the light of the enforcement tasks that the agency confronts. Where a specific technique is a reasonable extension of a basic statutory authority to investigate, the federal agency "need not have specific regulatory authority for each and every one of its inspection and investigational procedures."²¹⁵

Professor Yelnosky's failure to recognize the relative lack of intrusion or burden on potential defendants in the tester process allows him to assume that testing must be treated similarly to the formal investigative process, which can ensue only *after* a charge has been filed and notice given to the employer.²¹⁶ In fact, although the EEOC cannot coerce an employer to produce information prior to a charge being filed, nothing prevents the EEOC from undertaking an investigation such as a testing program prior to filing a charge.

213. An investigator in the criminal context must pose as a ready cooperater in the violation of the criminal law in order to disguise his true identity and avoid being attacked. PETER L. ZIMROTH, *PERVERSIONS OF JUSTICE—THE PROSECUTION AND ACQUITTAL OF THE PANTHER 21*, 160–64 (1974) (describing an account of an undercover agent assigned to a group that police believed was plotting to bomb public facilities in New York City).

214. See *In re* Establishment Inspection of Metro-East Mfg. Co., 655 F.2d 805, 812 n.14 (7th Cir. 1981) (noting that OSHA inspectors are authorized to wear personal sampling devices while in an employer's workplace to record violations with regard to the toxicity in the air).

215. *In re* Establishment Inspection of Kelly-Springfield Tire Co., 13 F.3d 1160 (7th Cir. 1994) (allowing videotaping by OSHA inspectors of employees in the employer's workplace to gauge alleged ergonomic hazards, although regulations did not expressly authorize this technique).

216. Yelnosky, *supra* note 31, at 463.

All of the cases that Yelnosky cites²¹⁷ to support his claim that the Commission cannot investigate prior to filing a charge actually stand for the proposition that the EEOC cannot obtain a contempt citation for a business's failure to turn over documentation until after a charge is filed.²¹⁸ These cases are inapplicable because the EEOC would not attempt to enforce a contempt citation against an employer during a testing investigation. Further, the limits in these cases are not applicable to testing. The very essence of the technique is that the defendant is not coerced into giving information, but is merely observed in the normal course of doing business. The defendant controls the hiring process and voluntarily invites the public to participate, exposing only as much of its business practices as it chooses. By using the tester technique, the Commission merely steps into that process to observe whether the defendant's voluntarily initiated process observed the rights of applicants to nondiscriminatory treatment.

Compared with the EEOC's formal investigatory process, testing is much less burdensome. All the investigative powers which the Commission may utilize after a charge is lodged could impose substantial costs on the defendant. An employer could be forced to produce evidence, allow inspection and copying of documents, and allow access to his premises, even against his will.²¹⁹ Congress placed limitations on this part of the Commission's investigative powers and allows employer-defendants to challenge Commission requests for information which are burdensome or irrelevant.²²⁰ An employer who is tested is not overwhelmed with informational demands, such as could occur in the more formal EEOC investigative process. Thus, there is no need, in terms of fairness, for notice and an opportunity to challenge this kind of fact gathering. The Commission would secure no more information about an

217. *Id.* at 463 n.273.

218. A typical statement is that made by the Court in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984). "[T]he EEOC's investigatory authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to *demand* to see records relevant to matters within their jurisdiction . . ." *Id.* at 64 (emphasis added). The EEOC is only limited in its authority to inspect or secure information by relying on the coercive power of a court.

219. 42 U.S.C. § 2000e-8(a) (1988) (right to copy documents); 29 U.S.C. § 161(1) (1988) (right to subpoena); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1977) (right to inspect).

220. Indeed, some statutory control of this process may be constitutionally mandated to protect citizens from unbridled governmental intrusions and disruptions of business. See *Marshall*, 436 U.S. at 324 n.22.

employer's hiring process than a private person could secure prior to filing a charge. Finally, Professor Yelnosky's attempt to analogize limitations on the EEOC authority to investigate prior to the filing of a charge with that of the National Labor Relations Board²²¹ (NLRB) is inapposite because the NLRB, unlike the EEOC, has no authority to initiate charges on its own.²²²

Professor Yelnosky's contention that no provision for investigation exists prior to filing a charge ignores an important investigation that the EEOC does undertake before it files a charge. The Commission has the power to require employers to submit reports that are "reasonable, necessary, or appropriate" for enforcement of the statute.²²³ The Commission collects reports annually from employers detailing the racial and gender composition of their workforce.²²⁴ The data in these reports can become the basis for a Commissioner's charge of discrimination. Moreover, courts have held that when an employer is obliged to make reports to a federal agency to show compliance with the statute, the agency can make non-intrusive investigations to verify the accuracy of the

221. Yelnosky, *supra* note 31, at 463 n.273.

222. Note, however, that the NLRB has ruled that employers commit an unfair labor practice when they refuse to hire a union staff member solely because she is simultaneously on the payroll of the union and organizes and acts as a watchdog regarding the employer's violations of the National Labor Relations Act. Three circuits have agreed with the Board. *See Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992); *Escada (USA), Inc. v. NLRB*, 140 L.R.R.M. (BNA) 2872 (3d Cir. 1992), *enforcing* 304 N.L.R.B. 845 (1991); *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979) (dictum); *Sunland Constr. Co.*, 309 N.L.R.B. 1224 (1992). Two circuits have disagreed. *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 73 (4th Cir. 1989); *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964).

The noted labor scholar, William B. Gould IV (now Chairman of the NLRB) believes that pursuing full-time employment ought to be a practice of both unions and civil rights organizations:

The recent record of "testers" . . . in connection with employment discrimination litigation makes it clear that the role of such individuals is important to effective enforcement of the statute. Enforcement of labor law and anti-discrimination law is promoted through the use of sophisticated full-time representatives of unions or civil rights organizations, whose purpose in the employment relationship involves more than assuming the role of applicant or employee.

WILLIAM B. GOULD IV, AGENDA FOR REFORM—THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 24 (1993).

223. 42 U.S.C. § 2000e-8(c)(3) (1988).

224. Employers subject to Title VII with 100 or more employees are required to file annual reports detailing the race and gender of employees by job classification. 29 C.F.R. § 1602.7 (1994).

employer's reports.²²⁵ The EEOC could use testers to verify that an employer follows the nondiscriminatory hiring policy that its reports suggest.

Professor Yelnosky acknowledges that it "may seem incongruous" that the Commission has the power to initiate charges but lacks the power to engage in pre-charge investigations before doing so.²²⁶ He argues that this incongruity is resolved because the Commission can file charges without "reasonable cause" to believe a violation occurred, and can institute its investigation to substantiate the charge later.²²⁷ The courts have established a low threshold for filing a Commissioner's charge.²²⁸ These decisions can be supported with the speculation that Congress may have sought to prevent early, and perhaps dilatory, challenges to the initial filing of a Commission charge. This conclusion does not mean that Congress thought it desirable for unsubstantiated charges to be filed or that the Commission should forgo easily available evidence before filing a charge. Congress placed limits on the Commission's formal investigatory powers to protect employers, but it is hardly protective of employers for the Commission to forgo a simple, informal monitoring technique that could preclude some employers from ever being charged or investigated further.

Excluding the powers of discovery during litigation, private parties lack the range of investigatory powers that the Commission possesses after a charge has been filed. Professor Yelnosky's reading of Title VII would mean that, despite the fact that the Congress gave the Commission that superior right of investigation, it gave the Commission less informal investigative power in the area of testing. The unreasonableness of Yelnosky's interpretation is further highlighted by Congress's action to strengthen enforcement in 1972 by authorizing the Commission to file charges in its own name.²²⁹ Yelnosky's

225. *Service Founding Co. v. Donovan*, 721 F.2d 492, 497-98 (5th Cir. 1983) (holding that OSHA need not rely exclusively on employer reports designed to reveal compliance with air emission standards; it can verify those reports by attaching personal sampling devices to OSHA employees to wear for monitoring purposes).

226. Yelnosky, *supra* note 31, at 466.

227. *Id.*

228. See Professor Yelnosky's account of the "loosening" of constraints on Commissioner's charges under the 1972 amendments. *Id.* at 468.

229. See *PLAYER*, *supra* note 74, at 201-02. "Title VII was significantly amended by the Equal Employment Opportunity Act of 1972. A primary impetus for the 1972 Amendments was a desire of civil rights advocates to provide the Equal Employment Opportunity Commission (EEOC) with enforcement power." *Id.* at 202.

interpretation attributes inconsistent motives and outcomes to Congress rather than following its explicit goals.

III. THE NEED FOR ACTION BY CONGRESS

Congressional action is not required before the EEOC can participate in testing for hiring discrimination. Congressional action may be needed, however, to enable the EEOC to coordinate activity in this field and to utilize the most effective testing techniques.

Testing conducted merely by presenting Blacks and whites who actually possess similar levels of education and work experience does not present the problems which may exist if testers misrepresent their education and experience. Yet it may prove difficult to find Blacks and whites with identical backgrounds, especially if the testing is done for high-level employment as proposed in this Article. Therefore, it might be desirable for the organization conducting testing to retain some flexibility to misrepresent the backgrounds of the testers. This would be an especially appropriate role for the EEOC.

Misrepresentation of one's background in order to obtain employment constitutes a serious problem and is already illegal.²³⁰ For example, a person who files an application for employment with a federal agency that includes materially false statements could be subjected to a criminal charge.²³¹ A few state statutes make false statements in employment applications a civil or criminal breach of the law.²³² A recent

230. Senator Alan Simpson, during deliberations on the 1991 Civil Rights Act, considered introducing an amendment to the Act that would prohibit the EEOC from misrepresenting the education, experience, or other qualifications of persons used as testers. *See supra* note 117.

231. 18 U.S.C.A. § 1001 (West Supp. 1995) makes it a crime to give false statements to departments or agencies of the United States government in the transaction of business.

232. ME. REV. STAT. ANN. tit. 32, § 9412 (West 1988) (making it a criminal violation for a person seeking employment as a licensed private security guard to "make any false statement or material omission in any application, . . . filed with the commissioner"); MO. REV. STAT. § 289.060 (1986) (making any applicant for employment liable for fees that she would have been obligated to pay her employment agency, even though she has lost the employment through material misrepresentations of fact in her employment application); N.C. GEN. STAT. § 14-122.1 (1994) (making it a criminal violation to "make a false written representation of fact that he has received a degree or other certification signifying merit, achievement, or completion of an educational program involving study, experience, or testing from a secondary school, a

article noted that most state legislation does not expressly control all false statements in employment applications, but primarily prohibits submission of false or forged academic credentials while securing employment or obtaining admission to a profession or educational institution.²³³ Credible studies "estimate that between twenty and thirty percent of all working persons have embellished their credentials."²³⁴ That number represents an astoundingly high percentage of misrepresentations concerning crucial facts. More state and federal legislation would be appropriate not only to penalize the submission of false academic diplomas but also to penalize any misrepresentations in applications for employment.

Strengthening legislation would pose minimal problems for a tester program. A tester program which has been as tightly controlled and disciplined as the one mounted by the Fair Employment Council would unlikely be subjected to criminal charges.²³⁵ The goal of such a program is not to secure actual employment for the tester under false credentials: therefore, the conduct does not satisfy the mens rea element of the criminal charge as required, for example, under the federal law.²³⁶ The current federal and state legislation is not expressly aimed at a tester situation because such legislation is designed to punish persons actually seeking to obtain employment or admission to a profession through fraudulent behavior.²³⁷ Such

postsecondary educational institution or governmental agency in an application for: (a) Employment"); R.I. GEN. LAWS § 11-18-1 (1994) (making it a misdemeanor to knowingly provide an agent of an employer with any document containing false statements).

233. See Joan E. Van Tol, *Detecting, Deterring and Punishing the Use of Fraudulent Academic Credentials: A Play in Two Acts*, 30 SANTA CLARA L. REV. 791, 819-22 (1990) (citing 12 states which have enacted statutes that regulate the use of academic credentials).

234. *Id.* at 794.

235. Nevertheless, Claudia Withers, Director of the FEC, stated that her organization employed testers only against private employers because of legislation that made the submission of false credentials to public bodies unlawful. Withers Interview, *supra* note 29.

236. *United States v. Lange*, 528 F.2d 1280, 1287-88 (5th Cir. 1976) (holding that a false statement is insufficient to sustain a criminal conviction, for there must be proof of an intent to gain a material advantage on the basis of the falsity).

237. *Cf. Jimerson v. Kisco Co.*, 542 F.2d 1008 (8th Cir. 1976). Employers may, naturally, discharge people who have made material misrepresentations on an employment application.

The discovery of misrepresentations also may protect an employer in instances where a former employee makes a claim that his discharge was motivated by discrimination because of the so-called after-acquired evidence rule, which permits employers to defend a discrimination charge with evidence gathered during litigation.

legislation does, however, evidence a general public policy of discouraging deliberately constructed misstatements in the employment process. In addition to the burden on employers who may suffer the expense of hiring, and then firing a person who is unqualified—some in very sensitive positions—employers are forced to bear the additional costs of verifying all of an applicant's statements to determine whether the applicant submitted a false application. Although a tester program using fabricated credentials would not ultimately violate the legislation prohibiting misrepresentations in the employment application process, strong public policy reasons argue for limitations on the individuals who would be allowed to resort to the technique.²³⁸ If any need exists for Congressional attention to the tester process, it would be in this discrete arena.²³⁹ Arguably, either the EEOC should be the only entity allowed to arm its staff with false credentials, or other organizations should be required to obtain approval from the EEOC. Because the employment testing process is much more complicated than testing in the housing arena, Congress should consider funding the EEOC to provide training and guidance to private organizations.

The circuits disagree, however, whether such after-acquired evidence operates as a total or partial defense. See Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 159-71 (1993). The Supreme Court recently resolved that disagreement when it determined that after-acquired evidence of a former employee's wrongdoing can bar reinstatement, but does not bar all recovery. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885-86 (1995).

238. Arguments that state legislation which prohibits misrepresentations in the employment application process were preempted would probably fail. Where Congress has not expressly preempted state legislation, the courts are less likely to find preemption where the state has strong public policy reasons for a right to continued control over the subject matter. See *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977). In any event, the preemption argument would not be applicable to the federal legislation that also prohibits falsification of credentials in the application process. The courts are likely to read the two pieces of legislation together to see if both can survive. In that event, the courts likely would find that Title VII permits testing, but that it cannot be done by a misrepresentation of credentials where it is unlawful under state or federal law.

239. Congress should take action on only one other matter: it should clarify that an organization like the Fair Employment Council could be structured solely to prepare and process testers and still retain standing to sue. See *supra* notes 42-64 and accompanying text.

CONCLUSION

Discrimination on the grounds of race, ethnicity, gender, and age are still widespread in our society. It is not surprising that stereotypes and the habits they foster have lingered. Discrimination in employment was made illegal by federal statute approximately thirty years ago, but discrimination on the basis of sex or race has been an active phenomenon since the founding of our nation.

It is a sign of progress that those who practice such discrimination now must do so covertly. The change in the character of discrimination calls for new techniques to fight it. Using testers in the employment field is one of those techniques, and it is heartening that the courts that have dealt with this new approach have been receptive. If the major litigator against employment discrimination—the EEOC—began to utilize the new approach, the technique could present a real impetus to the employer community to change its practices or to monitor its hiring process more closely. This powerful tool is legitimately within the present arsenal of the EEOC. The only legislative attention that is needed is control over the presentation of credentials to targeted employers.

