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## Salvaging the Opportunity: A Response to Professor Clark

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# SALVAGING THE OPPORTUNITY: A RESPONSE TO PROFESSOR CLARK

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Michael J. Yelnosky\*

*In this Article, Professor Yelnosky responds to Professor Clark's critique of his previous article, Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs. Professor Yelnosky first clarifies that Professor Clark has adopted several of the points Professor Yelnosky originally made in his earlier article. He then responds to the portions of Professor Clark's article that challenge his prior conclusions. He builds on and defends his previous arguments that: (1) testing is best suited to uncover hiring discrimination for lower-skilled jobs; (2) disincentives to bringing tester lawsuits make it unwise to rely on private parties and organizations to use testers sufficiently; (3) the EEOC currently lacks the statutory authority to engage in or fund testing for employment discrimination; and (4) Congress should amend Title VII to expressly authorize EEOC participation in testing. Professor Yelnosky discusses the Fair Housing Initiatives Program (FHIP) as a potential model statutory framework. FHIP authorized the United States Department of Housing and Urban Development to fund testing by private groups and individuals and has proven to be an effective and popular program for combatting housing discrimination.*

## INTRODUCTION

Unfortunately, Professor Clark has not acknowledged the many ways in which his reply<sup>1</sup> to my earlier article<sup>2</sup> borrows from my work. To minimize any misunderstanding of the content of my article created by Professor Clark's characterization, I feel compelled first to summarize my earlier

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

2. 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).

article.<sup>3</sup> A summary also helps to identify the issues on which Professor Clark and I genuinely disagree. Those issues will be the primary focus of this response.

In my earlier article, I asserted that employment discrimination is still widespread.<sup>4</sup> I identified reasons why less than an optimal number of Title VII cases challenging hiring decisions have been filed.<sup>5</sup> I opined that this difference between the optimal and actual number of cases challenging hiring decisions, which I described as an "enforcement void," was greatest with respect to cases challenging hiring decisions involving lower-skilled, entry-level jobs.<sup>6</sup> I suggested that the use of testers<sup>7</sup> might be an effective technique to fill this enforcement void.<sup>8</sup> The technique appeared promising because it could generate meaningful evidence of discrimination while imposing few costs on the "tested" employers.<sup>9</sup> Furthermore, I concluded that a tester who is not considered equally for employment with other applicants on the basis of a prohibited characteristic has standing to sue under Title VII of the Civil Rights Act of 1964.<sup>10</sup> In support of this conclusion, I showed that Congress created a right under Title VII to be considered for employment regardless of race, color, religion, sex, or national origin. That right does not depend on the applicant's willingness to entertain a job offer.<sup>11</sup>

In his reply to my article, Professor Clark argues, as I did, that there is reason to believe that employment discrimination persists.<sup>12</sup> He argues, as I did, that special obstacles to suit help explain why Title VII is used more often to

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3. My prior work speaks for itself, but some readers' thirst for information about testing for hiring discrimination may be quenched by reading the two Articles in this volume.

4. Yelnosky, *supra* note 2, at 410.

5. *Id.* at 410-11.

6. *Id.* at 410-13.

7. The Equal Employment Opportunity Commission (EEOC) defines testers as "individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices." Notice No. N-915-062, [2 Interpretations] EEOC Compl. Man. (CCH) ¶ 2168, at 2313-15 (Nov. 20, 1990) [hereinafter *EEOC Policy Guidance*].

8. Yelnosky, *supra* note 2, at 413-15.

9. *Id.* at 414.

10. *Id.* at 415; 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)). Prohibited characteristics under Title VII are race, color, religion, sex, and national origin. *See, e.g.*, 42 U.S.C. § 2000e-2 (1988).

11. Yelnosky, *supra* note 2, at 415-29.

12. Compare Clark, *supra* note 1, at 2-3 with Yelnosky, *supra* note 2, at 410.

challenge discharges than hiring decisions.<sup>13</sup> He argues, as I did, that using testers may be an effective means of uncovering hiring discrimination.<sup>14</sup> He argues, as I did, that testers have standing to sue under Title VII to enforce their right to equal treatment.<sup>15</sup>

After I concluded that testers who receive disparate treatment have standing to sue under Title VII, I suggested that because of certain obstacles, relying on private groups and individuals to use testers to fill the enforcement void might be unwise.<sup>16</sup> I speculated that while the law in this area was murky, testers might be threatened with common-law liability for breach of contract or fraud, and that lawyers intimately involved in recruiting, training, and orchestrating testers for purposes of litigation might be threatened by possible breaches of the rules of professional responsibility.<sup>17</sup> I suggested that these threats might deter the use of testers.<sup>18</sup> I also predicted that testers might be underutilized because of legal doctrines that could limit the available relief, including attorneys' fees.<sup>19</sup>

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13. Compare Clark, *supra* note 1, at 5 with Yelnosky, *supra* note 2, at 411-13.

14. Compare Clark, *supra* note 1, at 6 with Yelnosky, *supra* note 2, at 413-15.

15. Compare Clark, *supra* note 1, at 10-20 with Yelnosky, *supra* note 2, at 415-29. *Sub silentio*, Professor Clark has adopted my positions as his own, and at other times he misrepresents my previous work by suggesting his positions on these issues are contrary to mine. Although Professor Clark acknowledges that he agrees with my conclusion that testers have standing to sue under Title VII, Clark, *supra* note 1, at 7 n.31, not once does he cite to my prior analysis in reaching the same conclusion. For example, he does not acknowledge that I argued, as he now does, that under the analysis articulated by William Fletcher in William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988), testers have standing to sue under Title VII. Yelnosky, *supra* note 2, at 417-29.

My hunch is that his role as an incorporator of the Fair Employment Council, Clark, *supra* note 1, at 6 n.25, an organization established to "utilize testing to address equal employment issues," Roderic V.O. Boggs et al., *Use of Testing in Civil Rights Enforcement*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 345, 348 (Michael Fix & Raymond J. Struyk eds., 1993) [hereinafter CLEAR AND CONVINCING EVIDENCE], has something to do with his desire to claim the territory for himself. Regardless, his tactics are more consistent with advocacy than scholarship. Cf., Paul F. Campos, *Advocacy & Scholarship*, 81 CAL. L. REV. 817, 850 (1993) (describing scholarship as communication that derives its value from a pursuit of truth and advocacy as communication with no other purpose than to achieve some instrumental goal).

16. Yelnosky, *supra* note 2, at 429-45.

17. *Id.* at 446-59.

18. *Id.*

19. *Id.* at 429-45. In addition to attorneys' fees, I considered injunctive relief, declaratory relief, nominal damages, compensatory damages, and punitive damages. *Id.* I questioned the soundness of a number of the decisions that limit available remedies because they disregard Congress's purpose in Title VII to authorize

I expected to find that the Equal Employment Opportunity Commission (EEOC or Commission) could exercise its investigatory and enforcement power to engage in testing to fill the enforcement void. I discovered, however, that Congress had intentionally limited the agency's investigatory authority and did not grant it the power to use testers to enforce Title VII.<sup>20</sup>

Thus, I concluded that testing would be an effective means of supplementing the current Title VII enforcement scheme. I was concerned, however, that private groups and individuals would not step in to use testers to fill the enforcement void, and I was certain the EEOC did not have the power to use testing.<sup>21</sup> Therefore, I proposed that Congress amend Title VII to authorize the EEOC to use testers to uncover and remedy discrimination in hiring for lower-skilled, entry-level positions.<sup>22</sup> I favored a "public enforcement" model because the EEOC already is authorized to litigate Title VII cases in the public interest and because it seemed the most efficient way to assure that testing would be used only in instances where its potential benefits outweighed its costs.<sup>23</sup> I suggested, however, that "the Commission might contract with private groups to engage in testing according to standards and practices promulgated by the EEOC."<sup>24</sup>

Professor Clark questions the wisdom of limiting the use of testers to uncovering discrimination in hiring for lower-skilled, entry-level jobs.<sup>25</sup> He does not share my concern that private groups and individuals might be deterred from using testers,<sup>26</sup> and he challenges my conclusion that the EEOC does not have the statutory authority to engage in testing.<sup>27</sup> He ultimately agrees with my view, however, that Congress should amend Title VII to give the EEOC a special role in this area.<sup>28</sup> He is concerned, as a matter of public policy, about testers making misrepresentations in an uncontrolled

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individual plaintiffs to serve as private attorneys general to vindicate the rights of others. *Id.* at 438 nn.164-65.

20. *Id.* at 459-69.

21. *Id.*

22. *Id.* at 469.

23. *Id.* at 469-73.

24. *Id.* at 470 n.314.

25. Clark, *supra* note 1, at 20-23.

26. *Id.* at 25-26.

27. *Id.* at 37.

28. *Id.* at 46.

fashion when ostensibly applying for employment.<sup>29</sup> He concludes that Congress should amend Title VII to permit only the EEOC or private groups authorized by the EEOC to use testers who present false credentials to employers.<sup>30</sup>

Professor Clark's unwillingness to acknowledge our common ground is disappointing because the EEOC currently is reconsidering the methods it historically has employed to enforce Title VII and is looking specifically at the role that testers could play in a new enforcement focus at the agency.<sup>31</sup> Therefore, it is essential to illuminate further the important enforcement issues posed by the use of testers. This response to Professor Clark attempts to salvage the opportunity to discuss constructively the role that testers could play in a new era of Title VII enforcement.

Part I of this Article responds to Professor Clark's assertion that testing should not be limited to uncovering discrimination in hiring for lower-skilled, entry-level positions as I had proposed, but rather should be used to ferret out discrimination in hiring for higher-level positions. I argue that Professor Clark's enthusiasm for the technique has caused him to ignore its inherent limitations. Part II reasserts my concern that it might be unwise to assume that private groups and individuals will engage in an optimal amount of testing. Part III defends my conclusion that the EEOC currently lacks the authority to fill the Title VII enforcement void through its own testing. Part IV concludes with a discussion of a statutory scheme that Congress should consider as a model in incorporating the use of testers in the EEOC's enforcement arsenal. To uncover housing and mortgage-lending discrimination, Congress authorized the Department of Housing and Urban Development (HUD), in the Fair Housing Initiatives Program (FHIP),<sup>32</sup> to

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29. *Id.* at 48.

30. *Id.*

31. *E.g., Commissioner-Led Task Forces Will Probe EEOC's Major Concerns*, 1994 Daily Lab. Rep. (BNA) No. 230, at AA-1 (Dec. 2, 1994) (reporting that three task forces—focusing on charge processing, alternative dispute resolution, and the relationship between the EEOC and state and local fair employment agencies—were created by Chairman Gilbert Casselas to “address the major operational concerns” at the EEOC); *EEOC Chairman Faces Staggering Task With 94,000 Complaints on Docket*, 1994 Daily Lab. Rep. (BNA) No. 206, at AA-1 (Oct. 27, 1994) (reporting that EEOC Chairman Casselas characterized testers as a “useful” tool, while acknowledging that the EEOC had not yet addressed the possibility of using testers in either investigations or litigation).

32. Fair Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 561, 101 Stat. 1942 (codified as amended at 42 U.S.C. § 3616a (Supp. V 1993)).

fund testing by private groups and individuals according to guidelines and standards set by Congress and the agency. Congress should give the EEOC similar authority to use testers to uncover and remedy hiring discrimination.

### I. THE FOCUS ON LOWER-SKILLED, ENTRY-LEVEL JOBS

I asserted in my earlier article that despite a persistent gap in labor force participation between white and black workers—attributable in part to discriminatory hiring practices<sup>33</sup>—Title VII is used most often to challenge discharges rather than hiring decisions.<sup>34</sup> I asserted that this anomaly is based on several disincentives to suits challenging hiring decisions,<sup>35</sup> and that the resultant underenforcement problem is particularly acute with lower-skilled, entry-level positions.<sup>36</sup> In hiring for such jobs, “[c]ontact between the applicant and the employer . . . is typically fleeting,’ the eventual outcome and the make-up of the applicant pool are unknown to the applicant, the applicant knows little about the decisionmakers, and ‘the process itself rarely signals exclusionary intent.’”<sup>37</sup> Problems of proof, which are present in all hiring cases, may be worse with lower-skilled jobs because generally there exists little, if any, paper record.<sup>38</sup> Moreover, where the job in question pays a relatively low wage, potential plaintiffs are less likely to have the resources to pay counsel a retainer or an

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33. Yelnosky, *supra* note 2, at 410 & n.21.

34. *Id.* at 411. For instance, between 1989 and 1991, discharge cases outnumbered hiring cases by approximately seven to one. *Id.* at 411 n.23.

35. First, discharged employees may be likely to sue to protect the investment of time and energy they have made in the firm, whereas an individual discriminated against in hiring will have less incentive to sue, especially if she has subsequently secured a job. *Id.* at 412. Second, discharged employees are more likely to have access to the information that might lead them to suspect discrimination than those who never have been employed by the firm. *Id.*; see also Ronald Turner, *A Look at Title VII's Regulatory Regime*, 16 W. NEW ENG. L. REV. 219, 237 (1994) (explaining that an individual turned down at the hiring stage “most likely will not be in a position to shape, and prove, a claim of discrimination” when that individual is not familiar with the racial or gender makeup of the prospective employer’s work force and does not know the reason for, or person behind, the decision not to hire).

36. Yelnosky, *supra* note 2, at 412–13.

37. *Id.* at 412 (quoting Michael Fix et al., *An Overview of Auditing for Discrimination*, in CLEAR AND CONVINCING EVIDENCE, *supra* note 15, at 1, 13–14).

38. *Id.* at 412.

hourly fee, and the backpay remedy from which a contingency fee might come is limited.<sup>39</sup>

I suggested that the success of the testing technique in identifying housing discrimination makes the technique a plausible candidate to help fill the Title VII hiring discrimination enforcement void.<sup>40</sup> The success of testing in the housing context seemed easiest to extrapolate to hiring discrimination in lower-skilled, entry-level positions because "the hiring process for lower-skilled, entry-level positions is usually a summary one, very similar to the rental of a housing unit."<sup>41</sup> As with housing, "[i]t is possible to monitor . . . these transactions without becoming involved in the kind of complex interpersonal exchanges that would entail outcomes based largely on subjective criteria."<sup>42</sup> Moreover, in selecting among applicants for higher-skilled, upper-level positions, an employer may expend significantly more time screening, testing, interviewing, and otherwise evaluating candidates' fitness for employment.<sup>43</sup> Finally, I noted that feigning the qualifications, knowledge, and experience necessary to test for discrimination in hiring for some higher-skilled positions posed significant problems for recruiting or training effective testers.<sup>44</sup>

Professor Clark questions the wisdom of limiting testing to lower-skilled, entry-level jobs.<sup>45</sup> I certainly agree with his assertion that there are reasons to suspect widespread discrimination in hiring for jobs at all levels of the American economy.<sup>46</sup> I cannot agree, however, with Professor Clark's suggestion that using testers to improve the enforcement of Title VII in the context of hiring for lower-skilled jobs would waste resources.<sup>47</sup> First, as Professor Clark acknowledges, in

39. *Id.* at 412-13. At the time of my earlier article, I noted that it was too early to tell whether the amendments to Title VII permitting awards of compensatory and punitive damages, Civil Rights Act of 1991, Pub. L. No. 102-66, § 102, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a (Supp. V 1993)), might ameliorate this problem. Yelnosky, *supra* note 2, at 412-13 n.35. Presently, I still am unaware of any empirical studies that have addressed the issue.

40. *Id.* at 414.

41. *Id.*

42. *Id.* (quoting Fix et al., *supra* note 37, at 34).

43. *Id.*

44. *Id.* at 415.

45. Clark, *supra* note 1, at 20-23.

46. *Id.* at 3; Leroy D. Clark, *The Law and Economics of Racial Discrimination in Employment* by David A. Strauss, 79 GEO. L.J. 1695, 1700-02 (1991).

47. Professor Clark stated:

[S]ome economists hypothesize that race and sex discrimination is *less* present in unskilled and blue collar work than for any other kinds of work. . . . The



many cities young unskilled blacks have exceedingly low levels of employment, based at least in part on discriminatory hiring practices.<sup>48</sup> A study conducted by his organization, the Fair Employment Council (FEC),<sup>49</sup> concluded that young black job seekers often were denied lower-level jobs offered to whites with similar credentials, and moreover, that the black applicant often was eliminated from the hiring process at an earlier stage than his white counterpart.<sup>50</sup> In addition, the FEC's own "enforcement testing"<sup>51</sup> has focused on lower-skilled, entry-level positions.<sup>52</sup>

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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.

Clark, *supra* note 1, at 22.

48. *Id.* at 22 n.111.

49. *See supra* note 15.

50. Yelnosky, *supra* note 2, at 410 n.22 (citing Marc Bendick, Jr. et al., Fair Employment Council of Greater Wash., Inc., Measuring Employment Discrimination Through Controlled Experiments (May 1993) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*)).

51. Enforcement-oriented testing is conducted with subsequent litigation in mind. Research-oriented testing is conducted for the purpose of generating data for any number of social science purposes. Boggs et al., *supra* note 15, at 349.

52. *Id.* at 368 (acknowledging that as of 1992, "the [FEC's] testing activities ha[d] concentrated on jobs for which the necessary hiring qualifications are relatively limited").

Professor Clark also suggests that testing for lower-level hiring discrimination is unnecessary based on his extraordinary assumption that the EEOC is doing an adequate job investigating and screening cases involving claims of hiring discrimination in lower-level jobs. Clark, *supra* note 1, at 21. Professor Clark provides no empirical evidence or even anecdotal support for this assumption, which is not surprising because there is unanimity among current and former EEOC officials, practitioners in the civil rights community, policy makers, and academics that the EEOC's charge-processing system is fatally flawed and that change is necessary. In June 1993, the departing general counsel of the EEOC stated bluntly that Title VII "doesn't work. . . . [The] EEOC was established . . . for the voluntary resolution of disputes. But after setting up the administrative mechanism, it was never funded to provide those services." *Departing EEOC General Counsel Sees Need for New Direction at Overwhelmed Agency*, 1993 Daily Lab. Rep. (BNA) No. 111, at AA-1 (June 11, 1993); *see also EEOC Must Change Approaches to Deal with Growing Workload, Officials Say*, 1993 Daily Lab. Rep. (BNA) No. 153, at C-2, C-3 (Aug. 11, 1993) (reporting that in August 1993 a former general counsel and several EEOC staffers told an American Bar Association committee that the Commission must change the way it does business to keep up with the burgeoning workload of employment discrimination charges filed with the agency). A Commission official recently stated publicly that the EEOC was encountering "the most difficult period in its history." *EEOC Official and Attorneys Discuss Challenges Posed by Record Charge Rate*, 1994 Daily Lab. Rep. (BNA) No. 54, at A-13 (Mar. 22, 1994). The interim chair of the EEOC stated in 1994 that "the EEOC's workload growth now far surpasses the point where making internal

Professor Clark's challenge to my suggestion that disincentives to sue in hiring cases are greater in cases involving lower-level rather than higher-level positions deserves more serious consideration. I did not acknowledge as clearly as I might have that individuals who suspect discrimination in hiring for upper-level positions are subject to many of the obstacles I identified in the lower-level employment context.<sup>53</sup>

I wrote that individuals challenging hiring decisions involving higher-skilled, upper-level positions have a "greater likelihood of success" than those challenging decisions involving lower-skilled jobs.<sup>54</sup> Professor Clark correctly asserts that these individuals also have difficulty proving their cases. Hiring decisions for upper-level positions often are based largely on

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adjustments or reorganizing will solve its problems." GENERAL ACCOUNTING OFFICE, EEOC'S EXPANDING WORKLOAD: INCREASES IN AGE DISCRIMINATION AND OTHER CHARGES CALL FOR NEW APPROACH 15 (1994) [hereinafter CALL FOR NEW APPROACH]. The head of the EEOC's office of program operations has stated: "[B]y any means we use to measure caseload—charge processing time, age of inventory, caseload size—the positive indicators are down and the negative indicators are up." *EEOC Budget Up by 15.7 Million as Part of 'Investment Package'*, 1994 Daily Lab. Rep. (BNA) No. 26, at C-6 (Feb. 9, 1994).

A prominent plaintiffs' attorney recently told a congressional committee that the EEOC "is an absolute waste and should be abolished." *Plaintiffs' Attorneys Call for More Lawyer Involvement in EEO Disputes*, 1994 Daily Lab. Rep. (BNA) No. 56, at A-3, A-4 (Mar. 25, 1994) (quoting Robert Goodstein); see also CALL FOR NEW APPROACH, *supra*, at 14 (stating that officials and experts interviewed from both inside and outside the EEOC agreed that change is necessary); Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 482 (1992) (stating that "[b]ecause of the Commission's slow rate of processing cases and the uncertainty that the Commission will bring suit, the great majority of victims rely on private suits rather than on the Commission").

The General Accounting Office (GAO) recently concluded that the extensive processing times that charging parties can expect to face appear incompatible with the Commission's mandate to ensure equality of opportunity by vigorously enforcing laws prohibiting discrimination in employment. CALL FOR NEW APPROACH, *supra* at 14. It recommended that Congress establish a commission of experts to develop legislative and administrative means which would enable the EEOC to better carry out its mission. *Id.* at 15. The Senate Special Committee on Aging commissioned the GAO's latest audit of the EEOC's charge processing system in response to complaints from senior citizens about the length of time it was taking to resolve charges of age discrimination in employment. *GAO Calls for Outside 'Commission of Experts' to Develop Strategies to Deal with EEOC Workload*, 1994 Daily Lab. Rep. (BNA) No. 37, at A-16 (Feb. 25, 1994).

53. Clark, *supra* note 1, at 23; see also Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 964 (1982) ("Job candidates at the managerial and professional level are under strong pressures to avoid being labeled troublemakers. An individual decision to engage actively in litigation will usually be highly risky, given the low probability of prevailing and the danger of alienating present and potential future employers.").

54. Yelnosky, *supra* note 2, at 415.

subjective factors that separate candidates with similar objective qualifications. Employers evaluate a candidate's previous work and educational performance to determine whether the candidate meets threshold objective requirements;<sup>55</sup> they then use various procedures to try to evaluate the candidate's subjective qualities, such as sincerity, appearance, poise, ability to understand and articulate conceptual matters, leadership, ability to get along with others, and identification with organizational goals.<sup>56</sup> As I mentioned in my original article, under the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*,<sup>57</sup> a plaintiff must prove that an employer's articulated, subjective, nondiscriminatory justification for its hiring decision was a pretext for actual discrimination.<sup>58</sup> Thus, where subjective factors predominate, as they do in hiring for higher-skilled, upper-level positions, plaintiffs trying to prove discrimination face an uphill battle.

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55. Bartholet, *supra* note 53, at 955, 973.

56. *Id.* at 973, 996 (describing factors weighed heavily by a New York law firm and assessment centers). By contrast, in many hiring situations for lower-level positions an applicant may be able to show that an employer hires candidates based on minimal objective qualifications. *Id.* at 1001.

57. 113 S. Ct. 2742 (1993).

58. *Id.* at 2747. Professor Clark also criticizes the disparate treatment model of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), suggesting that it does not provide sufficient opportunity for plaintiffs to prove hiring discrimination cases. Clark, *supra* note 1, at 5. According to Professor Clark:

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. 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 in order to prevail.

*Id.* at 4 (citations omitted). Professor Clark's criticism of the *McDonnell Douglas* disparate treatment model is somewhat ironic. Only a few years ago, Professor Clark criticized Professor David A. Strauss, who argued that because the Title VII disparate treatment model was ineffective, the best way to accomplish the purposes of the statute would be to encourage quota hiring. Clark, *supra* note 46, at 1707-09 (commenting on David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991)). Professor Clark wrote that "disparate treatment lawsuits are not nearly so problematic as Strauss implies." *Id.* at 1696. Professor Clark argued for changes to Title VII that would increase incentives to sue. *Id.* at 1706-07. He stated that "it may be much too early to dismiss the individual lawsuit as a form of behavior control." *Id.* at 1707. Changes to Title VII that increased incentives to sue eventually were enacted in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Nevertheless, Professor Clark now seems much less sanguine about the efficacy of the individual lawsuit.

At this point, however, Professor Clark and I genuinely part company. From his observation that subjective factors may play a more important role in hiring for upper-level positions than in hiring for lower-level jobs, Professor Clark concludes that the "tester approach may be more necessary and appropriate for high-level employment."<sup>59</sup> This conclusion ignores the fact that where subjective factors predominate, testing is much less likely to identify discriminatory hiring practices effectively. Thus, while Professor Clark and I may agree that there is a regrettable enforcement void in the context of hiring for higher-skilled, upper-level positions, testing does not appear to be a viable enforcement option to fill that void.<sup>60</sup>

The success of testing in the housing area suggests that testing might effectively be used to identify discrimination in hiring for lower-skilled, entry-level jobs because the hiring process for such jobs is somewhat like the process for renting an apartment or even selling a house.<sup>61</sup> Blindly applying the housing testing technique to test for discrimination involving higher-skilled positions seems inappropriate, however, because "more subjective factors legitimately may be considered in [those] decisions than in decisions about selling or renting housing."<sup>62</sup> The goal in testing is to produce pairs of testers identical in all relevant characteristics so that any systematic difference in treatment within the pair can be attributed to discrimination based on race or sex or any other prohibited characteristic.<sup>63</sup> In the area of fair housing, testers typically are matched according to relatively few characteristics, such as income, age, family size, and housing needs.<sup>64</sup> This matching

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59. Clark, *supra* note 1, at 21.

60. See John C. Boger, *Extending the Reach of the Audit Methodology: Comments*, in CLEAR AND CONVINCING EVIDENCE, *supra* note 15, at 399, 403 (explaining that to state the limitation that testing works best in evaluating entry-level hiring decisions merely acknowledges that the method is only one of a number of complementary civil rights enforcement techniques that can perform some useful tasks).

61. Yelnosky, *supra* note 2, at 414.

62. *Id.*

63. James J. Heckman & Peter Siegelman, *The Urban Institute Audit Studies: Their Methods and Findings*, in CLEAR AND CONVINCING EVIDENCE, *supra* note 15, at 187, 190; Alex Y.K. Oh, *Using Employment Testers to Detect Discrimination: An Ethical and Legal Analysis*, 7 GEO. J. LEGAL ETHICS 473, 474 (1993) ("In a typical testing situation, a black and white tester are paired and sent out to the targeted entity with similar, if not identical, qualifications for whatever opportunities the entity provides . . . so that from the refusal of the black tester alone one can infer a discriminatory decision.")

64. Heckman & Siegelman, *supra* note 63, at 190-91.

generally eliminates differences in the nondiscriminatory factors that might justify disparate treatment of the two testers.<sup>65</sup> Employment testers, on the other hand, must be matched according to additional factors. Age, appearance, education, experience, openness, energy level, verbal skills, mannerisms, personality, and interview style all may be legitimate nondiscriminatory reasons for refusing to hire an individual.<sup>66</sup>

The more factors that might be lawfully relevant to the outcome of a particular hiring decision, the more difficult accurate matching becomes.<sup>67</sup> First, those responsible for matching must attempt to identify all the applicant characteristics relevant to the particular firm being tested. Perfect matches are impossible where all the worker characteristics valued by the firm cannot be identified.<sup>68</sup> In hiring for lower-skilled, entry-level positions it is less likely that firms place much weight on characteristics other than those on which testers are matched.<sup>69</sup> Even if those responsible for matching testers could predict accurately the attributes that would be dispositive for the hiring decision, it would be impossible in many instances involving higher-skilled positions to match testers on those attributes. The Urban Institute has recognized this limitation in designing its hiring discrimination studies using testers. The Institute instructs testers to withdraw from consideration for a job if they are asked to take a test or attend a training session.<sup>70</sup> This would rule out testing for many high-level positions where various personality and intelligence tests are given routinely.<sup>71</sup>

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65. *Id.*; see also Peter E. Millspaugh, *Fair Housing Testing: Its Legal Status and Policy Implications*, 13 U. BALT. L. REV. 215, 223, 229 (1984) (describing how testers should be matched to eliminate nondiscriminatory factors).

66. Bartholet, *supra* note 53, at 976-77, 996; Heckman & Siegelman, *supra* note 63, at 191; Yelnosky, *supra* note 2, at 404-05 n.4 (discussing a tester study described in MARGERY A. TURNER ET AL., URBAN INST., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991)).

67. *EEOC Policy Guidance*, *supra* note 7, at ¶ 2168 n.5 (explaining that employment testers may have a more difficult and elaborate role to play than in the housing context because they have the additional burden of appearing qualified for the job in question if interviewed).

68. James J. Heckman & Peter Siegelman, *Response to Comments by John Yinger*, in CLEAR AND CONVINCING EVIDENCE, *supra* note 15, at 271, 271.

69. See John Yinger, *Audit Methodology: Comments*, in CLEAR AND CONVINCING EVIDENCE, *supra* note 15, at 259, 265, 268 (recognizing that firms consider more characteristics when hiring for upper-level jobs).

70. TURNER ET AL., *supra* note 66, at 21, 23.

71. Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. LAW. 315, 355 (1991) (reporting that written honesty tests,

Further, despite sincere efforts to prepare matched testers to respond uniformly in interviews, the substance of applicant interviews can be quite variable and random, and the personal dynamics that account for a successful interview are difficult to plan for and predict. For example, if one considers the hiring process for a tenure-track position on a law school faculty, two candidates most likely will not be asked identical questions at the national hiring conference or at a callback visit to the law school. The content of those interviews depends to a large extent on the priorities of the individuals who participate on any particular day. Individual priorities are not always consistent, particularly when several interviewers are involved simultaneously and certain group dynamics exert their influence. Moreover, matching the scholarly presentations of testers would be quite difficult. On the one hand, the presentations would need to be sufficiently different to avoid detection. On the other hand, the presentations would need to be sufficiently similar to be "matched."

These matching problems—the difficulty in identifying firm-specific preferences and in matching candidates on highly variable and subjective characteristics—have been described as the "Achilles heel" of the testing methodology.<sup>72</sup> If two tester applicants are different with respect to relevant characteristics that could not be identified or with respect to identifiable but highly variable and subjective characteristics, there is room for nondiscriminatory disparate treatment of the two applicants.<sup>73</sup> Thus, it is difficult to conclude that one instance of disparate treatment constitutes discrimination.<sup>74</sup> Both testers might have actually received nondiscriminatory treatment and consideration at that firm.<sup>75</sup>

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psychological and personality tests, physical exams, genetic screening, and handwriting analysis have become increasingly popular tools in hiring selection). For example, a friend of mine recently interviewed for a position in the legal department of a Fortune 500 company. The company gave her an intelligence test after the field of applicants had been narrowed to approximately five.

72. Heckman & Siegelman, *supra* note 63, at 191.

73. *Id.* at 198.

74. *Id.* If the protected-class tester has a slight edge in credentials as well as other job-relevant characteristics, and the protected-class tester is treated less favorably, then an inference of discrimination may be stronger. Boggs et al., *supra* note 15, at 351. Giving the protected-class tester such an "edge" remains problematic, however, if all the job-relevant characteristics are not identifiable or if they are highly variable and subjective.

75. See Heckman & Siegelman, *supra* note 63, at 244 (questioning testing methodologies that count all instances of disparate treatment of testers as discrimination);

One way to avoid some of these problems is to conduct several tests of the same employer to see if the protected-class testers regularly receive less favorable treatment.<sup>76</sup> However, because an employer will likely have fewer openings for higher-level positions, repeat tests might not be feasible.

Limiting testing for higher-skilled, upper-level hiring discrimination to the early phases of the hiring process likewise may not be a viable solution. An attorney for the FEC has written that wherever possible, each pair of testers in an enforcement test should stay in the process until one is offered employment so the other tester can claim that her Title VII rights were violated.<sup>77</sup> This position recognizes that the relationship between non-outcome aspects of the hiring process and discrimination is somewhat tenuous. Being interviewed for a shorter period of time or receiving fewer positive comments is not necessarily evidence of unlawful disparate treatment. One pair of researchers suggests that such evidence should not ordinarily form the foundation of a discrimination claim.<sup>78</sup> Thus, the feasibility of testing in employment may not reach to higher-skilled, upper-level positions.<sup>79</sup>

The increased importance of subjective factors in hiring for upper-level positions also raises greater concerns about "experimenter effects"<sup>80</sup> on the reliability of the testing for discrimination. These effects may be more problematic in higher-level testing because the contact between the applicant and the employer is more intimate and more lengthy, and the outcomes

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Yinger, *supra* note 69, at 267 (reporting that researchers agree that every instance of disparate treatment does not constitute discrimination because there is no simple way to distinguish systematic from random unfavorable treatment due to difficulties in matching testers on all relevant qualifications).

76. See Boggs et al., *supra* note 15, at 355 (noting that it often is appropriate to perform repeat tests of the same employer to determine whether the observed differences in treatment were isolated or reflect a pattern or practice of discriminatory behavior); Heckman & Siegelman, *supra* note 63, at 198 (stating that researchers using testers to uncover hiring discrimination might not be able to conclude safely that disparate treatment of testers constitutes discrimination until the protected-class tester receives detrimental treatment in the aggregate or on average).

77. Boggs et al., *supra* note 15, at 361.

78. Heckman & Siegelman, *supra* note 63, at 228 n.8.

79. See Fix et al., *supra* note 37, at 61; see also Bartholet, *supra* note 53, at 999 (noting that "[s]election systems on the upper level are . . . likely to be multifaceted and discretionary, and therefore more difficult to analyze").

80. Heckman & Siegelman, *supra* note 63, at 215-16. "Experimenter effects" can exist because "the experimenter is not simply a passive runner of subjects, but can actually influence the results of an experiment." *Id.* (quoting HANDBOOK OF SOCIAL PSYCHOLOGY 66 (Gardner Lindzey & Elliot Aronson eds., 1975)).

tend to be based more on subjective factors. During the hiring process a tester is not a passive observer. For example, the tester can influence the results of the test by responding to questions in a subtly negative way or by not making eye contact with interviewers.<sup>81</sup> Therefore, the conscious and subconscious motivations of testers are important.<sup>82</sup> As a consequence, when conducting tests for social science research some researchers prefer "blind" testing, a program design which keeps testers unaware of both the theory being tested and the fact that they are working in pairs.<sup>83</sup> As a practical matter it would be very difficult to do blind testing, because matching testers on several highly subjective characteristics, such as openness in interviews, is best accomplished by permitting the testers to view each other in simulated interviews.<sup>84</sup>

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81. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). Focusing on retail car negotiations, Ayres recognized that in testing for discrimination on the basis of race or gender, individual differences among the testers might influence the results of a lengthy negotiation, even if the negotiating script was standardized. *Id.* at 825. For example, non-verbal behavior inevitably has an impact on the effectiveness of testers: "Salespeople may have offered certain testers a higher price not because of their race or gender, but because they blinked more often or opened the car door more quickly. In the end, the results need to be discounted by this residuum of non-uniformity." *Id.* at 826.

82. Heckman & Siegelman, *supra* note 63, at 215-16; see also Millspaugh, *supra* note 65, at 233-34, 240 (cautioning that where evidence of discrimination is of a more elusive nature, objective observation by testers may be impossible due to the "formidable psychological and emotional commitment" required from testers); Oh, *supra* note 63, at 499, 503-04 (proposing EEOC oversight of testing activity in employment because hiring practices at the interview stage are highly subjective, giving testers the opportunity to induce an employer to prefer other applicants by "pretending to be inarticulate . . . disorganized . . . or . . . uninterested").

In the context of enforcement testing, "testers must be willing to remain in contact with the testing program and return occasionally to participate in legal proceedings over an extended [time period]." Boggs et al., *supra* note 15, at 350-51; see also Millspaugh, *supra* note 65, at 223-24 (stating that because the success of tests rests heavily on the indoctrination, training, and rehearsing of dedicated testers, "participation in fair housing testing may not be suited to those lacking a strong commitment to the purpose for which the testing is undertaken"). That commitment from testers should be confirmed before testing, which minimizes the possibility of blind testing. Moreover, "[a] group that is obviously half black and half white . . . will start trainees thinking and perhaps making up their own mind about what the study is or how they should behave. It makes more sense . . . to keep participants from guessing by telling them the purpose of the study . . ." Yinger, *supra* note 69, at 260.

83. Heckman & Siegelman, *supra* note 63, at 216; *supra* note 82.

84. Boggs et al., *supra* note 15, at 351-52 (explaining that after testers receive background training they are coached on and practice the details of testing and thus during that latter phase "testers who will be paired work closely with and observe each other, developing a sense of teamwork and fostering a convergence of their personal styles").



Obviously, the dichotomy that I have suggested between lower-skilled, entry-level jobs, and higher-skilled, upper-level jobs is imprecise and merely descriptive. I believe testing should be used to identify hiring discrimination as far "up" the employment hierarchy as possible. My suggestion is that generally the farther up one goes, the less reliable the testing technique may be. Testing for discrimination in hiring for higher-level positions raises questions of scientific reliability and validity<sup>85</sup> that Professor Clark simply has not addressed.

Professor Clark's support for the use of testers to uncover and remedy discrimination in hiring for higher-skilled, upper-level positions raises two other important issues: the increased costs employers often expend in evaluating persons to fill those positions and the increased need for elaborate misrepresentations by testers to appear qualified for the positions.

As I mentioned in my original article, in selecting an applicant for a higher-level position, firms often expend significant time and money conducting interviews, administering tests, checking references, and conducting other background investigations.<sup>86</sup> Moreover, because the pool of qualified applicants for these positions can be relatively small,<sup>87</sup> an employer may lose a candidate with a bona fide interest in employment by focusing its efforts on a tester.<sup>88</sup> Because reliable testing for discrimination in hiring may be difficult to conduct,<sup>89</sup> tests for discrimination in this area may have few benefits. These few benefits will not outweigh the costs incurred by many tested employers.<sup>90</sup>

Professor Clark offers little to alleviate these concerns. While he acknowledges that employers must bear additional costs associated with verifying the content of applications,<sup>91</sup> he accepts these costs because testers have Title VII rights to equal treatment. He concludes that because testers have

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85. See Boger, *supra* note 60, at 402 (noting that testing organizations must scrupulously adhere to scientifically valid testing procedures).

86. Yelnosky, *supra* note 2, at 414.

87. Bartholet, *supra* note 53, at 1003.

88. Yelnosky, *supra* note 2, at 415.

89. See *supra* notes 61-85 and accompanying text.

90. See Millspaugh, *supra* note 65, at 240 (noting that the burden testers place on the time, energy, and expenses of tested firms is difficult to justify where testing is unwarranted); cf. Ayres, *supra* note 81, at 822 n.18 (describing the features of testing for discrimination in negotiations for automobile purchases intended to reduce the amount of time a salesperson spent with an individual who had no interest in buying a car).

91. Clark, *supra* note 1, at 24-25.

standing under Title VII, Congress made "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 [testing]." <sup>92</sup> As he acknowledges, however, there was "no discussion of the tester approach in the legislative history surrounding the initial adoption of Title VII." <sup>93</sup> Moreover, there is nothing in the legislative history of the amendments to Title VII to suggest that Congress ever made any judgment on the relative costs and benefits of the use of testers to enforce Title VII.

Professor Clark also seeks to dismiss the cost issue by asserting that if testers target only employers who are likely to be engaging in discriminatory hiring practices, the number of innocent employers tested will be small. <sup>94</sup> Identifying those firms is easier said than done, <sup>95</sup> and without legislative action, private groups and individuals are free to target whomever they wish for testing. Finally, if I am correct that higher-level testing tends to be unreliable, there are few, if any, benefits to offset the costs to tested employers.

In addition to imposing additional costs on employers, testing for hiring discrimination in higher-skilled, upper-level jobs involves more detailed misrepresentations of testers' qualifications than testing for lower-level jobs. "To 'appear qualified,' testers might find it necessary to present false credentials, bogus academic transcripts, made-up work histories, forged letters of reference, faked passports or work authorizations, counterfeit licenses, falsified professional ratings, perhaps even false security clearances." <sup>96</sup>

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92. *Id.* at 24.

93. *Id.* at 24 n.118.

94. *Id.* at 25.

95. Professor Clark offers one possible "targeting" technique. He suggests that "employers could be targeted for testing when they exhibit a profile with no minority or female employees, or serious underrepresentations in certain job categories." *Id.* at 24 n.119. This technique is probably both underinclusive and overinclusive. Certainly, many employers without "serious" racial or gender imbalances in their workforce may engage in discriminatory hiring practices, and many with such imbalances are not discriminating. However, to the extent that this technique would reduce the number of tests of employers unlikely to be engaged in discriminatory hiring practices, it may be one way to ameliorate the cost problem.

96. Yelnosky, *supra* note 2, at 407 n.14 (quoting Letter from Jeffrey A. Norris, President, Equal Employment Advisory Council, to the Hon. Evan J. Kemp, Chairman, EEOC (Feb. 12, 1991), in *Equal Employment Advisory Council Letter on Proposed Testing Policy at EEOC*, 1991 Daily Lab. Rep. (BNA) No. 31, at E-2 (Feb. 14, 1991)).

Professor Clark recognizes that testing conducted by presenting matched individuals who possess similar levels of education and work experience does not raise the same problems as misrepresenting testers' qualifications for purposes of testing.<sup>97</sup> He also acknowledges that it may be difficult to find testers "with identical backgrounds, especially if the testing is done for high-level employment as proposed in [his] Article."<sup>98</sup> He concludes that as a matter of public policy, misrepresentations should only be permitted for testing in limited circumstances.<sup>99</sup> Thus, Professor Clark proposes that Congress should make it clear that only the EEOC should have the authority to engage in or authorize testing that depends on numerous significant misrepresentations.<sup>100</sup>

I have asserted all along that coordination by the EEOC is desirable in this area. Professor Clark and I disagree over whether the EEOC currently is authorized to engage in its own testing. He has challenged my conclusion that the EEOC currently lacks the statutory authority to do so. His claim warrants some comments.

## II. THE EEOC'S INVESTIGATORY AUTHORITY

Professor Clark challenges my conclusion that the EEOC currently may not "employ its own testers or orchestrate the use of testers by private groups."<sup>101</sup> To do so he creates a straw man. He claims my conclusion is based on "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."<sup>102</sup>

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97. Clark, *supra* note 1, at 46.

98. *Id.*; see also Fix et al., *supra* note 37, at 34 (noting that because hiring for a mid-level, white-collar position may be a complex transaction, "testing may be less useful a tool unless the testers assume their own identities, which raises complicated recruitment . . . issues").

99. Clark, *supra* note 1, at 48.

100. *Id.*

101. Yelnosky, *supra* note 2, at 462.

102. Clark, *supra* note 1, at 40 (referring to EEOC v. First Nat'l Bank, 614 F.2d 1004 (5th Cir. 1980), cert. denied, 450 U.S. 917 (1981), discussed in Yelnosky, *supra* note 2, at 462 n.269).

His characterization is unfair. I discussed that case in one of many footnotes supporting a much simpler and more compelling argument. I argued that the investigatory powers of the EEOC were specifically limited and carefully delineated by Congress in response to concerns by certain lawmakers that a powerful EEOC would infringe on employers' rights.<sup>103</sup> Therefore, the Commission may not employ an investigative technique not authorized by Title VII, even if that technique helps the Commission eliminate discrimination in the workplace. Nowhere in Title VII did Congress even arguably give the Commission the power to engage in investigative techniques like testing. When investigating, the Commission is authorized only to request from an employer information relevant to a charge of discrimination by an employee, and the EEOC has subpoena power to enforce compliance with those requests.<sup>104</sup>

I also showed that Congress limited the EEOC's power in another relevant respect. The Commission has no authority to commence an investigation until after a charge of discrimination has been filed.<sup>105</sup> Therefore, even if the Commission's investigatory power was broad enough to encompass the use of testers, the Commission could not employ testers to obtain evidence for the purpose of filing a charge of discrimination.<sup>106</sup>

Professor Clark's assertion that the EEOC has authority to implement its own testing program to uncover evidence on which to base charges of discrimination ignores these statutory limitations on the EEOC's power. He cites *In re Establishment Inspection of Kelly-Springfield Tire Co.*<sup>107</sup> for the proposition that:

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

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103. Yelnosky, *supra* note 2, at 461. See generally *id.* at 459-69 for my complete analysis of the statutory limitations on the EEOC's investigatory authority.

104. *Id.* at 460-63 (describing the EEOC procedures for filing a charge).

105. *Id.* at 463.

106. *Id.* at 463-69. I further argued that the EEOC could not use testers to corroborate a charge already filed, because the EEOC must request information from employers that it is investigating. Testing would be inconsistent with the notice required by the request and subpoena system of Title VII. *Id.* at 469 n.302.

107. 13 F.3d 1160 (7th Cir. 1994).

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."<sup>108</sup>

Professor Clark failed to mention that the court in *Kelly-Springfield* was discussing the Occupational Safety and Health Administration (OSHA).<sup>109</sup> The Court of Appeals for the Ninth Circuit recently recognized what Professor Clark ignores—that the statute authorizing OSHA investigations is quite different from the statute authorizing EEOC investigations. In a case involving an employer's challenge to OSHA's investigatory power, the court ruled that the employer's reliance on a decision interpreting the EEOC's authority was misplaced.<sup>110</sup> The court found that the EEOC decision was not "relevant, because the EEOC's subpoena statute differs significantly from that of OSHA. The EEOC's authorizing statute specifically limits its subpoenas to the investigation of discrete charges."<sup>111</sup> Unlike some other administrative agencies created by Congress, the EEOC may not commence a Title VII investigation "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."<sup>112</sup>

Similarly, the power granted to the EEOC in the Age Discrimination in Employment Act (ADEA)<sup>113</sup> is much broader than that granted to it under Title VII. Under the ADEA, the EEOC has investigatory authority independent of the filing of a discrimination charge.<sup>114</sup> Thus, "[t]he Commission may, on

108. Clark, *supra* note 1, at 42 (quoting *Kelly-Springfield*, 13 F.3d at 1164).

109. *Kelly-Springfield*, 13 F.3d at 1164-65. The court's holding was directed to OSHA's investigative powers: "OSHA need not have express authority for each and every investigative technique." *Id.*

110. *Reich v. Montana Sulphur & Chem. Co.*, 32 F.3d 440 (9th Cir. 1994).

111. *Id.* at 446 (citing *EEOC v. Packard Elec. Div.*, 569 F.2d 315 (5th Cir. 1978); *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443 (9th Cir. 1988)).

112. *Alyeska Pipeline*, 836 F.2d at 447 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950)) (comparing the broad investigatory power of the EPA to the more narrow authority of the EEOC).

113. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

114. *See EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300, 303 (4th Cir. 1992). The ADEA gives the EEOC "the power to make investigations . . . in accordance with the powers and procedures provided in [the Fair Labor Standards Act]." 29 U.S.C. § 626(a) (1988). That power derived from the ADEA permits the EEOC to "investigate and gather data" and to "enter and inspect [work] places and . . . records, . . . question such employees, and investigate such facts, conditions, practices, or matters as . . .

its own initiative, conduct investigations” of ADEA violations,<sup>115</sup> and “[u]nlike the limited authority given the EEOC under Title VII, . . . the ADEA gives the EEOC authority to investigate and enforce independent of individual employee charges.”<sup>116</sup>

Perhaps recognizing that his argument disregards the express limits in Title VII on the EEOC’s power to investigate, Professor Clark ultimately suggests that the use of testers is not an “investigation” under Title VII and that the technique is a “reasonable extension” of the power to investigate.<sup>117</sup> He cites no direct support, however, for the assertion that testing is not an investigation within the meaning of the statute. It is irrelevant that sending testers to an employer may not be particularly intrusive. The statute simply does not authorize it.<sup>118</sup> Congress specifically limited the EEOC’s authority when

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necessary or appropriate to determine whether any person has violated any provision . . . or which may aid in the enforcement of the provisions . . . .” 29 U.S.C. § 211(a) (1988). To enforce the ADEA the EEOC may:

(1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate recordkeeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act; [and] (6) subpoena witnesses and require the production of documents and other evidence . . . .

29 C.F.R. § 1626.15(a) (1994). In contrast, the EEOC’s regulations for investigating charges filed under Title VII are more limited. They authorize the agency to request statements from the charging party, conduct a fact-finding conference, and issue subpoenas to enforce requests for (1) the testimony of witnesses, 29 C.F.R. § 1601.15 (1994); (2) the production of evidence under a subpoenaed person’s control; and (3) access to evidence for the purpose of examination and copying. *Id.* § 1601.16. *But cf. id.* § 1601.15(d) (stating that the EEOC’s authority to investigate “is not limited” to the procedures outlined within this section).

115. 29 C.F.R. § 1626.4 (1994).

116. *American & Efird Mills*, 964 F.2d at 304; *see also* Yelnosky, *supra* note 2, at 464 n.275 (explaining that although the EEOC’s investigatory power under Title VII is more limited than that of the Federal Trade Commission or the Wage and Hour Administrator, the EEOC nonetheless has broader power under the ADEA).

117. Clark, *supra* note 1, at 42.

118. Yelnosky, *supra* note 2, at 461–62 n.267 (citing *EEOC v. Western Elec. Co.*, 382 F. Supp. 787 (D. Md. 1974) (concluding that the EEOC did not have the authority to serve interrogatories on an employer during the investigation of a charge because the statute did not permit it); *cf. Midwest Growers Coop. Corp. v. Kirkemo*, 533 F.2d 455, 462–63 (9th Cir. 1976) (holding that an agency cannot use an investigative technique that is not authorized by statute).

Professor Clark also appears to suggest that I erroneously concluded that EEOC testing would violate the Fourth Amendment. Clark, *supra* note 1, at 40. He states:

it created and later amended Title VII. Wishing the statute was drafted differently does not make it so. The Commission simply "is not empowered to conduct general fact-finding missions concerning the affairs of the nation's work force and employers."<sup>119</sup>

Professor Clark's challenge to my conclusion that the EEOC may not orchestrate enforcement testing by others<sup>120</sup> is

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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 . . . the degree of intrusiveness of the investigative techniques on citizens' liberty, property, and privacy.

*Id.* If this is what Professor Clark is suggesting, he did not read my original article carefully. I stated that "[t]here also would be no Fourth Amendment bar to the use of testers by the EEOC." Yelnosky, *supra* note 2, at 480 n.363. Furthermore, I discussed this conclusion in some detail. *Id.*

119. EEOC v. Ocean City Police Dep't, 820 F.2d 1378, 1380 (4th Cir. 1987) (declining to order enforcement of an EEOC subpoena based on an invalid charge), *vacated on other grounds*, 486 U.S. 1019 (1988). The court also stated that "[t]he only legitimate purpose for an EEOC investigation is to prepare for action against an employer charged with employment discrimination, or to drop the matter entirely if the . . . charge . . . [is] unfounded." *Id.* In 1992, the Court of Appeals for the Fourth Circuit cited this same statement from *Ocean City Police Department* to demonstrate the limits of the EEOC's investigatory powers under Title VII. *American & Efird Mills*, 964 F.2d at 304 (distinguishing *Ocean City Police Dep't* on the grounds that Title VII limits the investigative authority of the EEOC in the absence of any independent statutory authority like that granted under the ADEA).

Professor Clark also asserts that under *Service Founding Co. v. Donovan*, 721 F.2d 492 (5th Cir. 1983), the EEOC could engage in testing to verify the accuracy of EEO-1 reports submitted to the EEOC. Clark, *supra* note 1, at 44-45 (quoting 42 U.S.C. § 2000e-8(c)(3) (1988)). Assuming, *arguendo*, that *Service Founding*, which involved OSHA's power, applies to the EEOC, the enforcement testing Professor Clark and I have been discussing would not be conducted simply to verify the content of EEO-1 reports. EEO-1 reports are filed annually by employers of 100 or more employees and detail the racial and gender composition of their work forces by job classification. 29 C.F.R. § 1602.7 (1994). Testing could not confirm, for example, that 20% of a reporting employer's clerical workers are black or female. Testing is conducted to determine whether the employer is engaged in discriminatory hiring practices.

120. Clark, *supra* note 1, at 38-40. Professor Clark also points to statutory provisions which he asserts give the EEOC authority to assist employers in structuring internal testing programs and to engage in research to determine the extent of hiring discrimination. *Id.*

Here I agree with Professor Clark. I have never suggested that the EEOC currently is not authorized to assist employers interested in structuring internal testing programs. The EEOC has the power "to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter." 42 U.S.C. § 2000e-4(g)(3) (1988).

The EEOC also may use its own testers to research the extent of hiring discrimination or, with funds appropriated by Congress, finance the use of testers by others to conduct similar research. The Commission may "make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter

likewise not persuasive. Professor Clark argues that under section 2000e-8(b),<sup>121</sup> “[i]t is . . . possible that the Commission has the statutory authority to help finance a testing program undertaken by a state agency.”<sup>122</sup> In making this argument, Professor Clark ignores the fact that the Commission’s power under section 2000e-8(b) to “contribute to the cost of research and other projects of mutual interest undertaken by” state and local fair employment agencies is limited to the expenditure “of funds appropriated specifically for such purpose.”<sup>123</sup> Even if enforcement testing fits within the definition of “research and other projects,” unless Congress appropriated money to the EEOC for it to assist state agencies in enforcement testing, the EEOC may not do so.

Similarly, contrary to Professor Clark’s assertion,<sup>124</sup> the EEOC does not appear to have the authority under section 2000e-4(j)(1) to train private organizations that desire to set up testing programs. That provision requires the Commission to establish a Technical Assistance Training Institute (TATI) “through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.”<sup>125</sup> The provision was intended to ensure that individuals and firms subject to Title VII received information that would help them comply with the law. There is nothing in the language of the statute or in the legislative history to suggest that TATI would be used to supplement the enforcement activities of private groups and individuals. In fact, the TATI was established at least in part to encourage voluntary compliance with Title VII in order to

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and . . . make the results of such studies available to the public.” *Id.* § 2000e-4(g)(5). However, this statutory provision does not authorize enforcement testing.

121. In conducting its investigations, the Commission is authorized to

cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter 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 . . . .

*Id.* § 2000e-8(b).

122. Clark, *supra* note 1, at 38 n.192 (quoting 42 U.S.C. § 2000e-8(b) (1988)).

123. 42 U.S.C. § 2000e-8(b) (1988) (emphasis added).

124. Clark, *supra* note 1, at 39.

125. 42 U.S.C. § 2000e-4(j)(1) (Supp. V 1993).



reduce the need for enforcement activity by the EEOC and others.<sup>126</sup>

Professor Clark also relies on section 2000e-4(g)(1) in support of his assertion that the EEOC currently has the authority to orchestrate the use of testers by others. There, Congress gave the EEOC the power "to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals."<sup>127</sup> Professor Clark writes that "[t]his provision provides a reasonable basis to argue that the EEOC is empowered to work with private individuals, private organizations like the Fair Employment Council, and even state agencies" to target and test employers for hiring discrimination that have work forces in which minorities and women seem to be underrepresented.<sup>128</sup> However "reasonable" Professor Clark's argument might be, it ignores the fact, as I previously set forth, that Congress specifically limited the EEOC's Title VII investigatory authority. That limited authority simply does not include the power to engage in enforcement testing. Congress likely would not have empowered the EEOC to authorize third parties to do some-

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126. "An employer or other entity covered" is not excused from compliance with Title VII "because of any failure to receive technical assistance under this subsection." *Id.* § 2000e-4(j)(2) (emphasis added); 138 CONG. REC. S16,312-03 (daily ed. Oct. 2, 1992) (statement of Sen. Metzenbaum) ("My hope is that as a result of the increased education, training, and technical assistance . . . [employer] compliance . . . will be improved.").

127. 42 U.S.C. § 2000e-4(g)(1) (1988). Professor Clark also suggests that this provision might permit the EEOC to share information obtained from EEO-1 reports with state agencies, private groups, and individuals to assist them in targeting employers for testing whose work forces reflect an imbalance suggestive of discriminatory hiring practices. *See supra* note 120. While it might permit the EEOC to share EEO-1 information with state and local government agencies, *see infra* note 136 (discussing authority for the EEOC to share information with another federal agency), section 2000e-8(e) prohibits the EEOC from making "public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 592 n.1 (1983) (quoting 42 U.S.C. § 2000e-8(e)); *id.* at 603-04 (holding that a charging party is not a member of the public to whom disclosure of information is prohibited if that information is in the charging party's own Title VII investigation file, but that a charging party is a member of the public to whom disclosure is prohibited if the information is in another party's file, even if the information is relevant to the charging party's case). Therefore, section 2000e-8(e) prohibits the EEOC from sharing EEO-1 reports with private groups or individuals unless they are charging parties and the EEO-1 information is in their file. *Id.* at 604.

128. Clark, *supra* note 1, at 38.

thing Congress had not permitted the EEOC to do on its own.<sup>129</sup>

Therefore, when issuing regulations, the EEOC may not expand its jurisdiction or otherwise exceed the authority granted to it by Congress. Congress gave the Commission the power to "issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of [Title VII]."<sup>130</sup> The Supreme Court has held that EEOC substantive regulations<sup>131</sup> are merely persuasive.<sup>132</sup>

Regardless of whether an EEOC regulation coordinating, directing, orchestrating, or funding testing by others would be deemed substantive or procedural, promulgation of such a rule would not be a valid exercise of the EEOC's power. A court will defer to EEOC substantive regulations, but only to the extent warranted by the thoroughness with which the agency considered the regulation, the validity of the agency's reasoning in support of the regulation, and the extent to which the regulation is consistent with earlier and later pronouncements of the agency.<sup>133</sup> Where the content of a regulation is contrary to congressional intent, it is not entitled to any deference.<sup>134</sup>

129. See *United States v. Westinghouse Elec. Corp.*, 615 F. Supp. 1163, 1180-81 (W.D. Pa. 1985) (explaining that the administrative apparatus established by Congress for the use of other agencies by the Inspector General "was intended to delegate effective power to investigate certain matters *within the scope of [the Inspector General's] authority*") (emphasis added); see also *United States v. Kamin*, 136 F. Supp. 791, 801 (D. Mass. 1956) (explaining that the statutory authority given to a Senate subcommittee is the maximum limit on its power because a Senate committee "could not delegate what it did not have"); *In re Barnes*, 116 F. Supp. 464, 467 (N.D.N.Y. 1953) (explaining that the subpoena power delegated by Congress to an administrative agency "must remain within the bounds of the legislative grant . . . and in investigatory matters should be conferred in express and explicit terms for that purpose"); cf. *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1189-90 (6th Cir. 1982) (prohibiting the EPA from using private contractors to inspect regulated workplaces for compliance with the Clean Air Act where Congress did not so authorize the EPA, even though forbidding the use of contractors might have hampered or crippled the inspection program).

130. 42 U.S.C. § 2000e-12(a) (1988) (emphasis added). A regulation or rule that regulates "the manner in which an administrative agency carries out its administrative function and responsibilities . . . is to be deemed procedural." *Associated Dry Goods Corp. v. EEOC*, 720 F.2d 804, 809 (4th Cir. 1983).

131. "[A] regulation or rule [that] enforces rights or imposes definite obligations on the parties . . . is ordinarily considered substantive." *Associated Dry Goods*, 720 F.2d at 809.

132. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

133. *Skidmore*, 323 U.S. at 140.

134. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *Gilbert*, 429 U.S. at 142-45.

Similarly, procedural regulations are valid only if they are "reasonably related to the purposes of the enabling legislation."<sup>135</sup> If, by regulation, the EEOC attempted to coordinate, direct, orchestrate, or fund testing by others, it would be acting contrary to Congress's intent to limit the agency's investigatory power. The EEOC cannot expand its investigatory power through its rulemaking authority, because the expansion would not be reasonably related to the purposes of the enabling legislation.<sup>136</sup>

Thus, I maintain that before the EEOC may conduct its own enforcement testing program or orchestrate enforcement testing by others, Congress must authorize it to do so. I also continue to maintain that one reason Congress should authorize this testing is because of the obstacles to the use of testers faced by private individuals and groups. I am still concerned that insufficient remedies may be available under current law to encourage an optimum amount of private tester litigation.

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135. *Jackson v. Richards Medical Co.*, 961 F.2d 575, 585 (6th Cir. 1992) (quoting *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973)).

136. *E.g.*, *Arabian Am. Oil Co.*, 499 U.S. at 257 (holding that a regulation extending the reach of Title VII extraterritorially had no support in the plain language of the statute); *Gilbert*, 429 U.S. at 142-45 (holding that a regulation predating the Pregnancy Discrimination Act that interpreted pregnancy discrimination as discrimination based on sex was not supported by the legislative history of Title VII); *see Zarr v. Barrow*, 800 F.2d 1484, 1493 (9th Cir. 1986) (holding that the Bureau of Indian Affairs exceeded its statutory authority by requiring that applicants for Indian Higher Education Grants have at least one-quarter Indian blood); *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1284 (5th Cir. 1983) (holding that the Interstate Commerce Commission exceeded its statutory authority in regulating labor compensation in the trucking industry); *California v. Block*, 663 F.2d 855, 860 (9th Cir. 1981) (holding that the Department of Agriculture exceeded its authority in regulations defining "gross negligence" in connection with the Food Stamps Act); *cf. Jackson*, 961 F.2d at 584-85 (holding that an EEOC regulation permitting the agency to reconsider a no-cause finding and issue a new right-to-sue letter, effectively tolling the 90-day limitations period triggered by issuance of the first right-to-sue letter, was valid because (1) it facilitated the Commission's processing of charges, (2) Congress intended that discrimination claims be resolved administratively, (3) the power to reconsider is inherent in the power to decide, and (4) it did not expand the scope of coverage of Title VII or create additional rights under the Act); *Associated Dry Goods Corp. v. EEOC*, 720 F.2d 804, 810-11 (4th Cir. 1983) (holding that EEOC procedures for disclosing information procured in an investigation to the charging party but not to the respondent, unless the charging party decides to commence an action in federal court, are valid because they are consistent with the statutory scheme); *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 903 (8th Cir. 1979) (holding that a memorandum of understanding between the Office of Federal Contract Compliance Programs (OFCCP) and the EEOC under which the agencies share information and forward complaints where appropriate is a valid procedural rule because Congress intended for them to cooperate).

Moreover, as I discuss in Part III, testers and their counsel might be deterred by state common-law causes of action and attorney disciplinary rules that could be used against them.<sup>137</sup> In light of these obstacles, depending on private groups and individuals to fill the Title VII enforcement void by using testers seems unwise. Professor Clark's challenge to this suggestion has not persuaded me otherwise.

### III. OBSTACLES TO THE USE OF TESTING BY PRIVATE PARTIES

To a large extent, my treatment of the relief issues differs from Professor Clark's in emphasis. When I surveyed the law in this area, I concluded that under existing doctrine significant relief might be denied to prevailing party testers, which could result in denial of their requests for attorneys' fees.<sup>138</sup> I was not unequivocal. However, in light of the possibility that testers might be denied significant relief and fees, I suggested that as a matter of policy, private groups should not be relied on to fill the Title VII enforcement void through testing. In contrast, Professor Clark is reluctant to acknowledge the existing law in this area that might be used to the detriment of testers. Rather, he suggests there is no reason to be concerned about incentives to private tester litigation.<sup>139</sup> His position seems unduly optimistic and in some instances superficial.

First, Professor Clark attempts to dismiss my concern that testers "may not be able to obtain injunctive relief for violations of their rights under Title VII."<sup>140</sup> My concern springs

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137. Yelnosky, *supra* note 2, at 429-30.

138. In my original article, I explained in detail the Supreme Court's attorneys' fees jurisprudence. *Id.* at 430-34. Based on the cases surveyed, I concluded that "a tester must obtain actual relief on the merits of the claim that materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the tester. . . . [and] the relief must be more than de minimis or purely technical." *Id.* at 434. Injunctive relief or a substantial damage award would satisfy these standards. Professor Clark has not challenged my conclusion that a declaratory judgment or a nominal damage award would not. *But see infra* note 187 (discussing Professor Clark's suggestion that a declaratory judgment or nominal damages might support an award of attorneys' fees). Thus, the following discussion focuses on the likelihood of testers obtaining injunctive relief or substantial damages.

139. Clark, *supra* note 1, at 25-26.

140. *Id.* at 26-28 (discussing Yelnosky, *supra* note 2, at 435).

from an analysis of Title VII cases in which courts had denied prevailing plaintiffs injunctive relief.<sup>141</sup> Various justifications were offered by courts in support of these decisions denying injunctive relief: (1) there was no evidence of widespread, pervasive discrimination in the record; (2) there was no evidence that the discriminatory practice that harmed the plaintiff would continue in the future; and (3) the plaintiff was no longer employed by the defendant and therefore not likely to benefit personally from any change in the employer's hiring practices.<sup>142</sup> I suggested that these justifications could be used to deny prevailing testers injunctive relief.

Professor Clark seems to agree. He acknowledges that an injunction is mandatory only "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.'"<sup>143</sup> Thus, evidence of widespread discrimination may be a prerequisite to an injunction.<sup>144</sup> Moreover, as Professor Clark further acknowledges, a district court is free to deny injunctive relief to a prevailing Title VII plaintiff where "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."<sup>145</sup>

Recognizing that a "structural impediment" to future harm may be a basis for denying an injunction to a prevailing Title VII plaintiff is acknowledging the point I tried to make in my earlier article. I expressed concern that courts may refuse to grant prevailing Title VII testers injunctive relief on the grounds that they will not personally benefit from any change in the employer's practices because testers "are not employees of the defendant or likely to become employees."<sup>146</sup>

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141. Yelnosky, *supra* note 2, at 434-38 & nn.162-65 (citing 16 cases that supported my assertion). I took note of one case that held injunctive relief is appropriate whenever a Title VII violation is found. *Id.* at 436 n.162 (citing *Berkman v. City of New York*, 705 F.2d 584 (2d Cir. 1983)). Professor Clark seems comfortable resting his analysis on that case rather than the others. Clark, *supra* note 1, at 26.

142. *Id.*

143. Clark, *supra* note 1, at 26 (quoting ROBERT BELTON, *REMEDIES IN EMPLOYMENT DISCRIMINATION LAW* 207 (1992)).

144. Yelnosky, *supra* note 2, at 436 n.163.

145. Clark, *supra* note 1, at 27.

146. *Id.* at 437. Professor Robert Belton, author of the Title VII remedies treatise relied on by Professor Clark, agrees that a district court may properly deny injunctive relief to a "discriminatee [who] does not seek reinstatement and would not benefit

His only response to the suggestion that prevailing testers could be denied injunctive relief on those grounds is the decision in *Fair Employment Council v. BMC Marketing Corp.*<sup>147</sup> Professor Clark reads that decision as permitting tester plaintiffs, who received allegedly discriminatory treatment from an employment agency, to amend the portion of their complaint seeking injunctive relief to include averments that they were likely to return to the employment agency in the near future as bona fide applicants and that the agency had a settled policy of racial discrimination.<sup>148</sup> Professor Clark misreads the case. The court concluded that the tester plaintiffs did not have standing<sup>149</sup> to sue the defendant employment agency for an injunction that would alter the agency's referral practices because the tester plaintiffs had not made sufficient allegations that they were "threatened with any future illegality."<sup>150</sup> While the court remanded the case "for the district court to exercise its sound discretion over whether to permit amendment," the court suggested that an allegation that the defendant had a settled policy of racial discrimination, even if coupled with a claim that the plaintiffs actually intended to return to BMC as job applicants, would not be a sufficient indication of a likelihood of future injury.<sup>151</sup> The testers alleged that their treatment by the defendant was part of "a

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personally from the injunctive relief." BELTON, *supra* note 143, at 208-09 & n.62 (citing *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1136 (11th Cir. 1984)). Professor Clark himself acknowledges this is a sufficient basis for denying injunctive relief when he cites favorably two cases that I had referred to in my earlier article, in which courts held the prevailing Title VII parties were not entitled to an injunction because they had voluntarily left the workplace. Clark, *supra* note 1, at 27 n.133 (citing *Hampton v. IRS*, 913 F.2d 180 (5th Cir. 1990); *Backus v. Baptist Medical Ctr.*, 671 F.2d 1100 (8th Cir. 1982)).

147. 28 F.3d 1268 (D.C. Cir. 1994).

148. Clark, *supra* note 1, at 27.

149. The court's use of the "standing" label is unfortunate. As I mentioned in my original article, the question of whether a plaintiff's statutory rights were violated—the standing question—is analytically separate from the question of the relief available for that violation. Yelnosky, *supra* note 2, at 427 (maintaining the fact that the plaintiff would not have accepted a job offer might affect the remedies available, but that it is not relevant to the standing issue). Professor Clark is incorrect in stating that I am merely "revisiting the standing question in an altered form." Clark, *supra* note 1, at 25. The Supreme Court recognized this distinction in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), where it held that after-acquired evidence of wrongdoing that would have resulted in the plaintiff's discharge from employment did not bar the plaintiff's ADEA suit challenging her discharge but was relevant to the remedies available for any statutory violation. *Id.* at 883-87.

150. *BMC Mktg. Corp.*, 28 F.3d at 1272.

151. *Id.* at 1274-75.

pattern, practice and policy of employment discrimination on the basis of race.’<sup>152</sup> The court said that the plaintiffs’ allegations did not “indicate that future violation of [the tester plaintiffs] rights is even remotely probable.”<sup>153</sup> “Their usefulness as testers is minimal because they are now known to [defendant] . . . . Their adversarial relationship with [defendant] . . . as well as their established record as deceivers, make it highly implausible that they would ever return as *bona fide* job seekers.”<sup>154</sup>

The same rationale could be used in most tester cases. Once an employer knows a tester, it is unlikely that the tester could be used to test for discrimination by that employer in the future. Moreover where testers must misrepresent their qualifications to appear qualified, they will not apply to the employer as a *bona fide* applicant. Finally, the court recognized that even if the testers could allege that they intended to return as candidates for employment, they would have no control over whether they would be subjected to discrimination at the hands of the defendant in the future.<sup>155</sup>

The most important point is that the court in *BMC Marketing* did exactly what I had predicted. It held that “[t]o pursue an injunction or a declaratory judgment, . . . tester plaintiffs must allege a likelihood of future *violations of their rights* . . . .”<sup>156</sup> Thus, it is undisputable that prevailing-tester plaintiffs are not guaranteed injunctive relief that would support an award of attorneys’ fees.<sup>157</sup> I continue to believe it is unwise to cling to a hope that the courts eventually will grant prevailing testers full injunctive relief on a widespread scale.

Professor Clark also challenges my suggestion that testers may not be able to overcome these potential obstacles to

152. *Id.* at 1274 (quoting from appellant’s complaint).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1273 (second emphasis added). The court’s decision to treat the request for declaratory relief and injunctive relief together is problematic. As I mentioned in my original article, there is no apparent justification for courts to deny declaratory relief under Title VII to a prevailing plaintiff who no longer works for the employer and cannot show a likelihood of doing so. Yelnosky, *supra* note 2, at 439–40. Requiring a showing of possible future harm for a declaratory judgment ignores the personal nature of the remedy. *Id.* The declaratory judgment serves simply as a determination that the defendant violated the plaintiff’s rights. *Id.*

157. I tried to make it clear in my original article that some decisions denying injunctive or declaratory relief to non-employee plaintiffs were probably unsound doctrinally, or at least inconsistent with other decisions granting relief to Title VII prevailing parties. Yelnosky, *supra* note 2, at 437–38 nn.164–65, 439–40 n.172.

injunctive relief through the class action mechanism.<sup>158</sup> I asserted that under Supreme Court decisions prohibiting “across the board” class actions in Title VII cases, testers who do not have a genuine interest in working for the employer defendant may not be permitted to represent a plaintiff class of bona fide applicants.<sup>159</sup> In *East Texas Motor Freight Systems, Inc. v. Rodriguez*,<sup>160</sup> the Supreme Court stated that in an employment discrimination class action “a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.”<sup>161</sup> Otherwise, the Court concluded, there is no way to assure the named plaintiff will adequately represent those who may have been victims of discrimination.<sup>162</sup>

In fact, a district court has read *Rodriguez* in precisely the way I suggested.<sup>163</sup> That court held that testers who had claimed that they received incomplete information about the availability of rental housing because of their race were prohibited from representing a class consisting of individuals who also received incomplete information but had a bona fide interest in housing in that area.<sup>164</sup> The court wrote that “[w]hatever injury a tester plaintiff may suffer . . . by virtue of or attendant to his intelligence-gathering activities, this injury is qualitatively different from the injury allegedly suffered by [bona fide renters].”<sup>165</sup> The court explained:

An injured renter plaintiff has allegedly been denied an opportunity to rent a dwelling because of his race, thereby resulting in his living in a segregated neighborhood to his detriment; a tester plaintiff asserting a claim for relief based upon racial steering . . . may likely claim only that he has been denied only the “provision of services” because of his race, as the tester plaintiff has no intent whatsoever to rent a dwelling from the person or agency he questions. As a different injury . . . accrues to a tester plaintiff from that which accrues to a renter plaintiff,

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158. Clark, *supra* note 1, at 28–29.

159. Yelnosky, *supra* note 2, at 438 n.166.

160. 431 U.S. 395 (1977).

161. *Id.* at 403 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)) (emphasis added).

162. *Id.* at 405–06.

163. *Turner v. A.B. Carter, Inc.*, 85 F.R.D. 360, 364 (E.D. Va. 1980).

164. *Id.* at 366–70.

165. *Id.* at 367.



such difference will preclude his designation by the Court as a class representative for those claiming monetary damage from being steered into a racially segregated neighborhood.<sup>166</sup>

Although courts are not unanimous on this issue,<sup>167</sup> my point remains a valid one. The class action vehicle may not be available to tester plaintiffs who wish to overcome the obstacles that exist in individual actions brought by testers. Likewise, relying on the opportunity of a sponsoring tester organization to sue to obtain significant relief and attorneys' fees seems unlikely to result in an optimal amount of testing.<sup>168</sup> As I mentioned in my original article, an organization that can show it suffered injury as a result of the defendant's alleged discriminatory hiring practices would have standing to sue under Title VII.<sup>169</sup> Once again, however, Professor Clark is quite sanguine about the *BMC Marketing* decision, in which the Court of Appeals for the D.C. Circuit granted the FEC standing.<sup>170</sup> He ignores severe limits placed by the court on the types of organizations that would have standing and the relief available to them.

Those limits again suggest to me that relying on private groups and individuals to engage in an optimal amount of testing is unwise. The court concluded that the FEC had standing based on the allegation that discrimination by the defendant agency interfered with the FEC's goals of promoting equal opportunity through community outreach, public education, counseling, and research projects.<sup>171</sup> It rejected the FEC's claim that the expense of testing the defendant was an injury that would support a claim for organizational standing.<sup>172</sup> Thus, the standing recognized by the court in *BMC Marketing* is limited to organizations that engage in broad equal employment opportunity efforts. I am not optimistic that there are a sufficient number of organizations nationwide to result in an optimum amount of testing. Moreover, the court held that the

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166. *Id.* (citations omitted).

167. *See* *Open Hous. Ctr., Inc. v. Samson Management Corp.*, 152 F.R.D. 472 (S.D.N.Y. 1993) (permitting testers to represent a class including individuals who actually intended to rent housing).

168. Clark, *supra* note 1, at 30-31.

169. Yelnosky, *supra* note 2, at 424 n.93.

170. Clark, *supra* note 1, at 30-31.

171. *BMC Mktg. Corp.*, 28 F.3d at 1276.

172. *Id.*

organization had standing only to redress perceptible harm to its programs caused by the defendant's discrimination against bona fide job seekers.<sup>173</sup> Discrimination against the testers would only be evidence of discrimination against bona fide applicants, and the organization would thus have to show that discrimination against bona fide applicants "perceptibly impaired" its non-testing equal employment opportunity programs.<sup>174</sup> I am certainly not convinced this current regime will result in sufficient testing to fill the Title VII enforcement void.

Next, Professor Clark challenges my prediction that prevailing tester plaintiffs may not recover sufficient money damages to obtain attorneys' fees.<sup>175</sup> After reviewing awards given to prevailing testers in housing cases I opined that "testers are likely to recover only modest amounts, which may not be sufficient to support a fee award."<sup>176</sup> Professor Clark responds by saying "[i]t 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."<sup>177</sup>

This wishful thinking seems a flimsy foundation for a policy decision about how best to encourage an optimal amount of testing. In fact, the FEC and the individual plaintiffs in the *BMC Marketing* case recently settled with the defendant for a total of \$6000, inclusive of attorneys' fees, compensatory damages, and costs.<sup>178</sup> This is certainly not the kind of settlement that will encourage groups to undertake testing.

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173. *Id.* at 1277.

174. *Id.*

175. Clark, *supra* note 1, at 25, 31-33.

176. Yelnosky, *supra* note 2, at 443 (footnote omitted), *questioned in* Clark, *supra* note 1, at 25, 31-32. Professor Clark asserts that in describing Fair Employment Council of Greater Washington, Inc. v. Molovinsky, No. 91-7202 (D.C. Super. Ct. Aug. 12, 1993), I mentioned that the jury awarded each of two tester plaintiffs \$10,000 in punitive damages, Yelnosky, *supra* note 2, at 443 n.185, but "did not further discover that each of the tester plaintiffs recovered an additional \$5000 in compensatory damages." Clark, *supra* note 1, at 31 n.156. Although I did not discuss the punitive and compensatory damages awards together, on the page following my discussion of the punitive damage award in *Molovinsky*, I mentioned that the jury "provided each of [the] two employment tester plaintiffs \$5000 in compensatory damages for sexual harassment in the course of applying for placement services with an employment agency." Yelnosky, *supra* note 2, at 444 n.189.

177. Clark, *supra* note 1, at 32.

178. *Racial Discrimination: Job Referral Agency Will Pay \$6,000 to Settle Bias Suit Involving Testers*, 1995 Daily Lab. Rep. (BNA) No. 38, at D-10 (Feb. 27, 1995).

Moreover, Professor Clark acknowledges that "low awards [in housing cases] continue[] in some courts."<sup>179</sup> Since my original article has been published, the author of a law review note surveyed awards in fair housing cases brought by testers and concluded that courts rarely award compensatory damages in excess of \$5000.<sup>180</sup> The note catalogued some of the more popular reasons expressed to justify lower compensatory damage awards to testers than to bona fide house seekers.<sup>181</sup> Some courts have stated that any injury suffered by testers may be offset by the pleasure they derive from participating in enforcing the civil rights laws.<sup>182</sup> Some have noted that compensatory damages are less important to those testers who receive compensation from their sponsoring organization.<sup>183</sup> Finally, some justify the lower awards by noting that the testers may be expecting the discrimination.<sup>184</sup> Despite Professor Clark's hopes, these reasons certainly could be used to justify low awards to testers in employment cases. Recognizing this propensity of courts to make low awards in housing cases, the author of the note argued that damages must be increased and made easier to collect in tester cases in order to encourage increased litigation of tester cases by the private and public interest bar.<sup>185</sup> This is the simple point I was trying to make.

Punitive damage awards under the Civil Rights Act of 1991 might not solve this problem either. Punitive damages are not awarded routinely. Instead, they are available in Title VII cases only where the defendant's acts were malicious—promoted or accompanied by ill will, spite, or grudge—or wanton—done in reckless or callous disregard of or indifference to the rights of the plaintiff.<sup>186</sup> If the compensatory and

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179. Clark, *supra* note 1, at 32 n.157.

180. Alex S. Navarro, Note, *Bona Fide Damages for Tester Plaintiffs: An Economic Approach to Private Enforcement of the Antidiscrimination Statutes*, 81 GEO. L.J. 2727, 2748 (1993).

181. *Id.* at 2746 nn.89–90.

182. *Id.* at 2746 n.89 (citing *United States v. Balistreri*, 981 F.2d 916, 932 (7th Cir. 1992); *Coel v. Rose Tree Manor Apartments, Inc.*, No. 84-1521, 1987 U.S. Dist. LEXIS 9212, at \*26, 1987 WL 18393, at \*16 (E.D. Pa. Oct. 13, 1987)).

183. *Id.* at 2746 n.92 (citing *Coel*, 1987 U.S. Dist. LEXIS, at \*17, 1987 WL 18383, at \*7).

184. *Id.* at 2746–47 (citing *Davis v. The Mansards*, 597 F. Supp. 334, 348 (N.D. Ind. 1984)).

185. *Id.* at 2745, 2752–53, 2766.

186. *E.g.*, *Dombeck v. Milwaukee Valve Co.*, 823 F. Supp. 1475, 1479–80 (W.D. Wis. 1993) (holding that the defendant's failure to conduct an investigation into an alleged

punitive damage awards recovered by prevailing employment testers are within the \$5000 figure, district courts are well within their discretion to deny those testers any attorneys' fees.<sup>187</sup> Thus, my concern that adequate remedies may not be available to promote private tester suits remains.

Those concerns are not alleviated by Professor Clark's suggestion that attorneys' fees will be available to prevailing tester plaintiffs under a 1991 amendment to section 2000e of Title VII.<sup>188</sup> I explored this possibility in my original article and concluded that the provision was not intended to apply—nor could it be read to apply—to prevailing testers seeking attorneys' fees unless the employer had a mixed motive for the disparate treatment of the testers.<sup>189</sup>

Professor Clark acknowledges, as I originally wrote, that the provision was passed by Congress in response to the Supreme Court's decision in *Price-Waterhouse v. Hopkins*.<sup>190</sup> There the Court held that a plaintiff who showed that an action taken by her employer was motivated both by unlawful discrimination and lawful considerations was entitled to no relief if the employer proved it would have made the same decision absent the unlawful motive.<sup>191</sup> In contrast, section 2000e-5(g)(2)(B) was intended to permit a district court to grant to plaintiffs in these so-called "mixed motive" cases the attorneys' fees generated in establishing the employer's

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hostile work environment, while negligent, was not a callous or reckless disregard of the plaintiff's rights).

187. Yelnosky, *supra* note 2, at 444–45 & nn. 191–96. However, Justice O'Connor, concurring in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), wrote that a nominal damage award might support a grant of fees, considering "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served." *Id.* at 579 (O'Connor, J., concurring). I suggested in my original article that under Justice O'Connor's reasoning "testers might be entitled to attorneys' fees if they recover nominal damages." Yelnosky, *supra* note 2, at 442 n.179. The Court of Appeals for the Eighth Circuit, in *Jones v. Lockhart*, 29 F.3d 422 (8th Cir. 1994), recently adopted the test from Justice O'Connor's concurrence and awarded \$10,000 in attorneys' fees in a prisoner's excessive force case where the plaintiff recovered \$1 in compensatory damages and \$1 in punitive damages. *Id.* at 423–24. If Justice O'Connor's test became the prevailing view of the Supreme Court's attorneys' fees jurisprudence, I might be more optimistic about the chances for prevailing testers to recoup their fees as a matter of course. However, one student author recently suggested an award of attorneys' fees would not be a sufficient incentive for tester plaintiffs because the cost of *administering* a tester program would not be recoverable as attorneys' fees. Navarro, *supra* note 180, at 2736.

188. Clark, *supra* note 1, at 32–34.

189. Yelnosky, *supra* note 2, at 445 n.196.

190. 490 U.S. 228 (1989).

191. *Id.* at 242, 258.

unlawful motivation, even if the employer met its burden of proving that it would have come to the same conclusion absent the discriminatory motive.<sup>192</sup>

Professor Clark suggests that I have read incorrectly this provision to authorize attorneys' fees only in mixed motive cases.<sup>193</sup> To the contrary, "[i]n passing this section . . . Congress's clear intent was to deal with situations in which mixed motives existed at the time the employer made the decision."<sup>194</sup> The language of the provision reflects that intent. A court may grant the limited fees authorized by section 2000e-5(g)(2)(B) 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"<sup>195</sup> and the "respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor."<sup>196</sup> Plainly, then, "[s]ection 2000e-5(g)(2)(B) . . . applies only to mixed-motive Title VII cases in which the defendant proves that the same decision would have been made in the absence of the discriminatory motive."<sup>197</sup>

Professor Clark incorrectly asserts that prevailing testers will be able to avail themselves of this provision even if they are not arguing that they received unequal treatment because of mixed motives. I agree with Professor Clark that in one way the prevailing tester plaintiff and the prevailing mixed motive plaintiff are similarly situated: they both prove that the employer engaged in discriminatory behavior.<sup>198</sup> That similarity,

192. 42 U.S.C. § 2000e-5(g)(2)(B) (providing that a court may grant attorneys' fees and costs "directly attributable only to the pursuit of a claim under section 2000e-2(m)," which provides that it is unlawful to base an employment decision on race, color, religion, sex, or national origin, "even though other factors also motivated the practice." *Id.* § 2000e-2(m).

193. Clark, *supra* note 1, at 33.

194. Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 191 (1993); see also H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 45-49 (1991), reprinted in 1991 U.S.C.A.N. 549, 583-87 (allowing courts to award attorneys' fees and other appropriate relief in cases where the employee demonstrates discrimination but fails to establish it as the sole cause).

195. 42 U.S.C. § 2000e-2(m) (Supp. V 1993).

196. 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. V 1993).

197. *Sheppard v. Riverview Nursing Centre, Inc.*, 870 F. Supp. 1369, 1375 (D. Md. 1994).

198. Yelnosky, *supra* note 2, at 445 n.196 (noting that an underlying premise of the provision is that an individual who proves that the employer's acts were inconsistent with Title VII's proscriptions should be entitled to attorneys' fees expended in proving that case).

however, does not change the plain language of the statute. A tester is only a mixed motive plaintiff if the tester was treated in a discriminatory manner for lawful and unlawful reasons. A prevailing party tester ordinarily proves her Title VII rights were violated by showing that an impermissible factor such as race was the reason she received disparate treatment. That she may not be entitled to relief sufficient to obtain attorneys' fees does not transform her case to one based on mixed motives. Congress "neither contemplated nor condoned using the carefully crafted mixed motives standard in cases in which the employer did not even know about the [lawful] reason [for disparate treatment at the time the decision was made]."<sup>199</sup> Professor Clark's assertion that Congress could not have intended the prevailing "single motive" tester plaintiff to be in a worse position than the prevailing mixed-motive plaintiff simply ignores the fact that Congress did not consider the issue.<sup>200</sup>

Finally, Professor Clark challenges my expressed concern that relying on private groups and individuals to engage in an optimal amount of testing might be unwise because employers might deter private groups and individuals from using testers by asserting various claims against them.<sup>201</sup> I speculated that employers might sue testers and their counsel for breach of contract or fraud, or argue that their conduct violates ethical, criminal, or civil common-law proscriptions on conduct that "stirs up litigation" or bars attorneys from contacting represented parties.<sup>202</sup> Although my concerns were somewhat speculative and discussed out of an abundance of caution, I accurately predicted that employers might assert such claims. Recently, defendants in a housing discrimination case brought by testers asserted RICO counterclaims against the plaintiffs.<sup>203</sup> Although the court ultimately dismissed these

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199. McGinley, *supra* note 194, at 191-92.

200. Even if the intent and language of section 2000e-5(g)(2)(B) could be interpreted to apply it to situations that do not involve mixed motives, district courts are not required to award fees under the provision. *See, e.g., Lewis v. American Foreign Serv. Ass'n*, 846 F. Supp. 77 (D.D.C. 1993). Relying on *Farrar v. Hobby*, 113 S. Ct. 556 (1992), the *Lewis* court denied fees to a mixed-motive plaintiff because in section 2000e-5(g)(2)(B) "Congress's use of the word 'may'" in relation to a court's granting attorneys' fees, "clearly indicates that the Court may exercise its discretion when awarding the relief allocated in the statute." *Lewis*, 846 F. Supp. at 83 n.8.

201. Clark, *supra* note 1, at 34 (commenting on *Yelnosky*, *supra* note 2, at 451).

202. *Yelnosky*, *supra* note 2, at 446-59.

203. In *Heights Community Congress v. Smythe, Cramer Co.*, 862 F. Supp. 204 (N.D. Ohio 1994), the defendant real estate company asserted counterclaims against the plaintiff testers under the Racketeer Influenced and Corrupt Organizations Act

claims,<sup>204</sup> that case is ample evidence that my concerns about claims being asserted against testers to deter the use of the practice are not idle ruminations. Therefore, Professor Clark's comments about some of the other claims that might be asserted against testers warrant some response.

First, he asserts that "[m]any of [my] claims regarding potential unethical activity have been refuted" in a recent law review article by Alex Oh.<sup>205</sup> Professor Clark fails to mention that Oh concluded that counsel who organize testing activities may engage in unethical conduct in what would appear to be a very common testing scenario.<sup>206</sup> Oh reasoned that an attorney might violate ethical proscriptions against misrepresentation if the attorney was responsible for altering facts on a tester's resume, and the employer offered a job to the tester, relying on the misrepresentation.<sup>207</sup> Oh also recognized, as I had suggested,<sup>208</sup> that lawyers and other private parties engaged in testing are more likely to run afoul of ethical proscriptions when they engage in testing for their own pecuniary gain.<sup>209</sup>

I continue to think it prudent to acknowledge the potential problems with relying exclusively on the private market to produce the optimum amount and type of employment testing to improve the enforcement regime of Title VII. At times, Professor Clark himself seems to acknowledge these problems. He states that public policy concerns about misrepresentations made in the course of testing should encourage Congress to authorize the EEOC to determine when and how

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(RICO), 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993) and Ohio's Corrupt Activities Act, OHIO REV. CODE ANN. §§ 2923.31-.36 (Anderson 1993 & Supp. 1994), arguing that the testers' organization "used settlement demands and threats to sue merely for the purpose of fund-raising." 862 F. Supp. at 207.

204. *Heights Community Congress*, 862 F. Supp. at 207.

205. Clark, *supra* note 1, at 35 (citing Oh, *supra* note 63).

206. Oh, *supra* note 63, at 489. Clark also neglects to mention that Oh concluded that testers who act in a way to encourage employers to reject them "entrap" the employers. *Id.* at 503-04. In light of that concern, Oh argued for EEOC coordination and oversight. *Id.* at 504. I argued in my original article and still believe that testing does not constitute entrapment, Yelnosky, *supra* note 2, at 474-81, but I also argued then, as I do now, that EEOC oversight and coordination of testing activities in the employment area is desirable. *Id.* at 483. Clark agrees with me. Clark, *supra* note 1, at 38-40.

207. Oh, *supra* note 63, at 487 n.61.

208. Yelnosky, *supra* note 2, at 451-52.

209. Oh, *supra* note 63, at 490.

misrepresentations may be made in employment testing.<sup>210</sup>

He is similarly ambivalent in responding to my conclusion that the state law hurdles that could be placed in the way of private testers would not be preempted by Title VII.<sup>211</sup> He claims in one section of his article 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."<sup>212</sup> Later, however, he writes that "[a]rguments that state legislation which prohibits misrepresentations in the employment application process were preempted would probably fail."<sup>213</sup> Regardless of where Professor Clark ultimately comes out on this issue, I stand by my previous analysis of it.<sup>214</sup>

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210. I first expressed the concern about liability for misrepresentation in my original article. Yelnosky, *supra* note 2, at 449-50. I also suggested that Congress should legislate in this area. *Id.* at 482-83.

211. *Id.* at 471-73.

212. Clark, *supra* note 1, at 35.

213. *Id.* at 48 n.238.

214. Professor Clark tries to dismiss most of the concerns I raised about a tester's lack of interest in employment with the tested employer by asserting that "[t]esters are not that different from bona fide applicants who ultimately turn down a job offer." Clark, *supra* note 1, at 35. They can be undeniably different, however, with regard to their intent to *consider accepting* an offer of employment. I recognized in my earlier article that applicants often test the waters to see if other employment opportunities are available and otherwise solicit offers they are not serious about accepting. Therefore, it is customary that the employer runs the risk in the initial stages of considering whether to offer a job to an applicant that the applicant is not serious about entertaining an offer of employment. Yelnosky, *supra* note 2, at 450 n.218. However, if the applicant becomes aware that the employer is expending significant amounts of time and money considering his suitability for employment or may be bypassing other qualified candidates, which is often the case in the latter stages of hiring for higher-skilled, upper-level positions, there may be liability in tort for failing to disclose the lack of a good faith intention to consider an offer. *Id.*

Professor Clark implies that the Court of Appeals for the Fourth Circuit said something important about the relief issues in *Lea v. Cone Mills*, 438 F.2d 86 (4th Cir. 1971). Clark, *supra* note 1, at 37 n.185. Professor Clark's reasoning here is difficult to follow. In *Lea* the court held that the district court erred in concluding that tester plaintiffs who prevailed in a Title VII action in obtaining an injunction against defendant's discriminatory hiring practices were not entitled to recover attorneys' fees. *Lea*, 438 F.2d at 88. The case has no precedential value on the attorneys' fees issue, because it was decided some 20 years before the Supreme Court articulated its current attorneys' fees jurisprudence. If Professor Clark is suggesting that the court in *Lea* addressed the issue of tester standing, he is simply wrong. Standing questions were not relevant to the posture of that case, and the court never mentioned any standing issues. *See, e.g.*, Oh, *supra* note 63, at 478 n.21. ("The majority opinion did not address the issue[] of standing . . . . Consequently, the decision serves only a minor role in assessing the present controversy.")



## IV. THE FAIR HOUSING INITIATIVES PROGRAM

After sorting through Professor Clark's article, I have concluded that he agrees with my central conclusions: the EEOC should take some leadership role in implementing enforcement testing to uncover hiring discrimination,<sup>215</sup> and some congressional action is necessary in this area.<sup>216</sup>

Professor Clark recognizes that testing programs should be as fair as possible and acknowledges (1) the public policy implications of testers misrepresenting their qualifications,<sup>217</sup> (2) the additional costs to employers associated with checking all of an applicant's statements to determine whether the applicant submitted a false application,<sup>218</sup> (3) the possible cost an employer might incur by hiring and then having to fire an unqualified tester,<sup>219</sup> and (4) the threat of tester liability for misrepresentations made to employers concerning job qualifications.<sup>220</sup> He responds to these concerns, in part, by arguing for EEOC oversight and congressional action,<sup>221</sup> recognizing that some of the state law obstacles to testing by private parties may be preempted if Congress specifically authorized the practice.<sup>222</sup> He also writes:

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.<sup>223</sup>

While he suggests that employers should not be targeted for testing unless there is some reason to believe that they are currently engaged in discriminatory hiring practices, he fails to recognize that this limitation would require legislative

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215. See Clark, *supra* note 1, at 38-40.

216. *Id.* at 46-48.

217. *Id.* at 47-48.

218. *Id.* at 48.

219. *Id.*

220. *Id.* at 46.

221. *Id.*

222. *Id.* at 35.

223. *Id.* at 48.

action.<sup>224</sup> Professor Clark also states that the EEOC should share information with others in order to help testers avoid targeting employers who are not likely to be engaged in discriminatory hiring practices.<sup>225</sup>

As I stated earlier, I think Professor Clark's time could have been better spent if he had acknowledged that he agreed with much of what I had written and used more of his response to my article to prompt a dialogue that would give the EEOC and Congress real guidance in reconsidering the role of the EEOC in enforcing Title VII, and the possible place for enforcement testing in a new vision of that role. Now that I have clarified where we really stand on these issues, I want to highlight an existing model of public/private partnership in the enforcement of federal civil rights legislation through the use of testers—the Fair Housing Initiatives Program (FHIP).<sup>226</sup> Congress should consider adopting a similar program to organize and utilize enforcement testing in employment in a more meaningful and systematic way.

Many of the arguments Professor Clark and I have made here suffer from a lack of empirical support. In some ways, as I suggested, some of our differences are really based on a more or less optimistic prediction of future events. He agrees with me that testing is necessary, that it can be reliable and cost-efficient when utilized properly, and that it should be used in instances where it fills an existing enforcement void. The best way to move us forward from here is to gather more empirical data to support conclusions on the proper context of employment law enforcement testing. A program like the FHIP can do that.<sup>227</sup>

Congress authorized the FHIP in section 561 of the Fair Housing and Community Development Act of 1987.<sup>228</sup> Under the FHIP the Secretary of Housing and Urban Development

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224. See *supra* notes 103–12, 117–19 and accompanying text.

225. Clark, *supra* note 1, at 38.

226. 42 U.S.C. § 3616a (Supp. V 1993).

227. I am not the first to suggest the FHIP could be a model for incorporating the testing technique into the EEOC's enforcement strategy. See, e.g., Penda D. Hair, *Civil Rights*, in *CHANGING AMERICA: BLUEPRINTS FOR THE NEW ADMINISTRATION* 334, 340 (Mark Green ed., 1992) (arguing that as part of an aggressive enforcement program, the Clinton Administration should support a federally funded employment testing effort by developing the employment equivalent of the FHIP program); Fix et al., *supra* note 37, at 45 (suggesting that policy makers should consider whether it is appropriate for the federal government to help build an infrastructure of private organizations to resemble the fair housing councils).

228. 42 U.S.C. § 3616a (Supp. V 1993).

was authorized to provide funds to non-profit organizations or other private entities "to conduct a variety of activities, including testing, in support of fair housing enforcement."<sup>229</sup> The program was authorized as a two-year demonstration to provide Congress with an opportunity to review the actual experiences with the program.<sup>230</sup> During this period, the Secretary was directed to "establish guidelines for testing activities funded under the private enforcement initiative . . . to ensure that investigations in support of fair housing enforcement efforts . . . develop credible and objective evidence of discriminatory housing practices."<sup>231</sup> The conference committee that reported out the final bill urged the Secretary, when preparing the testing guidelines, to:

give particular consideration to the comments and suggestions of both housing industry members (including those that have been the subjects of testing or otherwise involved in the testing process) and of private and public agencies that have practical experience in the use of testing as an instrument for securing rights under fair housing laws.<sup>232</sup>

Under the statute, the guidelines applied only to activities funded by the Secretary. Thus, the guidelines were intended to have no impact on the use of evidence secured through testing not funded by the Secretary in any legal proceeding brought to secure a right or remedy available under the federal fair housing laws. Those guidelines<sup>233</sup> set forth (1) specific

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229. H.R. REP. NO. 122(I), 100th Cong., 1st Sess. 90 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3317, 3406.

230. *Id.* at 293, 1987 U.S.C.C.A.N. at 3444. The Secretary was required to file a quarterly report with the relevant House and Senate committees detailing the activities funded under the section. Pub. L. No. 100-242, § 561(b)(2), 101 Stat. 1942, 1943 (1988).

231. Pub. L. No. 100-242, § 561(c)(2), 101 Stat. 1942, 1943 (1988) (codified as amended at 42 U.S.C. § 3616a(f)(2)(Supp. V 1993)). According to the House Report on the bill, the Secretary's guidelines were to "(1) contain measures necessary to ensure that such testing [was] objective, reliable, and controlled; (2) guarantee the credibility and probative value of testing evidence; and (3) preclude the misuse of the funds under the Program." H.R. REP. NO. 122(I), *supra* note 229, at 90-91, 1987 U.S.C.C.A.N. at 3406-07. The Committee stated explicitly that the Secretary should not interfere with any remedies currently provided under federal fair housing laws. *Id.* at 91, 1987 U.S.C.C.A.N. at 3407.

232. H.R. CONF. REP. NO. 426, 100th Cong., 1st Sess. 240 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3458, 3537.

233. The guidelines for testing funded under the FHIP are codified at 24 C.F.R. § 125.405 (1994).

applicant eligibility requirements, (2) a detailed description of procedures to be followed in the conduct of funded testing, and (3) performance monitoring requirements. For example, the guidelines address the targeting issue. Funded testing may only be conducted in response to a bona fide allegation of a discriminatory housing practice.<sup>234</sup> The agency justified this limitation on the ground that the program was a demonstration of limited duration with limited financial resources that Congress supported to enforce the fair housing laws, not to conduct research into the extent of housing discrimination.<sup>235</sup>

The guidelines address reliability and tester matching issues as well. In an attempt to establish a method of obtaining credible and objective evidence through funded fair housing testing, the guidelines specify how many testers must visit an entity targeted by a bona fide allegation. The guidelines also address how closely the testers' characteristics and alleged housing needs must match those of the individual who made the bona fide allegation or those of the other testers.<sup>236</sup> A funded program may not recruit as a tester any individual with a prior felony conviction or a conviction of a crime involving fraud or perjury.<sup>237</sup> The guidelines forbid a tester or funded organization from having an economic interest in the outcome of the test other than any interest in damages that may be awarded by a court for a fair housing law violation.<sup>238</sup> They also forbid any other "bias or conflict of interest which would prevent or limit [the] objectivity or fairness [of the test]."<sup>239</sup> Testers are forbidden from contacting each other during testing about the conduct of the test, testing experiences, or results.<sup>240</sup> The agency uses an application process to try to assure that funded organizations

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234. *Id.* § 125.405(b)(1).

235. Fair Housing Initiatives Program, 54 Fed. Reg. 6492 (1989) (codified at 24 C.F.R. § 125 (1994)). As discussed, Professor Clark would target employers for testing if minorities or women were statistically underrepresented in their workforces. Clark, *supra* note 1, at 24 n.119. Other targeting techniques have been suggested, such as a history of discrimination, tips from any source, jobs involving substantial contact with the public, or jobs that are valuable or plentiful. Boggs et al., *supra* note 15, at 355. There are proponents of purely random testing, e.g., Hair, *supra* note 227, at 338-39, but critics fear that without strict guidelines, testing could be used for ulterior motives. Millspaugh, *supra* note 65, at 239.

236. 24 C.F.R. § 125.405(b)(3),(c)(2)(iii),(iv) (1994).

237. *Id.* § 125.405(c)(1).

238. *Id.* § 125.405(c)(3)(i).

239. *Id.* § 125.405(c)(3)(ii).

240. *Id.* § 125.405(c)(2)(ii).

have experience in the area and will follow the funding guidelines.<sup>241</sup>

In 1990, Congress reauthorized the program and funded it to extend the demonstration period to September 30, 1992.<sup>242</sup> Congress reauthorized and amended the program most recently in the Housing and Community Development Act of 1992.<sup>243</sup> Congress removed the demonstration period provision, establishing the FHIP as a permanent program. It determined that testing "is a valid and necessary component of fair housing investigative and enforcement activities."<sup>244</sup> The Secretary is currently undertaking a review of the testing guidelines.<sup>245</sup>

Congress made other relevant changes to the FHIP in 1992. It authorized the Secretary of HUD to use funds to develop, organize, and build the capacity of existing fair housing organizations to engage in investigative activities and to form and establish new organizations<sup>246</sup> in unserved or underserved areas as well as areas where there are large concentrations of members of protected classes.<sup>247</sup> Congress also expressed enthusiasm for expanding the use of testers to uncover discrimination in mortgage lending practices<sup>248</sup> and specifically authorized the Secretary to fund testing intended to uncover discrimination in "the making or purchasing of loans or the provision of other financial assistance."<sup>249</sup> The Secretary will

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241. *Id.* § 125.405(d).

242. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 953(a),(b), 104 Stat. 4419 (1990).

243. Pub. L. No. 102-550, § 905, 106 Stat. 3638 (codified at 42 U.S.C. § 3616a (Supp. V 1993)).

244. 59 Fed. Reg. 44,598 (1994).

245. Because the testing guidelines were to be used during the authorized demonstration period, and because that period expired, HUD is proposing to eliminate most of the testing guidelines. It will still require that testers have no prior felony convictions or convictions of crimes involving fraud or perjury and that the testers receive training or be experienced in testing procedures or techniques. *Id.* at 44,596.

246. Pub. L. No. 102-550, § 905(b)(2), 106 Stat. 3869 (1992) (codified at 42 U.S.C. § 3616a (b)(2)(A),(C),(D) (Supp. V 1993)).

247. 59 Fed. Reg. 44,600 (1994). In issuing rules under these provisions, HUD intends to make "this category of funding broadly available," 59 Fed. Reg. 44,601 (1994), and to target areas identified by, *inter alia*, "the amount of funds available; the absence in an area of substantially equivalent State or local agencies, or private enforcement groups; and the presence of large concentrations of protected classes." *Id.*

248. H.R. REP. No. 760, 102d Cong., 2d Sess. 157 (1992), reprinted in 1992 U.S.C.C.A.N. 3281, 3437.

249. Pub. L. No. 102-550, § 905(b)(2)(B), 106 Stat. 3869 (1992) (codified at 42 U.S.C. § 3616a(b)(2)(B) (Supp. V 1993)).

be required to report to Congress annually on the administration of the program.<sup>250</sup>

## CONCLUSION

A funded testing program modeled along the lines of the FHIP seems to be a desirable next step in the development of the use of testers to enforce equal employment opportunity laws. The program can be used as a model for Congress and the EEOC to begin to integrate this new enforcement technique into the Title VII arsenal. The period of deliberation by Congress, as well as the subsequent public comment period associated with any EEOC rulemaking, are opportunities to air, debate, and test some of the issues Professor Clark and I, as well as others, have discussed here and elsewhere. Perhaps through the use of a demonstration period like that originally authorized under the FHIP we can move beyond speculation and conjecture and begin to produce the empirical evidence necessary to evaluate usefully the efficacy of using testers to uncover and remedy discrimination in hiring.

Issues such as the efficacy of testing for discrimination in hiring for higher-skilled jobs can be debated, tested, and hopefully revisited. Various techniques for targeting firms for testing can be debated and tested. More debate and empirical data on the need for misrepresentations of qualifications and the permissible types of misrepresentations in testing are necessary. Funds could be used, as they were in the FHIP, to develop more organizations capable of conducting reliable employment testing to further fill the Title VII enforcement void. Finally, by permitting unfunded groups to operate simultaneously,<sup>251</sup> which I assume Professor Clark would prefer, the

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250. Pub. L. No. 102-550, § 905(j), 106 Stat. 3872 (1992) (codified at 42 U.S.C. § 3616a(j) (Supp. V 1993)).

251. For several reasons, I took the position in my original article that there would be benefits to comprehensive congressional legislation in this area to set the permissible boundaries and techniques of employment law enforcement testing. For example, testing could be limited to uncovering discrimination in hiring for lower-skilled, entry-level jobs; disincentives caused by the inability of parties to recover attorneys' fees could be changed through legislation; and state law obstacles to testing could be preempted. Yelnosky, *supra* note 2, at 483. A program like FHIP would be a more incremental approach, permitting the use of testing to evolve as our understanding of potential costs and benefits increases.

law may be permitted to develop in this area and funded testing can continue unabated so that if I am right that incentives to promote testing are not sufficient, the technique will continue to be developed.

My final point, then, is a simple one. While I welcome the opportunity Professor Clark's article has given me to discuss further the ideas I first presented in my original article, to move forward from here we need to concentrate on developing and implementing the testing technique. Only then can we hope to make truly wise decisions about the efficacy of this practice.