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## REPORT

INVESTIGATORY TESTING AS A TOOL FOR ENFORCING CIVIL RIGHTS STATUTES  
CURRENT STATUS AND ISSUES FOR THE FUTURE

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### **I. Introduction**

Investigatory testing as a tool for enforcing civil rights statutes is very simple in concept. It starts with matching up a pair of testers who are as close to equal as possible in all relevant characteristics except one: the characteristic for which the test will seek to determine whether discrimination is occurring on the basis of that characteristic. For example, if a test is conducted for discrimination in rental housing, two testers would have similar credit reports, similar employment histories, drive similar cars, be dressed in a similar manner, be the similar age and of the similar educational background, but be of different races. The testers would then be sent, close together in time, to the same apartment complex. If the white tester is offered an apartment, but the black tester is told that no apartments are available, that is some evidence of illegal housing discrimination. If this test is repeated several times, and the same result is obtained, that is stronger evidence of discrimination. Because fewer people today are overtly discriminatory, such evidence can be crucial in uncovering the covert discrimination that continues to plague our society.

This paper looks at the status of programs that use tester evidence. Since most existing programs examine possible violations of federal law, the bulk of this paper examines testing programs at the federal level. It looks at the status and issues regarding tester programs and tester evidence in four discrete areas: housing, lending, employment and public accommodations. The analysis reveals that the paradigmatic example of investigatory testing described above becomes much more complex and problematic when translated to other contexts, such as employment or lending. It discusses some of the new and innovative approaches to those problems that have been developed, particularly in the area of lending.

At the end of each section, the paper offers suggestions about how testing programs could be used in California to ensure that California's civil rights statutes are being adequately enforced. In the more straightforward contexts, particularly housing and public accommodations, it concludes that little is needed in the way of statutory changes to allow California to conduct investigatory tests. A statute clarifying that the Attorney General has the authority to conduct proactive investigations would be helpful, however. In the more complicated areas of lending and employment, more detailed suggestions are offered.

### **II. Testing to Investigate Discrimination in Housing**

#### A. General Background of Testing in the Housing Context

Testing as an investigatory tool is most established in the area of housing discrimination.<sup>1</sup> In 1982 the United States Supreme Court held, in *Havens Realty Corp. v. Coleman*,<sup>2</sup> that both individual testers and the organizations sponsoring and employing the testers have standing to sue under the Fair Housing Act of 1968. In that case, the Court defined testers in the context of the case as "individuals who, without an intent to rent or

purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."<sup>3</sup> Much of the testing in the area of housing has been conducted by independent, nonprofit groups who, when their investigations uncover violations of the law, file complaints with the Department of Housing and Urban Development (HUD) and, subsequently, file law suits. Also, the Housing and Civil Enforcement Section of the Civil Rights Division of the Federal Department of Justice has recently initiated an investigatory program that utilizes testing.<sup>4</sup> But the most comprehensive program that addresses testing in the housing context is the Fair Housing Initiatives Program (FHIP), a part of the Fair Housing Act.

## B. The Fair Housing Initiatives Program

### 1. Statutory Basis of FHIP

Title VIII of the Civil Rights Act, commonly known as the Fair Housing Act,<sup>5</sup> charges HUD with the responsibility to accept and investigate complaints alleging discrimination based on the race, color, religion, sex, handicap, familial status or national origin in the sale, rental, or financing of most housing, and in other real estate-related transactions. In addition, the Fair Housing Act directs HUD to coordinate with State and local agencies administering fair housing laws, and to cooperate with and render technical assistance to public or private entities carrying out programs to prevent and eliminate discriminatory housing practices.

In 1987, amendments to the Fair Housing Act established, on an interim basis, the Fair Housing Initiatives Program, which was designed to strengthen HUD's enforcement of the Fair Housing Act.<sup>6</sup> The purpose of the FHIP is to fund State and local government agencies, public and private nonprofit organizations, and other groups to develop educational and outreach programs and implement testing and other enforcement programs to prevent and eliminate discrimination in housing and real estate-related transactions.

In 1991, Congress again amended the Fair Housing Act and established FHIP on a permanent basis. Congress found that the FHIP should be revised and expanded to reflect the significant changes in the fair housing and fair lending area that had taken place since the Program's initial authorization in 1987.

In particular, the amendments mandated that the HUD Secretary shall use funds made available under the FHIP to

conduct, through contracts with private nonprofit fair housing enforcement organizations, a range of investigative and enforcement activities designed to (A) *carry out testing and other investigative activities*. . . (B) discover and remedy discrimination in the public and private real estate markets and real estate related transactions . . . (C) carry out special projects, including the development of prototypes to respond to new or sophisticated forms of discrimination . . . (D) provide technical assistance to local fair housing organizations, and assist in the formation and development of new fair housing organizations; and (E) provide funds for the costs and expenses of litigation, including expert witness fees.<sup>7</sup>

Additionally, the FHIP requires HUD to use funds made available under the FHIP to enter into contracts or cooperative agreements with qualified fair housing enforcement organizations.<sup>8</sup> One qualification is that the contracts or agreements cannot provide more

than 50 percent of the annual operating budgets of the recipient organizations.

In addition to other amendments, the 1991 Act removed from the 1987 Act the requirement for testing guidelines as part of the FHIP. Rather, the 1991 Act instructed HUD to promulgate regulations that establish guidelines for testing activities that will ensure that investigations in support of the enforcement efforts will develop credible and objective evidence of discriminatory housing practices.<sup>10</sup>

## 2. FHIP Regulations

HUD passed a new regulation pursuant to that mandate on November 27, 1995.<sup>11</sup> The new regulation replaced previous testing guidelines that included more specific requirements, and instead sets forth general rules governing who can be a tester and what organizations can receive funds to run a testing program. During the promulgation of the regulation, several commentators stated, and HUD agreed, that federal courts and HUD Administrative Law Judges are in the best position to determine the validity of testing procedures, rather than having detailed requirements drafted into HUD regulations. Plus, since testing is continually evolving to accommodate changing discriminatory practices identified in the market place, it was proposed and agreed that the rule should be flexible enough to accommodate changing practices.

The regulation added a new section 125.007, which specifies the basic requirements that testers must meet. The regulation states:

*The following requirements apply to testing activities under the FHIP:*

- Testers must not have prior felony convictions or convictions of crimes and involving fraud or perjury.
- Testers must receive training or be experienced in testing procedures and techniques.

*Testers and the organizations conducting tests, and the employees and agents of these organizations may not:*

- Have an economic interest in the outcome of the test, without prejudice to the right of any person or entity to recover damages for any cognizable injury;
- Be a relative of any party in a case;
- Have had any employment or other affiliation, within one year, with the person or organization to be tested; or
- Be a licensed competitor of the person or organization to be tested in the listing, rental, sale, or financing of real estate.<sup>12</sup>

One testing guideline that was eliminated by the new rule was the requirement that testing be in response to bonafide allegations of housing discrimination. Although discrimination complaints will lead to testing, HUD decided not to make them a prerequisite to permit testing. HUD said that it did not want to keep the bonafide allegations requirement portion of the rule because the regulation should be flexible enough for private fair housing groups to be able to identify new forms of discriminations when they emerge in the housing marketplace.

The new rule also specifies rules for funding allocations for fair housing enforcement organizations. To receive funds, fair housing organizations must be engaged in complaint intake, complaint investigations, testing for fair housing violations, and enforcement of "meritorious claims." The new rule defines "meritorious claims" as "enforcement activities that result in lawsuits, consent decrees, settlements, or conciliations with the outcome of monetary awards for compensatory and/or punitive damages to plaintiffs or complaining

parties, or other affirmative relief, including the provision of housing."<sup>13</sup> Using these criteria, HUD can still continue to award grants on a competitive basis, and be assured that the grantees are legitimate housing organizations helping to enforce the Fair Housing Act.

Additionally, HUD may require an organization to submit documentation to support its claimed status as a qualified fair housing organization.<sup>14</sup> Again, this ensures that only qualified organizations are performing the testing, as required by the 1991 Act. Finally, the new regulatory rule subjects the multi-year FHIP grants to annual performance reviews and allows for rescission if the grantees do not meet their objectives or goals.<sup>15</sup>

### 3. Effectiveness of FHIP

The FHIP program is designed to be flexible and yet accountable, and to take advantage of the many existing fair housing enforcement organizations that have been working for years, with a variety of tools, to combat discrimination in housing. The fact that the FHIP program has grown over the years and has now been established on a permanent basis is a testimony to its effectiveness. One concrete example of the effectiveness of the program comes from Iowa. The Iowa Civil Rights Commission reports that as a result of a HUD grant, 909 tests were conducted in 51 different medium-sized communities in a three-month period in 1996 to determine the nature and extent of discrimination. The testing team found 136 possible violations of fair housing laws, and filed 41 complaints.<sup>16</sup>

In March of 1996, HUD awarded four-year grants nearly totaling \$5 million to seven private, non-profit fair housing enforcement organizations. The organizations used the money to conduct enforcement activities including investigation and processing of complaints, testing for violations of the Fair Housing Act, and enforcing meritorious claims.

One of the grant recipients was the Project Sentinel in Palo Alto, California. This Project received \$533,357 to conduct testing for violations of the Fair Housing Act in nearby communities. Joe Bialowitz, the Fair Housing Coordinator, mentioned that the type of testing done by his Project is very typical of what is commonly found in testing manuals.

The goal is to isolate the testing variables and to prevent accusations of bias against testers by those found in violation of the Fair Housing Act. The way the Project Sentinel prevents tester bias is by sending out testers who are shielded from the facts of the previous alleged discriminatory acts. When testers know what type of discrimination they are testing, it increases the chance that a HUD administrative judge or federal district judge will find bias in the testing process.

During President Clinton's first term, HUD reached out-of-court settlements on 6,517 housing discrimination cases. The Department took enforcement actions on 1,085 cases, in which HUD issued housing discrimination charges or referred cases to the Department of Justice. HUD obtained \$17.8 million in compensation for housing discrimination victims during the President's first term. However, it's unclear how many of these cases involved tester evidence.

### C. Recommendations for a Testing Program in the Housing Area in California

Although California law contains nothing as clear-cut as the FHIP program, the California Attorney General has the authority under California law to institute a program of investigatory testing in the housing context.<sup>17</sup> However, granting the Attorney General

express authority under the proposed S.B. 2176 to assume an investigatory role in regard to discrimination practices, which may be proactive, including reviewing data and subsequently investigating businesses or governmental agencies, would provide additional support for the Attorney General to initiate testing for housing discrimination.

### **III. Testing to Investigate Discrimination in Lending**

#### **A. The Problem: a More Covert Form of Discrimination**

Discrimination in lending in any sort of housing transaction is prohibited by the same laws that govern housing discrimination. But because lending involves a different behavior and a different set of actors, additional specific programs exist at the federal level to combat discrimination in lending. In the beginning of the 1990s, HUD switched its focus, in part, from monitoring overt, intentional forms of discrimination to the identification and detection of discreet manifestations of discrimination inherent in the housing financing market.<sup>18</sup> As a result of the crack down on intentional housing discrimination in the 1970s and 80s, covert forms of discrimination with proper business justifications evolved and became more pervasively used.

One such method is "redlining." Redlining occurs when minority individuals from lower income communities are denied mortgages either intentionally or unintentionally. The effect is that many minority individuals are "trapped" in lower income communities because they cannot obtain the mortgages necessary to acquire property elsewhere.

The difficulty with this type of discrimination is that intentional discrimination is difficult to prove as lenders can usually find some objective basis upon which to base the claim that the decision to deny the loan was not race based. As with "disparate impact" unintentional discrimination cases in the employment arena,<sup>19</sup> lenders can usually find some business justification on the basis of objective credit and financial information, supplied by individuals applying for mortgages, to nullify the complaint.

HUD's current emphasis is on remedying discrimination in the mortgage lending industry through measures outside of litigation or administrative hearings.<sup>20</sup> The agency is currently accomplishing this task in two ways. First, HUD utilizes the mandatory disclosure requirements of the Home Mortgage Disclosure Act. The second method is through self-testing reports provided by lending institutions. This second method was strengthened in January 1998 when HUD's Regulation on Self-Testing Regarding Residential Real Estate-Related Lending Transactions and Compliance With the Fair Housing Act took effect. Each of these methods is discussed below.

#### **B. The Home Mortgage Disclosure Act**

Under the Home Mortgage Disclosure Act,<sup>21</sup> mortgage lenders are required to disclose facts about individual loan applicants. Some of the factors subject to mandatory disclosure are the race, gender, income level, census tract, and age of the borrower. In addition, the lender is required to state whether he or she granted or denied the application. Based on the disclosures under the Act, HUD is able to monitor patterns of discrimination in the lending industry.

#### **C. HUD's Regulation on Self-Testing Regarding Residential Real Estate-Related Lending Transactions and Compliance with the Fair Housing Act**

In January of this year, HUD's residential real estate mortgage lending self-testing

regulation took effect. It was designed to encourage voluntary compliance by lenders with the Fair Housing Act with respect to residential real estate transactions.

The regulation defines a "self-test" as:

Self-test means any program, practice or study a lender voluntarily conducts or authorizes which is designed and used specifically to determine the extent or effectiveness of compliance with the Fair Housing Act. The self-test must create data or factual information that is not available and cannot be derived from loan files, application files, or other residential real estate-related lending transaction records. Self-testing includes, but is not limited to, using fictitious credit applicants (testers) or conducting surveys of applicants or customers, nor is it limited to the pre-application stage of loan processing.<sup>23</sup>

The incentive for lenders to participate in the self-testing program is that the results of the self-test are privileged and cannot be obtained or used by any person or agency in any proceeding alleging a violation of the Fair Housing Act or in any further investigation into a violation of the Fair Housing Act.<sup>24</sup> To qualify for the privilege, the mortgage lending institution must satisfy two requirements. First, the lending institution must report the results of self-tests to HUD. Second, a lender must take corrective action that is reasonably likely to remedy the cause and effect of a violation identified by a self-test in instances where it is more likely than not that a violation has occurred, even though no violation has been adjudicated formally.<sup>25</sup>

In order to invoke the privilege, the lending institution must provide HUD with its self-testing report. HUD could institute an action against a lender based on information contained in the report. However, such action is unlikely since most lenders providing reports are doing so in order to take advantage of the privilege. In order to do so, they must take remedial action, in which case instituting a suit or administrative action is unnecessary.

The test must create data or factual information that is not yet available or capable of derivation from material such as appraisal reports, loan committee meeting minutes, underwriting standards, compensation records, loan files, application files, or other residential real estate-related lending transaction records.<sup>26</sup> In other words, information included in company documents created for purposes other than compiling information for the self-testing report and information in individual applicant files, is not protected merely through its use or incorporation in a self-test report.

The theory behind the rule is that the privilege creates two incentives for lending institutions to generate information with respect to maintaining compliance with the Fair Housing Act. First, through generating information and creating self-test reports that qualify for the privilege, lenders can protect the information from becoming available to plaintiffs in subsequent suits. Second, through self-testing and the establishment of remedial measures, lenders can ensure compliance with the Fair Housing Act and reduce their risk of being subject to either intentional or disparate impact type litigation and hearings under the Act .

If the rule achieves its purpose, discrimination in the lending industry should be dramatically reduced, because in order to qualify for the privilege, lenders must remedy the violation's cause and effect. Therefore the regulation establishes a means of monitoring and remedying discrimination in the housing market, without litigation or

administrative action, at a minimal cost.

#### D. Use of More Traditional Testing Evidence

Although HUD's current efforts in the mortgage lending area are focused primarily on the self-testing program, it does also pursue cases where more traditional investigatory testing has been conducted. In early March of this year, HUD reached the largest settlement on record under the Fair Housing Act with three lenders who had been charged with mortgage discrimination. The three lenders, Temple-Inland Mortgage Corp., Banc One Mortgage Corp., and Overton Bank and Trust, agreed to extend nearly \$1.4 billion in home mortgage loans and spend \$6 million on programs to increase homeownership by low- and moderate-income families and minorities over the next three years. As a result of the agreement, more than 20,000 low- and moderate-income and minority families are expected to receive home mortgages.

The lenders committed to the agreements after the Fort Worth Human Relations Commission filed fair lending complaints with HUD under the Fair Housing Act based on *testing results* alleging unlawful discrimination. The Texas Human Rights Commission joined HUD and the Fort Worth Human Relations Commission in reaching the agreements with the lenders. The agencies made no finding that any of the three lenders who reached the agreements violated any law. All three lenders denied discriminating.<sup>27</sup>

#### E. Suggestions for Testing of Mortgage Lenders in California

Discrimination in the mortgage lending industry is one of the most dangerous forms of housing discrimination because of the potential difficulties in establishing a case of intentional or unintentional discrimination under the laws that prohibit such discrimination. Because it is a complicated transaction, lending institutions can usually point to some facially neutral business reason for denying a loan. For this reason, a program encouraging self-testing and remediation of mortgage discrimination should be created and implemented in California.

A self-testing regulation could be modeled on HUD's Regulation on Self-Testing Regarding Residential Real Estate-Related Lending Transaction and Compliance with the Fair Housing Act, discussed above. In essence, the regulation should offer a privilege-based incentive for mortgage lenders to conduct self-tests for compliance with California mortgage lending civil rights statutes. As a condition precedent to qualification for the privilege, mortgage lenders conducting self-tests should be required both to file a self-testing report with the appropriate agency and remedy the cause and the effect of the discrimination.

The regulation should also define "self-testing." As examples, self-testing could include tests conducted by the lender utilizing fictitious credit applicants including matched-pair testers, and surveys of applicants and mortgage customers. New information created for the purpose of writing the self-testing report and the report itself should qualify for the privilege.

A proposal which creates incentives for mortgage lenders to conduct self-testing and establishes remedial measures to maintain compliance with California statutes has two distinct advantages. First, it cuts down on government costs, by reducing both government investigation and enforcement costs. Investigation costs are reduced because the lending agencies themselves compile the reports on discrimination within their institutions. The lessened need for administrative hearings and litigation to enforce

compliance with the statute ensures reduction of the costs in this area.

Second, by requiring remediation as a condition of granting the privilege, discrimination will be reduced and compliance with California civil rights statutes will be achieved without the difficulties associated with proving either intentional or unintentional discrimination. This difficulty is inherent in litigation involving discrimination in mortgage lending in violation of both California and Federal Civil rights statutes.

A self-testing program such as this, however, is essentially administrative in nature and would be best implemented by an administrative agency and not by the Attorney General. Thus if California decides to implement a self-testing program in the mortgage lending area, the logical entity to administer it would be the Department of Fair Employment and Housing. On the other hand, as discussed in the section on housing discrimination, the California Attorney General currently has authority to conduct the more traditional type of investigatory testing, and S.B. 2176 would serve to clarify and support that authority. Since the California laws prohibiting discrimination in housing also cover discrimination in lending related to housing, the same analysis would apply to the lending context.

## **IV. Testing to Investigate Discrimination in Employment**

### **A. General Background of Testing in the Employment Context**

Testing for bias in employment hiring is much rarer than testing in the housing and banking contexts, according to LeeAnn Lodder, project manager for the Employment Discrimination Project of the Legal Assistance Foundation of Chicago. This is, in part, because hiring decisions are often based on subjective criteria, such that unlawful bias may be difficult to uncover through the use of matched pairs of testers.<sup>28</sup> Significantly, only eight percent of the claims filed with the EEOC allege hiring discrimination, reflecting the difficulty of proving this kind of claim.<sup>29</sup>

The subjectivity of the hiring process, and the difficulty of proving these claims, requires that the matched pairs of testers be much more carefully trained than in the other testing contexts, to minimize the possibility that one of the applicants would be rejected for reasons other than illegal discrimination. Critics of testing in employment point out that there are numerous variables in the hiring context that may be difficult or impossible to control, including whether the testers are all interviewed by the same person, and whether there are individualized nondiscriminatory reasons why a particular interviewer would fail to extend an offer to a particular tester.<sup>30</sup>

Although few organizations around the country are involved in employment testing, those who are have frequently uncovered hiring bias through their testing programs. In 1993, the Massachusetts Commission Against Discrimination (MCAD) sent testers to forty-two businesses in and around Boston to test for age discrimination in hiring. The testers were required to complete a twenty-five hour training program before participating. As a result of the testing, MCAD initiated complaints against seven employers, and found probable cause to believe that four of the employers had unlawfully discriminated.<sup>31</sup>

Another employment tester investigation initiated by MCAD in 1993 resulted in the organization filing suit against a clothing store. The defendant agreed to settle the case by paying an undisclosed fine, by sending job notices to the Urban League, the NAACP, a local newspaper, and a black newspaper based in Roxbury, and by integrating his seven-member staff.<sup>32</sup>

Testers may also be used to investigate a claim of discrimination after the claim is

brought to the attention of a civil rights agency. For example, in one suit, a female job applicant alleged that she had been propositioned during a job interview with an employment referral agency after she said that she had no money to pay the agency's referral fee. The applicant took her complaint to the Fair Employment Council of Greater Washington, D.C., which sent male and female testers to the same interviewer, all of whom claimed that they did not have money for the referral fee, and the female testers were routinely propositioned while the male testers were not. In that 1993 case, *Fair Employment Council et al. v. Molovinsky*, a superior court jury in Washington, D.C. heard the tester evidence and returned a verdict in favor of the plaintiffs for \$79,000.<sup>33</sup>

## B. Status of Testing by the EEOC

Title VII of the Civil Rights Act of 1964 and 1991<sup>34</sup> is the main law governing employment discrimination at the federal level. It prohibits employment discrimination on the basis of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age, or familial status. The Equal Opportunities Employment Commission (EEOC) administers Title VII.

Unlike HUD's congressional authorization to fund testing in the housing context through the FHIP program, the EEOC has not been authorized to fund testing programs in employment. Commentators have noted that Title VII makes no mention of testing.

Despite the lack of clear statutory authority, in December 1997, the EEOC announced that it had contracted with two agencies, the Fair Employment Council of Greater Washington, D.C., and the Legal Assistance Foundation of Chicago, to conduct pilot testing programs. Under the contracts, the agencies will each receive \$100,000 to train and send testers to various employers.<sup>35</sup> At the time of the December announcement, the EEOC indicated that it intended to develop its own testing program in the near future based on the findings of the pilot programs.<sup>36</sup> The EEOC's decision to participate in tester programs marked the first time that it would actively focus on discrimination in hiring.

However, in spite of its earlier announcements, the EEOC has subsequently determined that it will not seek federal funds for its own testing programs, primarily due to pressure from Republican lawmakers on Capitol Hill. In March 1998, Congressman Newt Gingrich (R-GA) and others criticized the EEOC's plan to develop its own tester program. Referring to upcoming budget negotiations, Gingrich conditioned his support for President Clinton's request for a \$37 million increase in EEOC funding upon the agency's promise to withdraw its funding of testers and instead focus on reducing its backlog of cases. Gingrich expressed concern that testers would create new litigation by entrapping employers, rather than resolve existing claims.<sup>37</sup>

On April 1, 1998, in response to that criticism, the head of the EEOC informed a House Appropriations Committee that the EEOC will not seek federal funds for testing programs. Acting Chairman Paul M. Igasaki noted that the EEOC had not yet hired testers itself, but had contracted with the groups in Washington and Chicago to support their use of testers. He also informed the subcommittee that the EEOC's use of testers was "Aminuscule," and that the EEOC had never used test results in litigation, but instead had used the information to alert companies to potential illegalities in their hiring practices. The effect of this decision on the funding provided to the Washington and Chicago programs is unclear.<sup>38</sup>

Supporters of tester programs will likely be disappointed by this change of heart,

especially in light of the early indications that the December announcement motivated some companies to begin training their managers and supervisors in nondiscriminatory hiring practices. According to employment lawyer Garry Mathiason, of Littler, Mendelson, Fastiff, Tichy & Mathiason of San Francisco, "Since December, we've had double the number of requests for training in hiring."<sup>39</sup> These training programs have proved to be effective for at least one company, Tower Records, which has seen a decrease in the number of grievances filed company wide since the trainings were instituted four years ago.<sup>40</sup>

## C. The EEOC's Legal Authority to Conduct Testing Programs

Despite the recent events recounted above, the basic question whether the EEOC has legal authority to conduct testing investigations remains unclear. While the EEOC withdrew its request for funds for a testing program, the reason was not because it felt it lacked the legal authority to conduct tests. However, unlike in the housing context, there is no clear grant of statutory authority. Thus, EEOC's authority to participate in testing must stem from more general grants of power—for example, from the EEOC's authority to investigate charges of discrimination, and to determine the extent to which employers comply with Title VII.

### 1. EEOC's Power of Investigation

Much of the debate regarding the EEOC's authority to participate in testing stems from disagreement over whether the EEOC may investigate discrimination by an employer *before* a charge of discrimination has been filed against that employer. In the context of a specific lawsuit, the EEOC has no power to investigate a claimant's charge of discrimination (as through subpoena or similar means) until a charge of discrimination has been filed. As noted by the Supreme Court in *EEOC v. Shell Oil Co.*,<sup>41</sup> "[T]he EEOC's investigatory authority is tied to charges filed with the Commission[,] unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction . . . ." <sup>42</sup> Thus, under Title VII, the EEOC might be prohibited from engaging in testing that would constitute a form of "pre-charge" investigation.<sup>43</sup>

However, outside the context of a specific lawsuit, the EEOC may have the authority to conduct testing on its own initiative, in conjunction with its power to request documents from an employer that are pertinent to the employer's compliance with Title VII. Specifically, the EEOC may require employers to submit reports that are "reasonable, necessary, or appropriate" for enforcement of the statute.<sup>44</sup> The EEOC also collects annual reports from employers subject to Title VII which detail the racial and gender composition of their workforce.<sup>45</sup> This authority may extend to allow the EEOC to conduct testing, because, as one commentator has noted:

[c]ourts have held that when an employer is obliged to make reports to a federal agency to show compliance with the statute, the agency can make nonintrusive investigations to verify the accuracy of the employer's reports. The EEOC could use testers to verify that an employer follows the nondiscriminatory hiring policy that its reports suggest.<sup>46</sup>

### 2. Working with Employers to Establish Internal Testing Programs

Other contexts in which the EEOC may be able to conduct testing or facilitate the testing of others are less controversial. At a minimum, the EEOC is presumed to have statutory authority to assist employers in structuring internal testing programs and to engage in research to determine the extent of hiring discrimination within a given organization. This

authority stems from the EEOC's power "to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter."<sup>47</sup>

### 3. Use of Testers to Research the Extent of Discrimination

The EEOC is authorized to engage in research independently or in conjunction with state and local fair employment practice agencies to determine the extent of employers' compliance with Title VII, under provisions authorizing the EEOC to "make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter."<sup>48</sup> One commentator has argued that this power provides the EEOC with the authority to use its own testers to research the extent of hiring discrimination or, with funds appropriated by Congress, finance the use of testers by others in order "to gauge the level of hiring discrimination nationally or in any given region."<sup>49</sup>

### 4. Working with State and Local Agencies Involved in Tester Programs

As mentioned, the clearest support for the EEOC's authority to engage in or fund testing stems from the EEOC's power to work with other agencies, and to contribute to the cost of their research. Title VII states that "[t]he Commission shall have power -- (1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals."<sup>50</sup> "This provision provides a reasonable basis to argue that the EEOC is empowered to work with private individuals, private organizations," and state agencies involved in testing.<sup>51</sup> Not only may the EEOC cooperate with other agencies, but it may also contribute to the cost of projects undertaken by such agencies. "The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, . . . within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies."<sup>52</sup> Thus, the Commission probably has the statutory authority to help finance a testing program undertaken by a state agency. As noted earlier, it was most likely under this provision that the EEOC extended grants to the Fair Employment Council of Greater Washington, D.C., and the Legal Assistance Foundation of Chicago.

### 5. EEOC Authority to Establish a Training Institute

Under Title VII, the EEOC is required to "establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission."<sup>53</sup> This could provide the EEOC with statutory authority to set up a training procedure to assist private organizations that wish to develop testing programs. However, commentators have debated what role the Technical Assistance Training Institute may play with regard to testing, and one commentator has concluded that this provision does not appear to authorize the EEOC to establish tester training.<sup>54</sup>

## D. Admissibility of Tester Evidence in the Employment Context

The United States Supreme Court has allowed the use of tester evidence in both the housing and the public accommodations contexts.<sup>55</sup> The EEOC has published a notice stating a strong position that in its view of the law,

testers (persons who apply for employment for the purpose of testing for discriminatory hiring practices, but do not intend to accept such employment), and the organizations that send testers to respondents, may challenge any discrimination to which they were subjected while conducting the tests.<sup>56</sup>

But despite the EEOC's position, some commentators have questioned whether court rulings allowing standing in housing and public accommodations contexts are equally applicable in the context of employment testing, because employment testers must misrepresent their qualifications and are not actually interested in being hired.

These concerns will be addressed in turn. First, with regard to misrepresentation of qualifications, one commentator has argued that legislation might be needed to permit testers to falsify their credentials. Second, on the question of bona fide interest, the EEOC has argued, and several lower courts have held, that even though rejected testers are not actually seeking the positions for which they apply, such testers are nonetheless proper plaintiffs because they do in fact suffer discrimination. Other courts have found that testing agencies who sponsored such testers might have standing, even if the individual testers do not.

Although much of the controversy among commentators on this issue has centered around the issue of standing -- e.g. whether testers or the organizations that sponsor them can bring a lawsuit based on that evidence -- in many cases the issue of standing is not critical. The more important issue is the value the results of a testing investigation have as *evidence* in a case charging employment discrimination. The testers may not necessarily be the plaintiffs in the suit, but may have turned the evidence they obtained over to another entity, such as the EEOC, who may have additional evidence of discrimination. In a case like that, the issue of standing does not arise. Instead the question becomes how valuable the testing results are as evidence, which would depend upon how well the test was conducted.

### 1. Misrepresentation of Credentials

Testers who falsify their credentials may violate certain state and federal laws. For example, 18 U.S.C. § 1001 makes it a crime to give false statements to departments or agencies of the United States government in the transaction of business, which could be construed to forbid materially false statements on applications for federal employment. Further, some state statutes criminalize, or impose civil penalties for, the making of false statements in employment applications.<sup>57</sup>

As a practical matter, such laws might not apply to testers because testers are not attempting to secure a position through the use of false credentials. Rather, testers seek to uncover discrimination, and thus lack the criminal intent necessary to justify prosecution under such laws. Nonetheless, one commentator has argued that legislation authorizing testers to misrepresent themselves is necessary to ensure that testers do not run afoul of the law.<sup>58</sup>

### 2. Testers Are Not Bona Fide Applicants

The circumstances under which testers, and the organizations that sponsor them, may file suit under 42 U.S.C. section 1981 or Title VII are unclear. In a recent case, *Fair Employment Council of Greater Washington v. BMC Marketing Corporation*,<sup>59</sup> the District of Columbia Circuit set limits on the ability of such plaintiffs to bring these discrimination claims. First, the court held that neither the individual testers nor the testing agency, Fair Employment Council (FEC), had standing to sue under § 1981. Second, the court found that, because the individual testers were not bona fide applicants, they were not entitled to damages under Title VII (as it existed at the time of their injury), because Title VII's earlier incarnation authorized only economic damages. Moreover, the court held that the individual testers were not entitled to prospective relief under Title VII unless they were able to allege a sufficient likelihood of future injury. Finally, the court found that the FEC

had standing under Title VII only if it were able to demonstrate that it had been "perceptibly impaired" by the defendant's discrimination, beyond mere monetary expenditure through the testing program itself.<sup>60</sup>

It is important to note that Title VII now allows plaintiffs to recover compensatory and punitive damages in addition to economic damages. Thus, had the plaintiffs' injuries in *BMC* occurred after this expansion of remedies, the testers may have been eligible for non-economic damages regardless of the fact that they were not bona fide applicants. However, because the court found that the FEC testers had no remedy regardless, it declined to reach the larger question of whether testers who are not bona fide applicants do in fact have standing to sue.

### E. In California, the Unfair Competition Law Provides a Broad Basis for Standing

As stated earlier, the question of standing is not always raised when the results of investigatory testing are part of the evidence in a suit charging employment discrimination. If the plaintiff is not also the tester, but is simply using testing evidence obtained by others, the question of standing does not arise. Further, in California the issue of standing is even less important because there is an independent basis for standing under state law prohibiting unfair competition.

The California Business and Professions Code's Unfair Competition Law prohibits "unlawful, unfair or fraudulent business practices."<sup>61</sup> The Attorney General, a district attorney, or, when authorized, a city attorney may prosecute acts of "unfair competition."<sup>62</sup> Further, "any person acting for the interests of itself, its members or the general public" can bring an action.<sup>63</sup>

In the *Stop Youth Addiction v. Lucky Stores* case,<sup>64</sup> the California Supreme Court has recently reaffirmed that this law confers broad standing to private plaintiffs to bring suits charging a violation of a law, even if the law in question would not confer such standing. Its reasoning is equally applicable to the ability of the Attorney General or a district attorney to bring suit. That case allowed a suit to go forward in which a private plaintiff had sued several retail stores, charging they had illegally sold cigarettes to minors, based in large part on evidence obtained by sending minors into stores to see if they could obtain cigarettes. Since a violation of any of California's civil rights statutes would also be an unfair business practice, a potential plaintiff could obtain standing through the Unfair Competition Law.

### F. Recommendations for a Testing Program in California

Because testing for employment discrimination is less straightforward than testing for housing discrimination, it is more problematic. Not only are there inherent problems with an employment testing program, as outlined above, but the issue of agency authority to test is also less clear. This is particularly true in California in regards to the power of the Attorney General to conduct investigatory testing programs.<sup>65</sup> However, as some of the few cases utilizing employment testing that do exist indicate, testing can be an important tool to combat employment discrimination.<sup>66</sup> If California does decide to pursue a program of testing investigations for employment discrimination, the following suggestions are offered to help alleviate potential legal problems and to make that program successful and effective.

#### 1. Setting Goals for the Testing Program

A testing program administered by the California Department of Justice should be nonpunitive, and its primary intent should be to equalize access to jobs rather than to win damages awards against businesses. In order to facilitate compliance with nondiscrimination laws, and to encourage employers to support the goals of the testing programs, employers in the state should be made aware of the testing program and the methods used to uncover discrimination.

Employers should be consulted in the development of the testing programs, so that they may be partners in the process of eradicating discrimination in employment. Information about the testing project and the training procedures should be made available to the public and the business community. All testers should be carefully trained, with guidance from organizations like the Massachusetts Commission Against Discrimination, which has utilized testers for several years.

## 2. Offering Incentives for Employers

Training programs should be made available for employers who request them, so that employers can educate their supervisors and managers about legally appropriate hiring methods.

Employers should be given the opportunity to participate in voluntary testing that may be done covertly, but with employers' consent. This would be similar to the self-testing done in the mortgage lending context at the federal level. This voluntary testing would not give rise to litigation but would allow employers to be made aware of, and to correct, their discriminatory practices.

In support of the goal of encouraging employers to participate in training programs, legislation could be drafted to create a safe harbor for employers who successfully participate in voluntary testing or training, such that they will not be targeted by covert testers within a certain period of time after they participate in the training.

Small businesses might need extra incentives, because they frequently have a more homogenized workforce and are less likely to hire diverse applicants.

## 3. Recommended Legislation to Facilitate Use of Tester Evidence

**Falsified Credentials:** legalize the use of false credentials on resumes for the purposes of employment testing.

**Entrapment:** declare that using testers is not an illegal entrapment scheme.

**Standing and Damages:** clarify that testers have standing to bring claims, and plaintiffs who bring claims based on tester evidence will not be eligible for economic damages, but may be eligible for emotional damages and other remedies.

**Private Organizations:** clarify the role of private organizations in conducting their own independent testing programs.

## **V. Testing to Investigate Discrimination in Public Accommodations**

### A. Status of Testing in Public Accommodations Context

No federal or California government agency currently performs testing for civil rights violations in the public accommodations field. At the federal level, part of this inaction is due to the structure of the law. Unlike in the housing or employment areas, there is no specialized agency charged with the enforcement of Title II of the Civil Rights Act, the

main law prohibiting discrimination in public accommodations.<sup>67</sup> Instead, the federal Attorney General is charged with its implementation. It does not appear that the Attorney General has any formal proactive investigatory programs in this area, and the Attorney General notes that Title II is "limited in scope and relief."<sup>68</sup>

Despite that limitation, the U.S. Department of Justice has played a role in testing with regard to court-imposed tests. The most notable case in this regard involves Denny's Restaurants. In 1993 the federal Attorney General sued Denny's, alleging that it had engaged in a pattern or practice of discrimination against black customers. These were bona fide customers, not testers, who had been denied service and otherwise been discriminated against. In a consent order that resolved the case, the restaurant chain was required to cease all discriminatory practices, to undertake an educational program for its employees, to advertize in an affirmative manner, and to implement a testing program to monitor compliance.<sup>69</sup> The Attorney General will monitor the restaurant's compliance with the consent order.

There is very little case law on the issue of testing in the public accommodations context. In *Pierson v. Ray*,<sup>70</sup> the Supreme Court held that a group of black clergymen who were removed from a segregated bus terminal had standing to sue under the broad civil rights law,<sup>71</sup> even though the plaintiff's sole purpose for being in the bus terminal was to test the validity of the law that mandated the terminal be segregated. This is not a case that arose under Title II, and it addresses slightly different issues than testing for discrimination. But it is cited as an example of the validity of tester evidence.<sup>72</sup> The lack of more cases in this area is likely attributable to the limitation in available remedies.<sup>73</sup>

Outside the legal context, several experimental tests for discrimination in public accommodations have been performed by psychologists and sociologists. These tests, along with cases such as the Denny's case, reveal that significant problems continue to exist in the area of discrimination in public accommodations. These tests can be found in psychology and sociology journals and occasionally in law reviews.<sup>74</sup>

One example of a fairly recent public accommodations test involves pairs pretending to be customers at car dealerships. One person from the pair would act as a customer, another person would soon follow with the same "customer intentions." The time between both people testing was usually four hours and never more than two days.

Ian Ayres, a Research Fellow for the American Bar Association and Associate Professor at Northwestern University, conducted this test with approval from the Human Subject Research Committees of the American Bar Foundation and Northwestern University Institutional Review Board. Generally, the study's results showed that sales people spent significantly more time with white males, and offered them a significantly better deal at the end of the negotiations. After white males, white females fared best, and black females fared the worst.<sup>75</sup> White males received the most time spent with them and the lowest prices quoted. The article concluded that this was evidence of disparate treatment.

## B. Recommendations for a Testing Program in California

Similar to the housing context, the California Attorney General already has, under existing law, broad authority for conducting investigatory testing in the public accommodations arena.<sup>76</sup> The clear express authority that would be granted to the Attorney General under S.B. 2176 would provide additional support. Because the public accommodations context is straightforward compared to the employment or lending situations, no additional statutory amendments should be necessary.

## VI. Conclusion

The practice of investigatory testing to determine whether laws prohibiting discrimination are being violated has been used, with positive results, for years. The longest history is in the housing context, but significant progress has been made using the tool of testing in other contexts as well. Currently, at the federal level, the use of testing investigations is very well established in the housing and lending contexts, but much less established in the employment and public accommodations contexts.

However, very different reasons exist for the relative lack of testing in the employment and public accommodations areas. In employment, significant systemic and political problems hinder the increased use of testing to investigate employment discrimination. Many factors go into hiring decisions, and some fear that using testers in this area would amount to "entrapment" of employers. Conversely, in the public accommodations area, the stakes are apparently not high enough to motivate organized, proactive investigations utilizing testers.

A somewhat different situation exists in the lending area. Although some traditional investigatory testing does occur, the main emphasis is on the fairly novel concept of self-testing, whereby lenders are encouraged to monitor their own behavior and, if possible discrimination is discovered, remedy the situation without adversarial procedures.

What can California learn from this complex picture of the status of testing at the federal level? First, that testing can be an important and effective tool for combating discrimination. Second, that it is much easier to apply in some situations than in others.

It has proven to be effective and relatively straightforward in the housing context. The California Attorney General already has, under existing law, the authority to engage in investigatory testing in this area, but would benefit from a clarification of the existing law. The same clarification would be helpful in the contexts of lending and public accommodations.

In the area of lending, California may also want to consider instituting a self-testing program similar to the program recently instituted by HUD. Such a program, however, would best be administered by an agency such as the Department of Fair Employment and Housing, rather than through the Attorney General. Before embarking on such a program, California may want to determine how the new program at the federal level works.

In the area of employment, additional legislation may be required to address the more complicated issues that arise in this field. If a program of testing for employment discrimination is implemented, the goals should be clearly set out, incentives should be offered to employers, and specific legislation should be considered to facilitate the use of tester evidence.

Despite some progress, discrimination in all areas of our public life continues to be a serious, costly, and humanly oppressive problem. California should continue to do all that it can to ensure a fair, equal and just environment for all of its residents. Full and fair enforcement of its civil rights statutes, including instituting testing programs when appropriate, is one important step towards that goal.

## FOOTNOTES

1. EEOC Notice No. 915.002, May 22, 1996, available on EEOC homepage at [www.eeoc.gov/docs/testers.txt](http://www.eeoc.gov/docs/testers.txt) ([return to text](#))
2. 455 U.S. 363 (1982). ([return to text](#))
3. *Id.* at 372. Racial steering is "a practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." *Id.* at 366 n.1. ([return to text](#))
4. See accompanying paper "The Role of the California Attorney General in Enforcing Civil Rights Statutes," section III. ([return to text](#))
5. 42 U.S.C. §§ 3601-3619. ([return to text](#))
6. 42 U.S.C. § 3616a. ([return to text](#))
7. 42 U.S.C. § 3616a(b)(2) (emphasis added). ([return to text](#))
8. 42 U.S.C. § 3616a(c)(1). ([return to text](#))
9. *Id.* ([return to text](#))
10. 42 U.S.C. § 3616a(f). ([return to text](#))
11. 24 CFR 125; 60 Fed. Reg. 58,446. ([return to text](#))
12. 24 CFR 125.007; 60 Fed. Reg. 58,453. ([return to text](#))
13. 42 CFR 125.103(3). ([return to text](#))
14. *Id.* ([return to text](#))
15. 42 CFR 125.104. ([return to text](#))
16. "Iowa Civil Rights Commission 1996 Annual Report: Testing," available at [www.state.ia.us/government/crc/annualtesting](http://www.state.ia.us/government/crc/annualtesting). ([return to text](#))
17. See accompanying paper on Attorney General, Section II. ([return to text](#))
18. HUD Annual Reports 1992-94. ([return to text](#))
19. See Appendix A, "Background on Employment Discrimination Law." ([return to text](#))
20. HUD Annual Reports 1992-94. ([return to text](#))
21. 12 U.S.C. § 2801 et seq. ([return to text](#))
22. 24 CFR 100 and 103; 62 Fed. Reg. 66423-33. ([return to text](#))

23. 24 CFR 100.141. ([return to text](#))
24. 24 CFR 100.144. ([return to text](#))
25. 24 CFR 100.143. ([return to text](#))
26. 24 CFR 100.142(b). ([return to text](#))
27. *HUD Secretary Announces Investigation of Mortgage Lending Discrimination*, U.S. Newswire, Mar. 10, 1998, available in 1998 WL 5683670. ([return to text](#))
28. See Stephen Franklin, *EEOC Tries Testing for Hiring Bias*, Chicago Trib., Dec. 10, 1997, available in 1997 WL 3619542. ([return to text](#))
29. See Susan J. Wells, *Training Game Tests the Rules of Hiring: Firms Learn that it Takes More than a Roll of the Dice*, The San Diego Union Trib., April 6, 1998, available in 1998 WL 4001889. ([return to text](#))
30. See Barbara Rabinovitz, *MCAD's Investigation of Age Bias Raises Questions on Testing Tools*, Mass. Law. Wkly., Jan. 31, 1994, at 37. ([return to text](#))
31. See Barbara Rabinovitz, *supra*. ([return to text](#))
32. See Diane E. Lewis, *Employment Testing: Useful Tool, or Entrapment?*, The Boston Globe, April 11, 1993 available in 1993 WL 6588350. ([return to text](#))
33. See *id.* ([return to text](#))
34. 42 U.S.C. §§ 2000e et seq. ([return to text](#))
35. See Marcia Coyle, *EEOC Plans to Try Out Workplace Bias*, The National Law Journal, Jan. 19, 1998, at A10. ([return to text](#))
36. *Id.* ([return to text](#))
37. See Steve Lash, *EEOC Won't Seek Funds for 'Testers'/Practice of Hiring Actors to Uncover Job Bias Criticized by Republicans*, Houston Chron., April 2, 1998, available in 1998 WL 356943. ([return to text](#))
38. *Id.* ([return to text](#))
39. See Susan J. Wells, *Training Game Tests the Rules of Hiring: Firms Learn that it Takes More than a Roll of the Dice*, The San Diego Union Trib., April 6, 1998, available in 1998 WL 4001889. ([return to text](#))
40. *Id.* ([return to text](#))
41. 466 U.S. 54 (1984). ([return to text](#))
42. *Id.* at 64. ([return to text](#))
43. The power granted to the EEOC in the Age Discrimination in Employment Act (ADEA) is much broader than that granted to it under Title VII. Under the ADEA, the EEOC does have investigatory authority independent of the filing of a discrimination charge. "Thus, '[t]he Commission may, on its own initiative, conduct investigations' of ADEA violations, 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.'" See Michael J. Yelnosky, *Salvaging the Opportunity: A Response to Professor Clark*, 28 U. Mich.

- J.L. Ref. 151, 170-71 (1994). Professor Yelonsky has argued that because no similar language appears in Title VII, Congress did not intend to authorize the EEOC to conduct pre-charge investigations. ([return to text](#))
44. 42 U.S.C. ♦ 2000e-8(c)(3) (1988). ([return to text](#))
45. 29 C.F.R. ♦ 1602.7 (1994). ([return to text](#))
46. Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelonsky*, 28 U. Mich. J.L. Ref. 1, 44-45 (1994) (citations omitted). ([return to text](#))
47. 42 U.S.C. ♦ 2000e- 4(g)(3) (1988). ([return to text](#))
48. 42 U.S.C. ♦ 2000e-4(g)(5). ([return to text](#))
49. Clark, *supra*, at 40. ([return to text](#))
50. 42 U.S.C. ♦ 2000e-4(g) (1988). ([return to text](#))
51. Clark, *supra*, at 38. ([return to text](#))
52. 42 U.S.C. ♦ 2000e-8(b) (1988). ([return to text](#))
53. 42 U.S.C. ♦ 2000e-4(j)(1). ([return to text](#))
54. Michael J. Yelonsky, *Salvaging the Opportunity: A Response to Professor Clark*, 28 U.Mich.J.L.Ref. 151, 173-174 (1994). ([return to text](#))
55. *Haven's Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Pierson v. Ray*, 386 U.S. 547 (1967). ([return to text](#))
56. EEOC Notice No. 915.002, May 22, 1996, available on EEOC homepage at [www.eeoc.gov/docs/testers.txt](http://www.eeoc.gov/docs/testers.txt). ([return to text](#))
57. See Clark, *supra*, at 46-47. ([return to text](#))
58. *Id.* ([return to text](#))
59. 28 F.3d 1268 (D.C. Cir. 1994). ([return to text](#))
60. *Id.* at 1276, 1281. ([return to text](#))
61. Cal. Bus. & Prof. Code ♦♦ 17200-17209. These provisions may be referred to collectively as the "Unfair Competition Law" ("UCL"). See *Stop Youth Addiction, Inc. v. Lucky Stores*, 17 Cal.4th 553, 558 n.4 (1998). See also accompanying paper, "The Role of the California Attorney General in Enforcing Civil Rights Statutes," section II.A.4. ([return to text](#))
62. Cal. Bus. & Prof. Code ♦17204; "unfair competition" is defined in ♦17203. ([return to text](#))
63. *Id.* ([return to text](#))
64. 17 Cal.4th 553 (1998). ([return to text](#))
65. See accompanying paper on the Attorney General, Section II.A.3. ([return to text](#))

66. See Section IV.A, *supra*. ([return to text](#))
67. 42 U.S.C. §§2000a et seq. ([return to text](#))
68. US Dept. of Justice Homepage, Activities of the Civil Rights Division, at [www.usdoj.gov](http://www.usdoj.gov). ([return to text](#))
69. *Id.* ([return to text](#))
70. 386 U.S. 547 (1967). ([return to text](#))
71. 42 U.S.C. §1983. ([return to text](#))
72. See, US Dept. of Justice Homepage, *supra*. ([return to text](#))
73. See, Comment, "A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations," 44 UCLA L. Rev. 1207 (1997). ([return to text](#))
74. Ian Ayres, *Fast Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991); Schaps, *Cost, Dependency, and Helping*, 21 Journal of Personality and Social Psychology 74, 1972 (testing for discrimination in shoe stores). ([return to text](#))
75. *Id.* at 828. The breakdown of the average dealer profit for final offers was as follows: white males, \$362; white females, 504; black males, \$783; black females, \$1237. ([return to text](#))
76. See, accompanying paper, "The Role of the California Attorney General in Enforcing Civil Rights Statutes," section II.A.2. ([return to text](#))