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TESTER STANDING IN EMPLOYMENT DISCRIMINATION CASES UNDER 42 U.S.C. § 1981

The evidence provided by testers ... is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination.

Richardson v. Howard

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I. INTRODUCTION

There is little direct evidence about the nature and extent of hiring discrimination in the United States. Indeed, "little is known about how often minority job applicants are treated less favorably than equally qualified majority job applicants." Yet, both judges and administrators believe our nation has made great progress in combatting discrimination and that we are "well along the way to becoming a color-blind society." According to Justice Blackmun, his colleagues too readily endorse that view. Indeed, Justice

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1712 F.2d 319, 321 (7th Cir. 1983).

2Margery A. Turner et al., Opportunities Denied, Opportunities Diminished; Discrimination in Hiring, URBAN INSTITUTE REPORT 91-9 (1991).

3Id. at 5.

4Id. at 6.
Blackmun expressed frustration in his dissent in *Wards Cove Packing Co. v. Atonio*, stating, "[o]ne wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was." Yet, there is no empirical evidence that discrimination has been eliminated; and even across the political spectrum there is recognition that the problem still persists.

Although there has been extensive investigation done on black and white wage differentials, there has been little empirical investigation of discrimination at the hiring stage. Clearly, little progress has been made in reducing the gap in minority labor force participation. Thus, it seems that "discrimination at the hiring stage may well represent the more pressing issue in employment today."

However, as many more claims pertaining to promotions and terminations are filed, there is a misperception that these reflect a more serious problem than that of hiring discrimination. But, it may be that the lack of hiring claims is explained by the heightened difficulty of detecting and proving such claims. Indeed, "[c]ontact between the applicant and the employer during the hiring process is typically fleeting, the eventual outcome is unknown to the candidate, and the process itself rarely signals exclusionary intent." Accordingly, victims of hiring discrimination are less likely to know that they have been discriminated against, and to have access to information needed to prove it. Thus, as discrimination at the hiring stage is subtle and less detectable, it requires more sophisticated tools of detection—such as the use of testers. The hiring audit (testing) methodology is an effective means for detecting concealed discriminatory practices.

Systematic employment testing involves the use of professional social science methodology, patterned after the methodology accepted in the testing methodology.

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5490 U.S. 642 (1989). The Supreme Court’s decision heightened the plaintiff’s burden in establishing a prima facie case in disparate impact cases, and reduced the employer’s burden in rebutting the plaintiff’s prima facie case.

6Id. at 662.


8Id. at 8-10.

9Id. at 10.

10Id.


12Id. at 23-24.

13See *Fowler v. McCrory Corp.*, 727 F. Supp. 228, 233 n.6 (D.Md. 1989) (stating that victims of hiring discrimination "would not even have known of the employment opportunities which they were being denied").
of compliance with fair housing laws.\textsuperscript{14} In a hiring audit, a minority group tester and a majority group tester are matched on all relevant characteristics.\textsuperscript{15} This might include like attributes such as age, physical size, education, work experience, and demeanor.\textsuperscript{16} Although some of these characteristics can be easily assigned for purposes of a hiring audit (i.e. education and prior work experience), "matching others requires very careful assessment and pairing of individual [auditor] candidates."\textsuperscript{17}

Indeed, testers go through a comprehensive training program where they learn techniques for observing their experiences, as well as the proper method for reporting facts concerning audits. Moreover, the testers engage in and observe simulated initial employment interviews to observe their partner's interviewing style, so that the tester pairs will interview similarly in the actual audit. Throughout the training process, professional testing staff emphasize the importance of accurate, objective, and detailed reporting of the test results. Once the testers have been appropriately matched, the testers separately attempt to inquire about a targeted position, complete an application, obtain an interview, and seek to be offered the job.\textsuperscript{18} Differential treatment is determined by comparing the experiences and results of the two testers.\textsuperscript{19} An employer acts in violation of 42 U.S.C. § 1981\textsuperscript{20} where the black tester has been deprived generally of the same rights to make and enforce contracts as the white tester. This note addresses the issue of whether testers have standing to challenge these racially discriminatory hiring practices under 42 § U.S.C. 1981.\textsuperscript{21}

\begin{quote}
\footnotesize
\textsuperscript{14}Turner, \textit{supra} note 2, at 10-11.
\textsuperscript{15}Id. at 11.
\textsuperscript{16}Id.
\textsuperscript{17}Id.
\textsuperscript{18}Id. \textit{See generally} Roderic V.O. Boggs et al., \textit{Use of Testing in Civil Rights Enforcement, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 345} (Michael Fix & Raymond Struyk eds., 1993).
\textsuperscript{19}Turner, \textit{supra} note 2, at 11.
\textsuperscript{20}Section 1981 provides that:
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
\textsuperscript{21}The author considers tester standing under 42 U.S.C. § 1981. Title VII of the Civil Rights Act of 1964, § 2000(e) et seq., appears to provide an alternative basis for standing. \textit{See infra} notes 177-84 and accompanying text.
\end{quote}
First, the author considers the general requirements for standing. Second, the issue of whether courts should allow standing for employment testers under § 1981, and the challenges to such an approach is addressed. Third, the author considers whether organizations aimed at eliminating discrimination in employment should have standing to bring suit, in their own right and on behalf of their members, under § 1981. Finally, recent legislation and federal agency policy in support of testers is discussed.

II. GENERAL REQUIREMENTS FOR STANDING

Article III of the U.S. Constitution limits the federal courts to the resolution of "cases and 'controversies'." At a minimum, to satisfy this "case" or "controversy" requirement, the party bringing the lawsuit must allege "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," that the injury "fairly can be traced to the challenged action" and that the injury "is likely to be redressed by a favorable decision."

In addition to the constitutional limitations on standing imposed by Article III, the federal judiciary has developed a set of prudential considerations in resolving standing questions. First, a plaintiff must generally assert his own legal rights and interests. Ordinarily, he cannot merely invoke a third party's rights. Moreover, even where a plaintiff has alleged an injury sufficient to meet the requirements of Article III, the courts have "refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Finally, the courts have held that

22Article III, Section 2 provides in pertinent part:
[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . —to Controversies to which the United States shall be a Party; —to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.
U.S. Const. art. III, § 2, cl. 1.


24Id. at 472 (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).


26Id. at 474.

27Warth v. Seldin, 422 U.S. 490, 499 (1975); see also Gladstone, 441 U.S. at 100 (1979).

the plaintiff’s complaint must "fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

However, the satisfaction of these prudential considerations alone cannot substitute for the Article III requirement of "distinct and palpable injury." The standing doctrine thus "prevents the courts from interfering in questions that 'our system of government leaves ... to the political processes.'" It is only after a litigant satisfies these dual requirements that the federal courts will consider the merits of a dispute.


Twelve years ago, in Havens Realty Corp. v. Coleman, the U.S. Supreme Court upheld the standing of testers to challenge discriminatory housing practices under the Fair Housing Act. Moreover, since that time, lower courts have endorsed the standing of testers in challenging discriminatory housing practices under 42 U.S.C. § 1981, and § 1982 as well. In upholding tester standing, the courts, including the Supreme Court, have recognized that testing is an invaluable tool for combatting racial discrimination. As with any


30Warth, 422 U.S. at 501; see also Haitian Refugee Center v. Gracey, 809 F.2d 794, 798 (D.C. Cir. 1987) (recognizing that litigants must satisfy constitutional requirements for standing before the court considers prudential standing requirements).


32"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Warth, 422 U.S. at 498.


34Section 1982 provides in pertinent part: "All citizens of the United States shall have the same right ... to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1982).

standing challenge, the courts must determine whether "the [employment testers have] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."\(^\text{36}\)

For testers, the first constitutional requirement of an injury-in-fact will likely be the most difficult to satisfy. However, because 42 U.S.C. § 1981 provides in pertinent part that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts,"\(^\text{37}\) where a tester is denied his right to "the initial formation of [a] contract", that denial gives rise to an injury sufficient to confer standing under § 1981.\(^\text{38}\) Indeed, the broad statutory language encompasses the widest possible range of plaintiffs who are victimized by discrimination in contracting.

Moreover, the fact that the tester's purpose is to test an employer's practices—rather than to seek actual employment—does not lessen his injury. Indeed, Article III imposes no requirement that an employment inquiry be bona fide.\(^\text{39}\) Accordingly, unless a particular statute imposes such a requirement, it is irrelevant to the question of standing. Section 1981 imposes no such mandate.\(^\text{40}\) Instead, to achieve its objectives, it reaches preliminary inquiries which serve as the basis for any ultimate agreement.

In addition, testers often suffer emotional injuries such as humiliation and embarrassment as a result of an employer's discriminatory hiring practices. These injuries, too, are sufficient to satisfy the injury-in-fact requirement.\(^\text{41}\) The


\(^{38}\) Patterson v. McLean Credit Union, 491 U.S. 164, 179-80 (1989).

\(^{39}\) E.g., U.S. CONST., art. III, § 2.

\(^{40}\) E.g., 42 U.S.C. § 1981.

\(^{41}\) As the court noted in McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976): Section 1981 doubtless was intended to give to the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable. . . .

\textit{Id.} at 1089; see, e.g., Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1238 (D.C. Cir. 1984) (stating that "humiliation is a cognizable and compensable injury under section 1981").
Supreme Court has consistently held that injuries suffered by testers are real and sufficient to confer standing under Article III of the U.S. Constitution.\(^ {42}\)

Beyond the constitutional requirements, the courts must determine whether prudential considerations bar the finding of standing for tester-plaintiffs in the employment context under § 1981.\(^ {43}\) These prudential limitations ask whether the tester plaintiff is "assert[ing] his own legal rights and interests;"\(^ {44}\) whether the injury claimed is a "generalized grievance"\(^ {45}\) shared by many people; and finally, whether § 1981 seeks to protect the plaintiff from this sort of injury.\(^ {46}\) Once an employer has rejected a person from a job because of race, that person, when challenging the employer’s discriminatory hiring practices, would be invoking his or her own rights to be protected from invidious discrimination. Accordingly, the fact that others may share the same concern does not lessen the tester’s individual harm.

Further, the protection from discriminatory hiring practices on the basis of race, even for tester-plaintiffs, falls within the zone of interest of § 1981.\(^ {47}\) Indeed, as the district court recognized in Fowler v. McCrory Corp.,\(^ {48}\)

By its terms § 1981 protects the exercise of four different rights or sets of rights: (1) the right to ‘make contracts’; (2) the right to ‘enforce contracts’; (3) the related rights ‘to sue, be parties, give evidence’; and

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\(^{42}\) See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-75 (1982) (concluding that the injury suffered by tester held sufficient to confer standing under the Fair Housing Act); Pierson v. Ray, 386 U.S. 547 (1967) (reasoning that where injury was sustained by plaintiff, that injury sufficed to confer standing under 42 U.S.C. § 1983, where plaintiffs entered a Jackson, Mississippi bus terminal for the sole purpose of testing their rights to desegregated public accommodation, knowing an arrest would follow); Evers v. Dwyer, 358 U.S. 202 (1958) (concluding that the injury suffered by black tester who chose to sit in the white section of a bus merely to test the legality of segregation policy held sufficient to allow standing).


\(^{44}\) Warth v. Seldin, 422 U.S. 490, 499 (1975).

\(^{45}\) Id.


\(^{47}\) See Fowler v. McCrory Corp., 727 F. Supp. 228, 230 (D.Md. 1989) (stating that "claims for racial discrimination in hiring and promotion are cognizable under § 1981").

\(^{48}\) Id.
the right to 'the full and equal benefit of all laws and proceedings for the security of persons and property.'

Accordingly, although the use of testers in the employment context to challenge discriminatory hiring practices is new and unsettled, tester-plaintiffs would likely satisfy the constitutional and prudential requirements of standing.

In the employment setting, only a few courts have discussed a plaintiff's status as a tester, and none have expressly rejected the standing of such individuals to bring suit on their own behalf. In Lea v. Cone Mills Corp., the district court enjoined the defendant's discriminatory hiring practices under Title VII, but refused to award back pay or attorneys' fees to the tester-plaintiffs. The court advanced three reasons for limiting the award of damages: (1) it was "clearly apparent" that the plaintiffs' "primary motive was to test defendant's employment practices rather than to seek actual employment;" (2) the defendant had not since employed any females with plaintiffs' credentials; and (3) no vacancy existed at the time plaintiffs sought employment from the defendant.

However, when the case was appealed to the Fourth Circuit, the status of the plaintiffs as testers received further attention. The Fourth Circuit not only affirmed the district court's decision, but also vacated the denial of attorneys' fees. The court acknowledged that "specific employment was not sought," and that "the application [might] solely [have been] a predicate for th[e] suit." The court found this, however, to be irrelevant as to the matter of attorneys' fees. Indeed, the majority concluded that the plaintiffs had prevailed on the merits by obtaining an injunction against the defendant's discriminatory employment practices, and, therefore, the "[p]laintiffs should not be denied attorneys' fees merely because theirs was a 'test case.'"

Judge Boreman angrily dissented from the court's decision to award attorneys' fees. He argued that "[t]he allowance of attorney's fees is specifically left to the discretion of the trial court; [and] there should be no

49 Id. at 231.


51 438 F.2d at 89-90 (Boreman, J., concurring in part, dissenting in part) (quoting Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969), aff'd in part and vacated in part, 438 F.2d 86 (4th Cir. 1971)).

52 See Lea, 438 F.2d 86.

53 Id.

54 Id. at 88.

55 Id.

56 Id.

interference . . . unless there [has been] a clear showing of abuse of such discretion," which he found lacking in the lower court’s decision.\textsuperscript{58} To him, "this entire case smack[ed] of nothing but manufactured litigation and, to employ a rather harsh but well known characterization—‘ambulance chasing’—with the plaintiffs themselves serving merely as puppets or as pawns in the game."\textsuperscript{59}

In \textit{Lea}, the Fourth Circuit did not specifically discuss the issue of tester standing. Significantly, the standing of the \textit{Lea} plaintiffs went unquestioned. Indeed, by awarding injunctive relief and attorneys’ fees to tester-plaintiffs, the Fourth Circuit, at least implicitly, supported the standing of tester-plaintiffs to challenge discriminatory employment practices under Title VII.\textsuperscript{60}

Since its decision, however, the \textit{Lea} court’s approach to tester-plaintiffs has been challenged. In \textit{Sledge v. J.P. Stevens & Co.},\textsuperscript{61} the plaintiffs challenged the defendant’s employment practices both under Title VII and § 1981. Although the Fourth Circuit decided the case without ultimately deciding the relevance of the plaintiff’s tester status, the holding was accompanied by dicta with important implications for tester-plaintiffs.\textsuperscript{62} Indeed, the dicta suggests that whether an employment application is bona fide should be a relevant factor in the legal outcome.\textsuperscript{63} However, the court does not address what effect the plaintiff’s tester status would have had on its decision, and it is unclear whether the court would have denied standing to the plaintiff, or as in \textit{Lea}, only limited the award of damages (back pay, injunctions, attorneys’ fees) available to the plaintiff.\textsuperscript{64}

Furthermore, in \textit{Parr v. Woodmen of the World Life Ins. Soc’y},\textsuperscript{65} a Georgia district court relied on Judge Boreman’s dissent in \textit{Lea}\textsuperscript{66} to restrict a tester-plaintiff from challenging employment discrimination under Title VII and § 1981. The district judge stated that the plaintiff had the burden of proving a prima facie case of racial discrimination by satisfying the \textit{McDonnell Douglas Corp. v. Green}\textsuperscript{67} test:

1. that he is a member of a protected class;
2. that he applied for a job . . .;
3. that he was qualified for the job;

\textsuperscript{58}Id.\textsuperscript{59}Id. at 90.\textsuperscript{60}Id. at 86-88.\textsuperscript{61}585 F.2d 625 (4th Cir. 1978), \textit{cert. denied}, 440 U.S. 981 (1979).\textsuperscript{62}585 F.2d 625.\textsuperscript{63}Id.\textsuperscript{64}Id.\textsuperscript{65}657 F. Supp. 1022 (M.D. Ga. 1987).\textsuperscript{66}Lea v. Cone Mills, Corp., 438 F.2d 86, 88-91 (4th Cir. 1971) (Boreman, J., concurring in part, dissenting in part).\textsuperscript{67}411 U.S. 792 (1973).
4. that, despite his qualifications, he was not hired; [and]
5. that at the time he applied a job was open and defendant continued to seek application [sic] from persons of plaintiff Parr's qualifications. 68

The court concluded that the tester-plaintiff had failed to make out a prima facie case. The court emphasized his insincere motive in seeking employment and stated, "a plaintiff whose primary purpose in interviewing for a job is to create the basis for a Title VII EEOC charge and lawsuit, is not the bona fide applicant for a job that he must be to establish a prima facie case [under Title VII]."69 Although in Parr,70 the tester-plaintiff never submitted an employment application, the court explained that even if he had, he would still have been viewed as "nothing more than a test plaintiff," who could not have been injured by the defendant's refusal to hire him.71 Accordingly, Parr suggests that tester-plaintiffs may not be able to establish a prima facie case of employment discrimination at all.72 However, the effect of this court's decision is limited because in Parr, unlike most tester cases, the tester did not even complete an employment application.73 The application is an important step in beginning the inquiry that §1981 recognizes as a necessary foundation of any later contract. Furthermore, in holding against tester-plaintiffs, the Parr court relied only on dicta in Sledge,75 and on Judge Boreman's dissent in Lea,76 which challenged the majority's award of attorneys' fees.77

Although these cases have not expressly addressed the issue of tester standing, they have suggested that because of insincere motives, tester-plaintiffs suffer no personal injury when rejected from a job, and thus, would not meet the constitutional requirements of standing. Outside the employment context, however, case law clearly supports the standing of testers to challenge discriminatory practices, absent even a bona fide application. Indeed, the federal courts have repeatedly held that testers have standing to

69 Id. The court did not expressly analyze the plaintiff's §1981 claim, but it entered judgment for the defendant "as to his claims under Title VII and §1981." Id. at 1033.
70 Parr, 657 F. Supp. 1022.
71 Id. at 1032.
72 Id.
73 Id.
74 Id.
77 Parr, 657 F. Supp. at 1032-33.
bring suit for discriminatory housing practices under 42 U.S.C. § 1981. For example, in Coel v. Rose Tree Manor Apartments, Inc., the Pennsylvania district court held that testers "have the same right to truthful information" about the availability of possible contracts as other individuals, and allowed tester standing under § 1981. Similarly, in Meyers v. Pennypack Woods Home Ownership Ass’n, the Third Circuit expressly held that Meyers’ status as a housing tester did not deny him standing under § 1981, even though his application for housing was intended solely for testing Pennypack’s policies. Likewise, in Sherman Park Community Ass’n v. Wauwatosa Realty Co., the district court, in finding standing for housing testers under § 1981, expressly held that standing is "available to the full extent permitted by Article III."

Several courts have also recognized tester standing under § 1982, the housing counterpart to § 1981. Indeed, in Watts v. Boyd Properties, Inc., the Eleventh Circuit held that the housing tester had standing to challenge discriminatory housing practices under 42 U.S.C. § 1982. Furthermore, in Village of Bellwood v. Gorey & Associates, the district court found standing for the tester-plaintiffs under § 1982. As both § 1981 and § 1982 derive from Section 1 of the Civil Rights Act of 1866, "[b]oth are subject to the same analysis and must be interpreted in the same light." Accordingly, the Watts and Village of Bellwood cases provide additional precedent for the standing of testers under § 1981.

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79ld. at *16.
80559 F.2d 894 (3d Cir. 1977).
81486 F. Supp. 838 (E.D. Wis. 1980).
82ld. at 842.
85758 F.2d 1482 (11th Cir. 1985).
88758 F.2d 1482.
89664 F. Supp. 320.
One court found standing in the employment context under § 1981, both for testers and for the organization directing their activities. That fresh precedent now must be considered together with the clear precedent in the non-employment cases brought under § 1981, § 1982, and the Fair Housing Act that testers have suffered the requisite injury to confer standing. In sum, as "[t]he very essence of civil liberty... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," the courts should find standing for employment testers under § 1981.

IV. CHALLENGES TO TESTER STANDING IN THE EMPLOYMENT DISCRIMINATION CONTEXT UNDER 42 U.S.C. § 1981

Despite the many benefits of testing as a basis to uncover discriminatory practices, there have been both legal and policy challenges to the device. The legal challenges have questioned the standing both of testers and of any organization that supervises them. Challengers to tester standing argue: (1) that the testers have suffered no injury because they were aware of the risks of discrimination; (2) that the testers' intended to decline any offers of employment, so they are not harmed by a denial; and (3) that the employer organization overseeing the testing program also suffered no harm.

As with any standing challenge, the central question is whether the testers have suffered a judicially cognizable personal injury sufficient to create a "case or controversy" under Article III of the Constitution. Opponents of employment tester standing under § 1981 argue that testers have suffered no "distinct or palpable injury." First, opponents allege that humiliation or

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93 Boggs, supra note 18, at 364-67.


emotional injury, without more, is not sufficient to confer Article III standing.96 Second, opponents contend that any harm suffered by the testers is incurred voluntarily, and therefore "the testers and not the discriminating employer are actually the cause of the harm."97 Indeed, in Village of Bellwood v. Dwivedi,98 the court stated, "The standing of ... testers is, as an original matter, dubious. They are investigators; they suffer no harm other than that which they invite in order to make a case against the persons investigated .... The idea that their legal rights have been invaded seems an arch-formalism."99

However, the Supreme Court has ruled otherwise. Beginning with Evers v. Dwyer,100 the Supreme Court held that a black man who had chosen to sit in the white section of a bus, solely to test the legality of the segregation policy, had suffered a harm sufficient to confer standing under the civil rights laws. Later, in Pierson v. Ray,101 the Supreme Court similarly held that a black man had been harmed when he entered the segregated section of a bus station with the intent of testing the lawfulness of the segregation policy. Then, in Havens Realty Corp. v. Coleman,102 the Supreme Court again found that black testers, who had been misinformed when inquiring about the availability of housing, had suffered the requisite harm to confer standing. Indeed, the point is that "testers do not surrender their rights to be free from discrimination simply because they voluntarily approach test sites with the intention of testing for discrimination."103

Furthermore, those opposing employment tester standing under § 1981 argue that § 1981 protects a narrow right "to make and enforce contracts," in contrast with the broad statutory rights conferred by the Fair Housing Act.104 Opponents contend that the making of a contract under the common law of contracts requires an intent to be bound, a bona fide offer and acceptance.105 Testers lacking this intent have not suffered "an actual or threatened injury" in


97 BOGGS, supra note 18, at 365.

98 895 F.2d 1521 (7th Cir. 1990), reh'g denied en banc, 1990 U.S. App. LEXIS 3372 (7th Cir. 1990).

99 Id. at 1526.

100 358 U.S. 202 (1958).

101 386 U.S. 547 (1967).


103 BOGGS, supra note 18, at 365.


an attempt to make a contract, and accordingly do not fall within the zone of interest protected by § 1981. Indeed, in Spann v. Colonial Village, Inc., the D.C. Circuit held that § 1981 and § 1982 "have a limited province and do not qualify as all-purpose antidiscrimination or comprehensive open housing laws." Indeed, in Spann v. Colonial Village, Inc., 107 the D.C. Circuit held that § 1981 and § 1982 "have a limited province and do not qualify as all-purpose antidiscrimination or comprehensive open housing laws." 108

Moreover, opponents allege that the Havens decision, allowing limited standing under the Fair Housing Act, does not support standing under § 1981. Havens, of course, is the seminal case in support of tester standing in the housing context. In Havens, the testers were found to have standing under the broad provisions of § 804(d) of the Fair Housing Act, as distinguished from § 804(a), under which testers would not have had standing because of the requirement of a bona fide offer. Thus, some argue that § 1981 is similar to § 804(a), and requires a bona fide offer to contract. Accordingly, those opposed feel standing should be denied to testers under § 1981.

However, § 1981 was designed to meet chronic race discrimination in contracting. It should be interpreted liberally to assure that its purposes will be achieved. The tester and his organization come within the coverage of the statute even though they do not intend to make a contract. The freedom to contract, if it is to be meaningful, must include the freedom to engage in preliminary discussion with no certainty of an ultimate contract. Moreover, the conditions providing such freedoms must exist and be perceived as existing

106 See, e.g., Grant v. Smith, 574 F.2d 252, 255 (5th Cir. 1978) (noting that good faith in contracting is necessary under §§ 1981 and 1982, but is not pertinent to the broad standing allowed by the Fair Housing Act).


108 Id. at 35 (emphasis added).


110 Section 804 reads: "[I]t shall be unlawful—
(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."


111 See, e.g., Grant v. Smith, 574 F.2d 252, 255 (5th Cir. 1978) (stating that "[t]he plaintiffs' good faith or lack of it would be pertinent to the claims asserted under §§ 1981 and 1982").

112 See generally E. ALLAN FARNSWORTH, CONTRACTS 3 (2d ed. 1990).
so that individuals—discouraged by previous patterns of discrimination—will be encouraged to seek employment.

The tester and his organization seek to engage in an important component of § 1981, namely the preliminary discussion. Allowing tester standing offers remedies for employment discrimination not easily attainable otherwise. These remedies will both deter employer misconduct, and help to achieve the conditions for an open and non-discriminatory employment environment in the nation. Precedent also establishes that contract formation is not a matter of subjective intent, but rather of the objective circumstances. Accordingly, § 1981 should be interpreted so as to permit standing to the tester and his organization.

Finally, those opposing employment tester standing argue that there are strong prudential reasons for denying standing to testers who fabricate their credentials, misrepresent their status to prospective employers and then sue for injuries, especially given the narrow rights protected by § 1981. Indeed, opponents contend that testers are not protecting their individual right to contract, but are only protecting the broad contract rights of third parties. Furthermore, opponents argue that "its use of deception renders it offensive to public policy and even unethical." In particular, opponents analogize testing to entrapment; however, there is arguably a clear distinction between the two. In entrapment, a crime is induced by the prosecution's direct involvement in a criminal scheme. Clearly, "[c]ivil rights enforcement testing . . . is different from most undercover law enforcement. In civil rights testing, testers are instructed not to suggest a discriminatory outcome of their test. When an intent to discriminate is expressed, it is initiated by the test subject." Given this distinction, it is understandable that the courts have recognized the "strong national policy favoring vigorous enforcement of our civil rights laws," repeatedly approving the use of civil rights testing. Indeed, in Richardson v. Howard, the Seventh Circuit recognized the crucial role of testers in gathering evidence in

113 Id. at §§ 3.6-3.9.

114 In Sherman Park Community Ass'n v. Wauwatosa Realty Co., 486 F. Supp. 838 (E.D. Wis. 1980), the court noted that, because of the broad statutory reading of the statute, prudential considerations do not apply in housing cases under the Fair Housing Act. In contrast, in Clifton Terrace Assoc., v. United Technologies Corp., 929 F.2d 714 (D.C. Cir. 1991), the court granted summary judgment on prudential grounds on claims brought under §§ 1981 and 1982.

115 BOGGs, supra note 18, at 366.


117 BOGGs, supra note 18, at 366.

118 Id. See also supra note 94.

119 712 F.2d 319 (7th Cir. 1983).
discrimination cases, and convincingly disposed of opponents' arguments against testing in the housing area. The court stated:

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

In sum, those challenging the standing of testers under § 1981 contend that testers cannot meet the Article III requirements for standing, and prudential considerations weigh strongly against allowing tester standing. However, for many years, the courts, including the Supreme Court, have approved the use of civil rights testing in a number of areas. The employment context is an appropriate one, as well. Of course, possible objections to tester standing could be diminished by using testers who have mixed motives. For example, a person who is sincerely interested in seeking particular employment clearly has no standing problem in challenging the discriminatory practices of an employer, even if that person was also motivated by a desire to test the employer's hiring practices. Indeed, in Coel v. Rose Tree Manor Apartments, Inc., the plaintiff acted as a tester while sincerely looking for an apartment. The Coel court stated that because the plaintiff "was actually an apartment-seeker, as well as a 'tester', her standing [could not] really be questioned." Thus, mixed-motive testers would alleviate many of the challenges to tester standing. But, even absent such mixed-motives, standing for the individual tester should be deemed present. As we have said, the tester, whatever his ultimate goal, is bona fide in the inquiry stage. He or she seeks to ascertain an employer's policy and practice. A broad and liberal inquiry stage is fundamental if contract protections are to be meaningful. As in the housing area, only if individuals are confident that there is an open and fair inquiry process will the goals of § 1981 be met.

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120 Id. at 321.
121 See supra notes 100-02 and accompanying text.
123 Id. at *15.
V. ORGANIZATIONAL STANDING IN THE EMPLOYMENT DISCRIMINATION CONTEXT UNDER 42 U.S.C. § 1981

Does a nonprofit organization, organized to eliminate discriminatory practices in employment, and which implements a program of systematic employment testing, have standing to sue for violations of § 1981?

An organization can assert standing in two ways: direct standing, and indirect, or "associational," standing. An organization asserts direct standing when it sues for an injury to itself. On the other hand, an organization asserts associational standing when it sues on behalf of injuries to its members. Regardless of which theory of standing an organization sues under, the same constitutional and prudential requirements must be satisfied. Moreover, the Supreme Court has noted that often precedent can resolve the standing question.

A. Direct Standing

"An organization has standing on its own behalf if it meets the same standing test that applies to individuals. The organization must show actual or threatened injury-in-fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." "But the 'injury-in-fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be [it]self among the injured." In Havens Realty Corp. v. Coleman, the Supreme Court addressed the question of what kind of allegations of injury were sufficient for an organization to have standing in its own right under Article III. In Havens, Housing Opportunities Made Equal (HOME), a nonprofit organization designed to promote equal opportunities in

124 See, e.g., Hunt v. Washington Apple Advertising Comm’n, 432 U.S. 333 (1977) (noting that associational standing is also known as "representational standing").

125 Warth v. Seldin, 422 U.S. 490, 511 (recognizing that an organization is entitled to sue on its own behalf for harm it is has sustained); see also Havens Realty Corp. v. Coleman, 455 U.S. 363, 380, n. 20 (recognizing that an organization may suffer an injury to its noneconomic interests).

126 See Hunt, 432 U.S. 333 (permitting the Washington State Apple Advertising Commission to assert representational standing on behalf of the apple growers and dealers to challenge the constitutionality of a North Carolina statute which only allowed apples to enter the state bearing federal or state approval).


129 Spann, 899 F.2d at 27.


housing, sued Havens Realty Corporation for allegedly engaging in "racial steering" practices, in violation of the Fair Housing Act of 1968.\textsuperscript{132} HOME claimed that it had "been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counselling and other referral services," and that it "had to devote significant resources to identify and counteract the[se] ... discriminatory steering practices."\textsuperscript{133} The Supreme Court found HOME had standing in its own right and held that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."\textsuperscript{134}

However, as the D.C. Circuit recognized in \textit{Spann v. Colonial Village, Inc.},\textsuperscript{135} "[a]n organization cannot ... manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create an injury in fact by bringing a case, and Article III would present no real limitation."\textsuperscript{136} Hence, as \textit{Havens}\textsuperscript{137} makes clear, the Supreme Court considered the frustration of HOME's purpose, as well as the resulting drain on its resources, sufficient to meet the Article III requirements for standing "independent of its suit challenging the action."\textsuperscript{138} Later, in \textit{Spann}, the D.C. Circuit recognized that "expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public impressions created by [discriminatory] use of print media, [were] sufficiently tangible to satisfy Article III's injury-in-fact requirement."\textsuperscript{139}

As discussed, prudential considerations are an additional roadblock to standing.\textsuperscript{140} Although "Congress may create a statutory right . . . the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute,"\textsuperscript{141} courts generally make prudential inquiries under the Civil Rights Act.\textsuperscript{142}

\begin{thebibliography}{99}
\bibitem{132} \textit{Id.} at 366.
\bibitem{133} \textit{Id.} at 379.
\bibitem{134} \textit{Id.; see also Sierra Club,} 405 U.S. at 739.
\bibitem{136} \textit{Id.} at 27.
\bibitem{137} 455 U.S. 363 (1982).
\bibitem{138} \textit{Spann}, 899 F.2d at 27; \textit{see also Havens Realty Corp. v. Coleman,} 455 U.S. 363, 379 (1982).
\bibitem{139} \textit{Spann,} 899 F.2d at 29.
\bibitem{140} \textit{Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.}, 454 U.S. 464, 474 (1982).
\bibitem{141} \textit{Warth v. Seldin,} 422 U.S. 490, 514 (1975) (citation omitted).
\bibitem{142} \textit{Id.}
\end{thebibliography}
Indeed, "[u]nlike the Fair Housing Act, Sections 1981 and 1982 do not create a statutory right which confers standing even where plaintiff[s] would otherwise have no judicially cognizable injury."143

Accordingly, an organization must allege specific, programmatic injuries, and not merely "generalized grievances."144 "A sincere, vigorous interest in the action challenged, or in the provisions of law allegedly violated, will not do to establish standing if the party's interest is purely ideological, uncoupled from any injury in fact, or tied only to undifferentiated injury common to all members of the public."145 Indeed, "[t]he federal courts were simply not constituted as ombudsmen of the general welfare."146 Accordingly, in Valley Forge Christian College v. Americans United for Separation of Church and State,147 the Supreme Court denied the plaintiff-taxpayer's standing to challenge the conveyance of property allegedly violating the Establishment Clause. The Court reasoned that respondents "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Article III."148 Indeed, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."149 Thus, in Sierra Club v. Morton,150 a membership corporation with a special interest in the conservation of the national parks was denied standing to challenge the development of a ski resort in the beautiful Mineral King Valley, as "a mere 'interest in a problem', no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization... 'aggrieved'."151

However, the fact that an organization has a "special interest" in the elimination of employment discrimination does not diminish the organiza-
tion’s specific harm to its programs. Prudential limitations, of course, require that the organization assert its own interests, and not merely the "putative rights of third parties." Accordingly, in Saunders v. General Services Corporation, the court held that although the nonprofit fair housing corporation had standing to sue the operator of an apartment complex and its president for violations of the Fair Housing Act, "prudential limitations . . . militate against according [the organization] individual standing under Sections 1981 and 1982," because the organization did not allege any individualized harm. In making such a determination, courts consider two factors: "the concreteness of the claimed injury[.] and the degree to which the policies underlying the statute allegedly violated by the defendant can be vindicated by granting . . . third-party standing." Indeed, in Barrows v. Jackson, the U.S. Supreme Court, in finding third party standing, reasoned that the defendant was the perfect adversary, since "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Hence, where an organization’s injuries are caused as a result of its efforts to defend persons protected under § 1981 from invidious discrimination, courts have repeatedly found no prudential reasons for denying third party standing under § 1981.

Finally, prudential limitations require the specific harm to the organization to come "within 'the zone of interests to be protected or regulated by the statute

155 Id. at 1054.
156 The Supreme Court has found third party standing in some cases. See Craig v. Boren, 429 U.S. 190 (1976) (concluding that vendor had standing to challenge statute imposing penalties on males under 21 years and females under 18 years by asserting males’ equal protection rights); Doe v. Bolton, 410 U.S. 179 (1973) (concluding that physicians had standing to challenge statute imposing penalties on physicians for performing certain abortions by asserting patient’s privacy rights).
or constitutional guarantee in question."\textsuperscript{161} In making such a determination, courts have looked to the words of the statute, and its legislative history.\textsuperscript{162} The zone of interest test "is passed if a plaintiff's interest in the agency action appears to fall within the ambit of the constitutional clause, statute, or regulation allegedly violated."\textsuperscript{163} Indeed, as the court noted in Capital Legal Foundation v. Commodity Credit Corp.,\textsuperscript{164} "[t]he would-be plaintiff's interest in the relevant law is ascertained by injury in fact; the law's interest in the would-be plaintiff is determined by the 'zone of interests' test. Mutuality of interests must be credibly asserted."\textsuperscript{165} Accordingly, the interest of eliminating discrimination in employment is clearly within the zone of interests protected by § 1981. Hence, where an organization seeks redress for its own injuries suffered as a result of an employer's discriminatory practices, and wishes to vindicate the rights of those actual victims of discrimination who are unable to do so effectively, prudential considerations weigh in favor of finding standing under § 1981.

B. Representational Standing

An association has representational standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."\textsuperscript{166} Accordingly, if an organization can prove that any of its members were injured, or injury was threatened as a result of discriminatory hiring practices, the organization will be successful in meeting the first requirement. Moreover, an organization, whose purpose is ensuring equal employment opportunity, will clearly meet the second requirement by seeking to protect an employee's interest in nondiscriminatory hiring practices. Furthermore, the third requirement will be satisfied where the suit "raises a pure question of law," and it becomes unnecessary for the court to consider the individual circumstances concerning a particular member's injuries.\textsuperscript{167} Thus, where an organization successfully satisfies all three requirements, there is


\textsuperscript{163} Capital Legal Found. v. Commodity Credit Corp., 711 F.2d 253, 258-59 (D.C. Cir. 1983).

\textsuperscript{164} Id.

\textsuperscript{165} Id. at 259.


\textsuperscript{167} Id. at 1052 (quoting International Union, UAW v. Brock, 477, U.S. 274, 274 (1986)).
adequate proof to confer standing upon the organization as a representative of its members.

VI. PROTECTIVE LEGISLATION

The tester approach, notwithstanding its deception, is a reasonable and necessary one in ridding society of discrimination. Such a position is reflected in recent efforts to assure that possible barriers to its use are eliminated. Thus, a bill passed by the Ohio House of Representatives would exclude the use of testers from categories of deception prosecutable or prohibited as fraud.168

The bill,169 approved February 12, 1992, by the Ohio House of Representatives, "appl[ies] to individuals acting on behalf of public or private groups that investigate discriminatory housing, employment and credit practices."170 Under existing law:

the offense of falsification occurs if a person knowingly makes a false statement . . . when the statement is in writing and is made for certain purposes. This offense is a first degree misdemeanor. Under the bill, if a person was charged with falsification (as described above) as a result


169 H.B. 455 "would amend section 2921.13 of the Ohio Revised Code to permit persons investigating discriminatory practices to make false statements in the course of a discrimination investigation without being guilty of falsification." Id. Section 1 provides that section 2921.13 of the Revised Code be amended to read as follows:

Section 2921.13 (A) No person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when any of the following applies:

(8) The statement is in writing, and is made with THE purpose to induce another to extend credit to or employ the offender, or to confer any degree, diploma, certificate of attainment, award of excellence, or honor on the offender, or to extend to or bestow upon the offender any other valuable benefit or distinction, when the person to whom such statement is directed relies upon it to his detriment.

(B)(2) IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE UNDER DIVISION (A)(8) OF THIS SECTION THAT THE PERSON MADE THE STATEMENTS TO ANY PERSON FOR THE PURPOSE OF INVESTIGATING POSSIBLE UNLAWFUL DISCRIMINATORY PRACTICES AND MADE THE STATEMENTS IN THE COURSE OF AN INVESTIGATION OF POSSIBLE UNLAWFUL DISCRIMINATORY PRACTICES CONDUCTED BY A LAW ENFORCEMENT AGENCY, OTHER GOVERNMENTAL AGENCY AUTHORIZED TO CONDUCT THE INVESTIGATION, OR ANY OTHER PUBLIC OR PRIVATE AGENCY OR ORGANIZATION THAT, AS A MATTER OF COURSE CONDUCTS INVESTIGATIONS OF POSSIBLE UNLAWFUL DISCRIMINATORY PRACTICES.

Id. (new language of section 2921.13 in all caps).

of statements made during an investigation of possible unlawful discriminatory practices, that person could establish an affirmative defense. This defense would only apply if the incident involved possible unlawful discriminatory practices and the statements were made in the course of an authorized investigation.\footnote{171} Accordingly, the bill "protect[s] testers from a charge of falsification, a misdemeanor, if the untrue statements were made for the purpose of investigating possible discriminatory practices."\footnote{172} However, because this is an affirmative defense "[t]he burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence . . . is upon the accused."\footnote{173}

The Ohio Civil Rights Commission strongly supports the bill.\footnote{174} In a letter to Representative Otto Beatty,\footnote{175} the bill's sponsor, Joseph T. Carmichael, the Executive Director of the Ohio Civil Rights Commission, stated:

It is essential for the continued protection of the civil rights of all Ohio citizens for persons affiliated with civil rights agencies, whether they be governmental or private, to investigate allegations of discrimination without fear of being charged with the Ohio laws governing the making of false statements on sworn documents. The use of such 'testers' has long been recognized as crucial in the field of housing discrimination. And now that steps are being taken to incorporate the use of testers into the employment discrimination arena, such protection could be more important than ever.\footnote{176}

Presumably, more such measures will be introduced into the legislatures throughout the country because of a growing recognition of the importance and reasonableness of this approach.

\footnote{171}{Fiscal Note, H. B. as reported by House Ethics and Standards Committee, January 21, 1992.}
\footnote{172}{Chalfant, supra note 170.}
\footnote{173}{H. B. 455, 119th General Assembly, Regular Sess. § 2901.05(A), Comment 2 (1991-92).}
\footnote{174}{See Letter from Joseph T. Carmichael, Executive Director, Ohio Civil Rights Commission, to Representative Otto Beatty, Ohio House of Representatives (February 10, 1992) (on file with author).}
\footnote{175}{Id.}
\footnote{176}{Id.}
VII. FEDERAL AGENCY POLICY

In 1990, the Equal Employment Opportunity Commission (EEOC) issued a Policy Guidance concerning the use of testers to detect discriminatory hiring practices. "After examining the principles of standing to sue and the application of testing in the field of fair housing, the EEOC concluded that testers denied equal employment opportunities for a reason prohibited by EEO laws have been harmed and may challenge the discrimination themselves." Accordingly, the EEOC concluded that "testers who pose as job applicants for the sole purpose of uncovering illegal discrimination have standing to challenge these practices under Title VII." Indeed, the agency directed its regional offices to accept discrimination charges filed by testers and by organizations filing charges on a tester's behalf. "This development constituted the first endorsement by a government agency of the use of EEO testing as an enforcement technique."

As stated in the text of the EEOC policy guide issued November 20, 1990:

Testers in both the housing and employment areas serve essentially the same function. It is well established that testers in the housing area have standing to challenge prohibited discriminatory practices by landlords/realtors. There is no reason to distinguish between the standing of testers in the housing area and testers in the employment context.

Accordingly, as the courts have been receptive to tester claims brought in the fair housing area, there is reason to hope that courts will similarly endorse the standing of testers in the employment area. Moreover, "[t]he EEOC's interpretation of EEO laws is entitled to substantial deference by the courts when they are faced with cases brought by EEO testers."

VIII. CONCLUSION

Employment discrimination persists in America, yet traditional approaches to demonstrating its existence are costly and difficult. Where discrimination

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178 BOGGS, supra note 18, at 362.

179 Equal Employment Opportunity Commission, supra note 177, at § 405.6906.

180 Id.

181 BOGGS, supra note 18, at 362.

182 Equal Employment Opportunity Commission, supra note 177.

183 Id. at § 405.6906.

184 BOGGS, supra note 18, at 362.

185 Id. at 359-61.
occurs today, it is typically subtle and difficult to detect without the use of advanced social science methodology employing the use of testers.\textsuperscript{186} Indeed, direct evidence of hiring discrimination is rare, and as a result, applicants for employment who suspect discriminatory hiring practices are not likely to bring challenges.\textsuperscript{187} Moreover, unless the discriminatory treatment is overt, applicants for employment who have been subject to discriminatory hiring practices will likely not recognize that the treatment they received was unlawful. Further, where discrimination is suspected, most applicants lack the proof necessary to support a claim of discrimination.\textsuperscript{188} Accordingly, testing can be an enormous help in investigating and evaluating allegations of discrimination.\textsuperscript{189}

The most basic roadblock to equal employment opportunities for minorities is at the hiring stage.\textsuperscript{190} Obviously, if a person cannot obtain a position, there can be no hope for promotion or advancement. Accordingly, testers, who apply for employment and play much the same role they have played in fair housing cases, are crucial in detecting discriminatory hiring practices that would otherwise go undetected.\textsuperscript{191}

Although testers may have no real intent to form a contract, there is inquiry, a necessary first step to assure an open environment in which meaningful contract development can take place. Moreover, where opportunities to form a contract or to obtain employment referrals are denied or lessened due to race, the tester suffers a real injury. This injury results from not being given the same right to truthful information about the availability and nature of jobs, as well as the same right to negotiate for jobs, as the tester’s majority counterparts.\textsuperscript{192} Only by sending a message to employers that they will be subject to a lawsuit where they deny access to persons who clearly appear acceptable, will the door be open to all those who legitimately seek employment.

In a perfect world, no need for these somewhat deceptive practices would exist. But in balancing the benefits and costs, the interest in using meaningful tools to fight employment discrimination should take precedence over total forthrightness in this particular setting. Further, the entrapment analogy furthered by opponents to the use of testers is erroneous.\textsuperscript{193} There is no effort to entice employer’s to discriminate. The process involves a neutral presentation of candidates. It is the employer’s or agency’s discriminatory

\textsuperscript{186}Id.

\textsuperscript{187}Id. at 359; see generally Turner, supra note 2.

\textsuperscript{188}BOCGS, supra note 18, at 359.

\textsuperscript{189}Id.

\textsuperscript{190}Id.

\textsuperscript{191}Id.

\textsuperscript{192}Id.

\textsuperscript{193}Id. at 366.
practices, not the tester’s action, that cause denial of the candidate’s employment.194

Moreover, in other settings deception has been deemed at times to be necessary or appropriate. Indeed, the federal government regularly uses informers to gain information not otherwise accessible. Accordingly, the government ought to endorse the tester approach as a meaningful way to reduce employment discrimination, a continuing blight on our nation’s conscience. The EEOC, the key investigative agency in the area, has already recognized a need for testers.195 And, in at least one state, there is some indication that state governments will also endorse the practice.196

Given the substantial societal need to attack employment discrimination, precedent and good sense call for liberal construction of relevant federal legislation and liberal application of standing inquiries. There has been ample reason for the Supreme Court to permit standing for testers and their organizations in the housing area. There is equal justification for extending tester standing to the employment setting.

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194 Id.

195 See Equal Employment Opportunity Commission, supra note 177.