



SHIFTING THE BURDEN OF PROOF:

Using Audit Testing to Proactively Root Out Workplace Discrimination

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Institute on Race, Power
and Political Economy

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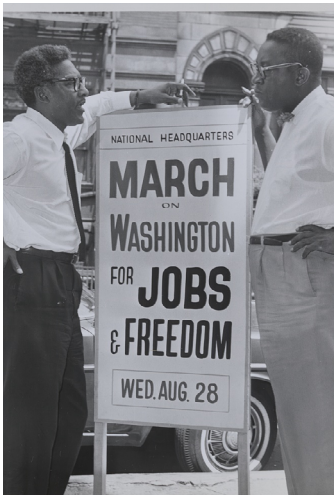
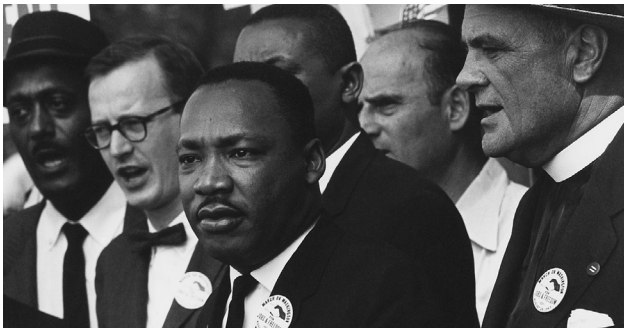


Photo top left: Martin Luther King, Jr. during the 1963 March on Washington for Jobs and Freedom, during which he delivered his historic “I Have a Dream” speech, calling for civil and economic rights and an end to racism.

Source: [Wikipedia](#)

Photo top right: Fannie Lou Hamer, American Civil Rights Leader, at the Democratic National Convention, Atlantic City, NJ, August 1964.

Source: [Wikipedia](#)

Photo above: Bayard Rustin, Deputy Director (left) and Cleveland Robinson, Chairman of Administrative Committee (right), in front of 170 W. 130 St., 1963 March on Washington.

Source: [Library of Congress](#)

Equal employment opportunity as a fundamental right was a historic gain of the 20th-century movement for civil rights and human rights led by Black Southerners.

Yet, more than a half-century after passage of the Civil Rights Act of 1964, employment discrimination based on race remains a real obstacle to advancement in our nation.¹ Racial (and other) discrimination and resulting disparities in job recruitment, interviews, hiring, and promotions remain significant in virtually all job categories and industries, but current data collection practices shroud discriminatory practices, particularly at the early stages of hiring. Bad data renders invisible the harm caused to Black, female, immigrant, and disabled applicants by disregarded applications, poorly evaluated resumes, and overlooked promotions. This report addresses prevailing legal, policy, enforcement, and market flaws that currently obstruct fair employment practices. It argues for expanded governmental oversight and the use of selective audits designed to incentivize employers to eliminate bias in their hiring processes.

A large part of the problem is that under current practice workers have the burden of detecting and calling out racial discrimination that impacts them. Government agencies rarely intervene affirmatively to uncover and penalize inequitable hiring practices. But there is an underutilized tool—audit testing, also known as matched-pair testing—that can identify hiring discrimination, and potentially even target enforcement, more effectively. This paper argues that federal, state, and local agencies charged with combatting employment discrimination should be deploying this tool. Such audits, performed on a systematic basis, could be relatively easily and inexpensively administered in virtually every sector of U.S. economic activity. The need for more research, testing, and active government intervention to eliminate employment bias is real and long overdue.

INTRODUCTION

Over the past two years, the COVID-19 pandemic has only exacerbated the inequities of structural racism and sexism deeply embedded in our labor markets.

Black communities across the nation have been hit harder than most,² both in health and economic position, because Black workers are disproportionately represented in front-line, essential jobs.³ Meanwhile, immigrants have often been left behind in the government's relief efforts,⁴ or worse, targeted as scapegoats.⁵ Workers with disabilities experienced high levels of layoffs due to the pandemic, and historically are rehired at a slow pace after economic disruptions.⁶ And as recent events show, it's no surprise that Black and Brown communities—and often women⁷—stand to lose again in the economic rebuilding effort ahead, further reinforcing the deep inequities. In the wake of COVID-19 and beyond, with Black unemployment that peaked in the double digits and a major subset of individuals facing persistent, long-term unemployment, these challenges will be compounded.

Even before COVID-19, efforts to combat discrimination have been hindered by structural changes in the economy, including the increasing proportion of Black and Brown workers in temporary jobs.⁸ All too often, these changes (including shifting economic structures and workplace practices) are obscuring and making it harder to address longer-standing root causes of employment inequities through the enforcement of civil rights laws.⁹



As we address the challenge of rebuilding a more equitable economic system, it is critical to tackle the role of persistent hiring discrimination in creating barriers to employment. For public agencies charged with enforcing antidiscrimination laws, responding to complaints is not enough. Hiring discrimination is particularly difficult to identify because those not hired often lack information about why they were not selected or who was selected instead. Since employers are unlikely to be held accountable for hiring discrimination, insufficient incentives exist for employers to prioritize identifying and removing discriminatory barriers in their hiring processes—even assuming they are willing to do so.

One pillar of our response to these challenges should be to ensure the robust and proactive enforcement of civil rights laws already on the books. Under the Obama administration, the Equal Employment Opportunity Commission (EEOC) launched stronger systemic enforcement efforts,¹⁰ and the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) instituted new Active Case Enforcement procedures

to investigate federal contractors under its jurisdiction.¹¹

Looking ahead, public agencies should revisit Audit Testing as another tool to tackle longstanding challenges of addressing hiring discrimination.¹² In audit testing in employment, two or more individuals who are carefully matched except for one key characteristic—race, gender, national origin, age, LGBTQ status, a disability, etc.—pursue the same position.¹³ Depending on the methodology of the test, they may seek employment through correspondence studies that rely on sending written résumés, by calling prospective employers about a job announcement, by directing trained applicants to participate in live interviews, or even by taking automated tests. The results—for example, who gets to the next stage in the application process and who does not, or simply how different applicants are treated—can be analyzed to assess discrimination based on the key characteristic, often a protected class under relevant laws.

Findings from employment testing can provide powerful evidence to inform broader policymaking, and agencies should explore using audit testing to inform enforcement efforts. Federal, state, and local governments as well as researchers and public interest organizations can play a transformative role by using audit testing to bring patterns of hiring discrimination to light, forging new pathways of opportunity for the people who are most marginalized in our workforce. Moreover, if employers understand audit testing as a tool and its potential for enforcement, they may be more proactive in avoiding discrimination by implementing well-established anti-bias practices in their hiring processes. In other words, audit testing can change employers' behavior, whether or not agencies ultimately target them for enforcement. Given this, we recommend that the

Why Audit Testing?

Below we discuss several reasons why agencies should use audit testing to further their missions:

RESEARCH—investigating the extent of discrimination in various industries or occupations as a key building block in targeting education, outreach, and even enforcement

PROGRAM EVALUATION—assessing the effectiveness of an enforcement program

EDUCATION AND DETERRENCE—sending the signal to employers (both those who are tested and those who hear about testing) about legal requirements and the importance of coming into compliance voluntarily

MONITORING—directly or via a contractor, tracking compliance with settlement agreements

ENFORCEMENT—in addition to the above, agencies should explore the use of audit testing to investigate specific targets, identify complainants or witnesses, and strengthen complaints pursued based upon other evidence, a common use of testing in the housing world

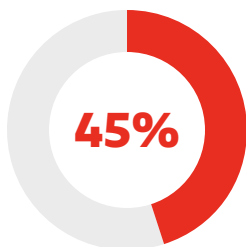
EEOC and OFCCP and state and local fair employment practices agencies (FEPAs) revisit the potential of deploying audit testing to identify discrimination, promote employment opportunities, and advance racial equity.

In this paper, we briefly lay out the context of employment discrimination and occupational segregation in the United States today and the unique challenges of tackling hiring discrimination through civil rights enforcement. Next, we discuss the history of audit testing in support of fair housing, where the Department of Housing and Urban Development (HUD) has a long history of investment in this tool, as well as historical and contemporary uses of audit testing in identifying hiring discrimination, including mid-1990s pilot programs by the EEOC and OFCCP. We explain why this is an opportune time to revisit audit testing. Finally, we provide a brief overview of considerations applicable to designing audit testing programs in the public enforcement context.

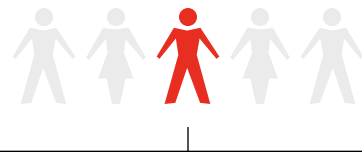
THE PROBLEM: DISCRIMINATION AND OCCUPATIONAL SEGREGATION

The vast body of research has documented that discrimination in many different aspects of life remains a reality for too many Americans, including Black people and other people of color, immigrants, Indigenous people, women, LGBTQ+ people, people with disabilities, and others.

One recent study¹⁴ of almost 3,500 diverse respondents across the nation found:

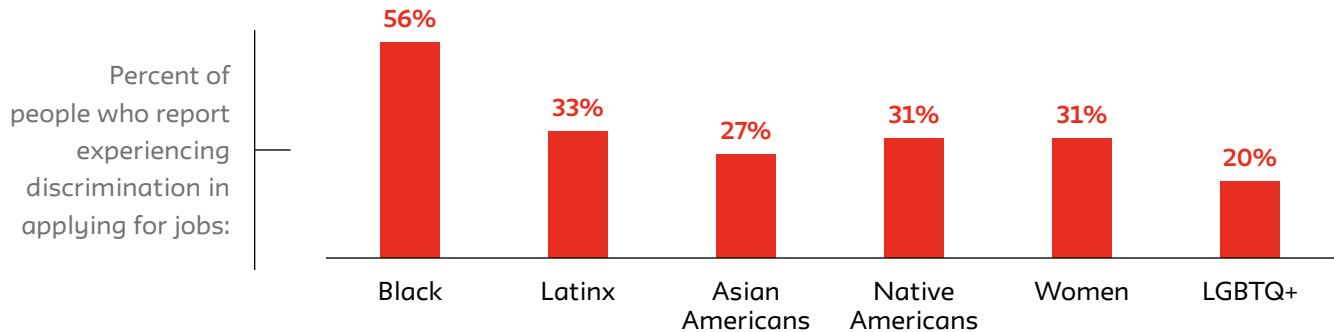


Percent of Black people interviewed who reported racial discrimination when they tried to rent or buy a home



Almost one-in-five Asian Americans reported discriminatory police interactions

These problems are more stark when it comes to employment. In the same study, more than half (56 percent) of Black Americans report experiencing discrimination in applying for jobs, as did 33 percent of Latinx people and 27 percent of Asian Americans,¹⁵ 31 percent of Native Americans and women, and one in five LGBTQ+ people.¹⁶ More still reported discrimination in terms of promotions and pay equity.¹⁷ The U.S. Department of Justice has found that even if job applications are available in accessible formats for workers with disabilities, they may not disclose their disability for fear that a potential employer will dismiss their application despite the prohibitions of the Americans with Disabilities Act.¹⁸



This reported discrimination plays out in statistical data on who gets which jobs. Economist Barbara Bergman published a pioneering paper¹⁹ in 1971 that described the results in this way:



There are very few occupations from which Negroes have been completely excluded. But we may put the matter this way: An employer filling a particular vacancy is unlikely to consider filling it with a Negro unless the job in question is in one of a handful of occupations.”

—ECONOMIST BARBARA BERGMAN

This has been described as “racial division of labor,” “occupational crowding,” and “occupational segregation.” Decades of studies have demonstrated substantial, persistent pay disparities between White and Black men, regardless of educational level.²⁰ Black women are hit even harder: a recent study suggests that 56 percent of Black women would need to change occupations in order to fully integrate the workforce.²¹ As a result, regardless of education level, Black women earn 60 cents (or less) for every dollar that White men with an equivalent education receive.²²

Indeed, research on the “theory of ability misperception” has shown that many employers discount the skills or productivity of workers of color and women before they are hired.²³ It is especially difficult to overcome that bias without having the opportunity to perform. Getting hired—getting a proverbial “foot in the door”—gives many of these workers their only opportunity to demonstrate their capabilities.²⁴ Indeed, one study suggests that “returns to additional tenure for nonwhite employees will actually exceed that of white employees.”²⁵ In other words, addressing hiring discrimination is not only necessary, but it can have outsized impacts for workers of color.²⁶

A KEY DRIVER: CHALLENGES IN ENFORCING CIVIL RIGHTS LAWS

Why do occupational segregation and racial wage and employment rate disparities, regardless of education, remain so persistent in our labor market, decades after the passage of the Civil Rights Act and the formal end of Jim Crow?

Clearly those important steps could not in themselves erase the longstanding racialized caste system in the U.S.²⁷ In recent years, the nation has had flashes of awareness of the longstanding devaluation of Black people by law enforcement.²⁸ It should be no surprise that our economy has devalued Black people as well. The same can be said for immigrants, Indigenous people, women, LGBTQ+ people, and people with physical and mental disabilities. Members of other marginalized groups too often face structural discrimination as well.²⁹ Multiple forms of discrimination also intersect, for example, women who identify as Black can face some of the most virulent discrimination.³⁰ Similarly, data shows that disability affects 1 out of every 4 Black people in the U.S., and that those with disabilities are twice as likely to live in poverty than White people with disabilities.³¹

Anti-discrimination laws must be enforced in order to be effective. A patchwork of federal, state, and local agencies currently have that role, in combination with private actors. The United States Equal Employment Opportunity Commission (EEOC) was created by Title VII of the Civil Rights Act of 1964,³² and the agency now enforces that law and several related ones.³³



Together, these laws prohibit employment discrimination on the basis of race, color, religion, sex, national origin, pregnancy, childbirth, disability, age, and genetic information, and provide a series of protections against retaliation.³⁴ However, Congress has never provided the EEOC with sufficient resources to engage in enforcement actions against more than a fraction of the charges workers file with the agency, and in recent years, has further cut the EEOC's budget in real dollars significantly.³⁵

Meanwhile, the Office of Federal Contract Compliance Programs (OFCCP) at the United States Department of Labor enforces a series of laws that prohibit discrimination by federal contractors. Executive Order 11246 itself—which has roots dating back to President Franklin Delano Roosevelt's administration³⁶—

now forbids discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin by employers contracting with the U.S. government.³⁷ That Executive Order delegates responsibility for administering and enforcing its requirements to the Secretary of Labor, and authorizes the Secretary to “adopt such rules and regulations and issue such orders as are deemed necessary and appropriate” to achieve the order’s purposes.³⁸ OFCCP also enforces Section 503 of the Rehabilitation Act of 1973,³⁹ which prohibits federal contractors from discriminating in employment against individuals with disabilities, and the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA),⁴⁰ which prohibits discrimination against protected veterans. Each of these laws—11246, Section 503, and VEVRAA—also requires contractors to take affirmative action, though the specifics vary by law. Although OFCCP has powerful enforcement authority over the approximately 25,000 covered federal contractors and subcontractors that employ approximately 20 percent of the U.S. government workforce, it also has been chronically underfunded and able to conduct compliance evaluations of only a fraction of contractors each year.

State and local governments around the nation have their own equal employment opportunity laws as well.⁴¹ Many of those laws establish or otherwise empower local agencies to investigate violations.

But taken together, these laws are not effectively deterring violations, in part because of substantial enforcement hurdles. A big challenge is the incredibly limited enforcement resources allocated to civil rights enforcement agencies. The EEOC filed only 157 total cases in FY 2019, 87 of which covered Title VII claims.⁴² State and local anti-discrimination agencies are also woefully underfunded. A recent report by Danyelle Solomon,

Connor Maxwell, and Abril Castro describes that in the ten states with the highest percentage of Black residents, in 2015 more than \$230 per resident was spent on state and local police, 328 times more than these states spent enforcing anti-discrimination laws.⁴³ This is especially problematic because many state laws cover more employers or additional protected classes than federal laws.⁴⁴

To be sure, some of these laws—including Title VII and many state and local laws but not Executive Order 11246—allow for enforcement through private litigation as well. For example, a person may file a charge with the EEOC, and if the agency does not pursue its own litigation, it can provide a “Dismissal and Notice of Rights” or (after an attempted conciliation) a “Notice of Right to Sue,” either of which allows the complaining party to file suit within 90 days in federal court.⁴⁵ In the 12 months ending March 31, 2020, more than 1,413 private civil rights cases were filed in federal courts alone (though that total includes voting, housing, education, and non-employment ADA as well as employment cases).⁴⁶

However, Title VII cases are not easy to win for private plaintiffs, who on average win less often than plaintiffs in other types of civil lawsuits.⁴⁷ Nationally, 56 percent of all private-sector non-union employees, including 59 percent of Black workers and 57.6 percent of women workers, are subject to forced arbitration agreements as a condition of employment, denying them the ability to seek judicial relief of their claims.⁴⁸

One study suggests that even when suits were heard, only 1 percent of the claims filed in court ever got to positive judgments, though many were doubtless settled on at least partially positive terms for the workers.⁴⁹ The power imbalances in employment relationships contribute significantly to this problem.⁵⁰

The reality is that after more than half a century of Title VII protections, too many individuals still fall through the cracks. They may not be able to convince a government agency or private attorney to take on their claims, or they may simply decide that it is not worth risking the time, effort, and threat of retaliation to pursue their claims.⁵¹ Studies suggest that victims of discrimination are unlikely to report it.⁵² Many may not even know that they have claims. It is incredibly difficult for individual job applicants to know if they have a claim for hiring discrimination.⁵³ Most have no way of knowing the overall hiring pool nor who is ultimately given the job or their comparative qualifications. In practice, unless an employer says something to the applicant in the hiring process that directly relates their membership in a protected class to the decision not to hire them, or an applicant knows a current employee who provides information about why the applicant was not hired, it is difficult for an applicant to have sufficient information to support a discrimination claim.⁵⁴ So most hiring discrimination remains unidentified.

Simply put, employers are unlikely to get caught discriminating in hiring, which makes complaint-driven enforcement a weak deterrent against hiring violations.⁵⁵ This is why it is important that government enforcement agencies move beyond individual complaints and pursue more proactive enforcement in order to encourage compliance.⁵⁶ As the EEOC has explained:⁵⁷

“Because most employers do not overtly express discrimination during the selection process, most applicants are unaware when they have been denied hire because of discrimination. Through its investigations, EEOC is uniquely situated to identify systemic hiring and recruitment issues and to address and remedy potentially discriminatory hiring practices in conciliations and lawsuits.”

—THE U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

If government agencies regularly undertake efforts to identify discrimination—even when workers do not file complaints—employers will have greater incentives to eliminate hiring discrimination.

In fact, the EEOC sought to pursue more systemic enforcement in both the George W. Bush and Obama administrations.⁵⁸ Unfortunately, the Trump administration’s EEOC appointees severely undermined data collection, systematically undermining the agency’s enforcement efforts.⁵⁹ Many of these directives were rescinded by the Biden administration, but the lack of information during that gap will impact workers and hamper systemic data analysis.⁶⁰

On the other hand, OFCCP by its very nature pursues systemic enforcement rather than individual enforcement. Although the agency receives and pursues individual complaints, it refers

“allegations of discrimination of an individual nature on a Title VII basis” to the EEOC for resolution.⁶¹ But the core of OFCCP’s enforcement program involves several types of periodic audits of establishments with federal contracts, none of which requires the filing of a complaint.⁶² In practice, OFCCP’s investigations range from “desk audits” (asking contractors to submit documentation) to “onsite” reviews (which involve a more thorough analysis of personnel files or other records).⁶³ In more progressive administrations, OFCCP has tried to use its resources even more strategically. In the Obama administration, OFCCP launched “Active Case Enforcement” procedures, which focused on conducting more thorough evaluations of fewer contractors.⁶⁴ But the Trump administration abandoned those efforts, and it remains to be seen if under President Biden the OFCCP will return to the practice.⁶⁵

REVISITING AUDIT TESTING TO PROMOTE SYSTEMIC CHANGE

Given the government’s limited resources it is important to explore the most effective ways to identify and address discrimination.

That is why we urge enforcement agencies to explore audit testing as a key tool for focusing proactive enforcement resources and promoting systemic changes in hiring practices.

The History of Audit Testing

Matched-pair testing—also called auditing—involves setting up a real-world experiment to identify evidence of discrimination for use in research, advocacy, and enforcement. In general, the methodology involves choosing two (and often more) individuals who are similar except for the one factor being tested—race, ethnicity, gender, etc. Both are sent to apply for the same job (or home, etc.), using the same script and similar credentials, and recording the treatment and/or services they receive.⁶⁶ Depending on the particular study,



“testers” may be live humans or computer-generated résumés, live testing may be by phone/video or in-person, and they may use their own identities or be assigned back-stories. Regardless of the methodology and testers’ motivations, live testers require rigorous training to be able to report objectively about their experiences, but live testing brings back richer information.⁶⁷

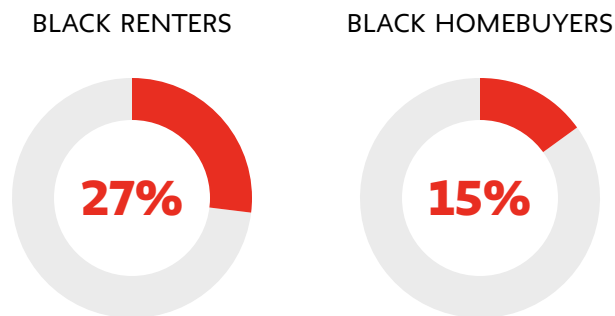
Audit Testing for Housing Discrimination Research and Enforcement

For decades, audit testing has been used in the fair housing context for research, advocacy, and even enforcement. While housing testing has been funded routinely by the federal government, private researchers, advocates, and activists have been key allies in making testing work to measure discrimination.

In 1979, the Department of Housing and Urban Development (HUD) published one of the earliest studies using matched-pair testing to measure housing discrimination.⁶⁸ That study—which rigorously outlined its methodology and the training that testers received—found that more than a decade after the passage of the Fair Housing Act, 27 percent of Black renters nationwide in at least one interaction faced discrimination in “housing availability,” (whether a particular home was volunteered to a Black family), while 15 percent of Black homebuyers found the same.⁶⁹

DISCRIMINATION IN HOUSING AVAILABILITY

Percent of Black renters and/or homebuyers nationwide that faced discrimination in at least one interaction in 1979 HUD study.



Since the effect was cumulative, visiting more realtors potentially compounded the discrimination. The study further broke down its results across 40 metropolitan areas nationwide. All told, it showed that Black families were at a significant disadvantage when it came to securing housing.

In the decades that followed, audit testing has been extensively used to measure a wide variety of discrimination in rental housing and home buying. Some groundbreaking studies have been supported by philanthropy, a key partner in these efforts,⁷⁰ but HUD has set aside federal resources as well to sponsor many important studies documenting the scope of housing discrimination.⁷¹

Indeed, HUD has commissioned a series of national housing market studies roughly every 10 years since the late 1970s, using matched-pair testing to estimate the incidence of discrimination in the national housing market.⁷² In addition, HUD deploys general research and evaluation funds to support testing programs. In recent years, HUD has appropriated between \$14 and \$17 million each year for research, evaluations, and demonstrations.⁷³

HUD has also long supported fair housing testing that goes beyond research and evaluation to include fair housing enforcement. In 1982, the Supreme Court issued a landmark ruling in *Havens Realty v. Coleman*, which held that fair housing testers had suffered sufficient “injury” to maintain a claim for relief under the Fair Housing Act.⁷⁴

Subsequently, the 1988 Amendments to the Fair Housing Act created a Fair Housing Initiatives Program, through which HUD may issue grants to nonprofit organizations that are working to prevent or eliminate housing discrimination or enforce the Fair Housing Act.⁷⁵ This program provides significant resources to fair housing organizations and other nonprofit advocacy groups to “assist people who believe they have been victims of housing discrimination,” including by “sending ‘testers’ to properties suspected of practicing housing discrimination.”⁷⁶ In recent years, the Fair Housing Initiatives Program has received \$39.6–\$45 million annually to support a variety of fair housing initiatives, including the Private Enforcement Initiative.⁷⁷

The Department of Justice’s Civil Rights Division established its own Fair Housing Testing Program in 1991 to bring suits on behalf of the United States whenever it identified unlawful discrimination based on race, national origin, disability, or familial status.⁷⁸ This program has used various methods of conducting tests, including (non-attorney) DOJ employee volunteers, contracts with individuals, and contracts with private fair housing organizations. The Civil Rights Division reports that it has filed 111 “pattern and practice testing cases with evidence directly generated from the Fair Housing Testing Program,” most of which were based on units that were not offered to members of one group but were offered to another, or were offered on differing terms. In all, the Civil Rights Division reports recovering \$13.7 million in damages and civil penalties for the 105 cases resolved thus far.

Audit Testing for Employment Discrimination Research and Private Enforcement

While audit testing in the employment context does not have the same history of federal support, it has long been established as an effective instrument for identifying discrimination in hiring. Researchers and advocates have effectively used testing to measure discrimination facing many subgroups.

Almost 30 years ago, researchers at the Urban Institute conducted two early pilot studies of employment practices using matched-pair testing.⁷⁹ Both studies tested for discrimination against “young men seeking entry-level jobs—a critical part of the market from the perspective of the career opportunities of minority males.”⁸⁰



The studies involving live testers showed that employers simply turned away Black applicants (in Chicago and DC) about 20 percent of the time versus 7 percent for White testers, and did the same for Hispanic applicants (in Chicago and San Diego) about 31 percent of the time versus 11 percent for White testers.⁸¹ A full 36 percent of young Black men encountered opportunity-diminishing treatment, for example, having trouble obtaining an application, having to wait longer before being interviewed, or being offered a different (and inferior) position than their audit partners.⁸²

Since then, sociologists, economists, and other social scientists have found field experiments like audit testing to be a key tool for measuring employment discrimination.⁸³ A more recent study by the late Devah Pager and Bruce Western underscores the importance of testing.⁸⁴ In their 2012 paper describing two sets of in-person tests in Milwaukee and New York City respectively, Pager and Western showed why hiring discrimination is so hard to identify without testing. In both cities, young men between 21 and 24 years of age were chosen and matched based on their work and educational experience, neighborhood of residence, appearance, verbal skills, and interaction styles. Their methodologies differed somewhat from that point, with Black and White testers in Milwaukee applying to separate employers, and Black, White, and Latinx testers in New York City applying to the same employers. The study found that White applicants in Milwaukee received a callback or offer in 34 percent of cases, while equally qualified Black applicants received a callback or offer just 14 percent of the time. In New York City, White applicants received callbacks or offers 31 percent of the time, versus 25 percent for Latinx applicants and 15 percent for Black applicants. Interestingly, the testers involved were rarely able to identify when they faced

discrimination in any given interaction, underscoring how difficult it is to identify hiring discrimination, and suggesting that individuals may be likely to underestimate the presence of discrimination in their own lives even if they recognize its presence more broadly.

Audit Testing in Action

Over the years, a number of other researchers have used audit testing in cutting-edge studies documenting different examples of employment discrimination, for example:

RACIALLY IDENTIFIABLE NAMES—

Marianne Bertrand and Sendhil Mullainathan conducted a study, published in 2000, sending résumés to help-wanted ads in Chicago and Boston newspapers, measuring the interview callbacks for each résumé sent.⁸⁵

They carefully matched four résumés for each job: two with “very White-sounding names (such as Emily Walsh or Greg Baker)” and two with “very African-American-sounding names (such as Lakisha Washington or Jamal Jones);” and they produced so-called “higher quality” résumés (with more labor market experience and fewer résumé gaps, an email

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address, and other skills or degrees) and “lower-quality” résumés, assigning one “African-American-sounding” and one “White-sounding” name to each.⁸⁶ After sending nearly 5,000 résumés to respond to 1,300 employment ads in sales, administrative support, clerical, and customer service categories, covering jobs from cashiers to clerical and sales positions. The study found that applicants with White-sounding names had to send about 10 résumés to get a callback, while applicants with African-American-sounding names needed to send 15 résumés to get a callback. They quantified a White-sounding name to be equivalent to about 8 years of experience. In addition, while White-sounding names with higher quality experience got 30 percent more callbacks than White-sounding names with lower quality experience, the gap was smaller for African-Americans.

CRIMINAL RECORDS—In 2003, Pager published a groundbreaking study exploring how criminal background information is used to make hiring decisions and how criminal background intersects with race.⁸⁷ Pager again paired four testers—two Black, two White, one of each with a criminal conviction (felony drug possession with intent to distribute, carrying an 18-month sentence).⁸⁸ In general, testers reported favorable treatment until they informed the employers of their records (though some employers treated criminal histories as a plus and a sign of a potential hard worker).⁸⁹ Ultimately, White applicants with criminal records received callbacks in 17 percent of cases versus those without in 34 percent of cases—a 50 percent difference.⁹⁰ Black applicants with criminal records received callbacks in 5 percent of tests, while those without records got callbacks in 14 percent of cases.⁹¹ In other words, White applicants with records received more frequent callbacks than Black applicants without. Pager found that the negative impact of a criminal record is greater for

Black applicants, even while more White applicants are affected in terms of absolute numbers.⁹² Pager’s work is widely credited as a crucial building block of the “Ban the Box” movement to remove criminal background check boxes from job applications.⁹³

WORKERS WITH DISABILITIES—In a Norwegian study, researchers submitted 1,200 fictitious applications for 600 job openings, some disclosing disability status with all other characteristics remaining constant. They found that disability disclosure reduced the probability of securing an interview by 48 percent.⁹⁴

TEMPORARY WORK—In a forthcoming paper, two of the nation’s foremost testing experts, economist Marc Bendick, Jr., and the Equal Rights Center’s Elias Cohn, will report on the results of a new study of temporary manufacturing jobs in Chicago. Their study will show evidence of discrimination and job segregation favoring Latinx workers over African-Americans in these jobs.⁹⁵

When aggregated, these experiments are even more instructive. For example, a recent meta-analysis by Lincoln Quillian, Pager, Ole Hexel, and Arnfinn H. Midbøen reviewed 28 testing experiments since 1989, finding *no* change in racial discrimination in hiring over time.⁹⁶ This result underscores the continuing need for interventions to address discrimination in hiring.

AGENCY USE OF AUDIT TESTING

Given the effectiveness of audit testing and its long use in fair housing enforcement, it is striking that this tool is not being used more often by public agencies charged with enforcing employment discrimination laws.

In this section, we explore pilot audit testing programs that the EEOC and OFCCP, respectively, launched in the mid-1990s. We also discuss why testing could be an important tool in opening up today's labor market as the nation rebuilds from the devastating (and racially unequal) impacts of the COVID-19 pandemic.

The History of Federal Agencies Deploying Testing

While audit testing in employment has not had the same history of sustained federal support as fair housing testing, both the EEOC and OFCCP did launch pilot trials of audit testing in the mid-1990s, each with different goals. This section recounts the design and implementation of those pilots.

After releasing its original guidance on tester standing in the first Bush administration, and updating it in the Clinton administration, the EEOC launched its own testing pilot project in 1997 with the stated goal of “study[ing] the use of employment ‘testers’ to detect hiring discrimination”⁹⁷ and, potentially, to better focus enforcement. The agency entered into contracts with two nonprofit organizations, the Fair



Employment Council of Greater Washington [now the Equal Rights Center] and the Legal Assistance Foundation of Chicago [now Legal Aid Chicago].⁹⁸ Media reports suggest that the total budget for the two contracts was only \$200,000.⁹⁹

The agency conducted little public analysis of the program afterwards. From interviews with EEOC leaders and staff at the time, we understand that the EEOC provided data to help focus these tests, but the pilot faced numerous challenges in implementation that made its utility limited.¹⁰⁰ Audit testing can be expensive, and doing it properly takes time.

The agency did not provide the time or resources to do the sort of robust testing that would lead to helpful results. Moreover, the testing project soon raised substantial political concerns. The then-Chairman of the House Education and Workforce Committee’s Employer-Employee Relations subcommittee attacked testing at the beginning of a 1994 oversight hearing in relation to a request for an increase in the agency’s budget.¹⁰¹ Then-Speaker Newt Gingrich himself appeared at the same hearing, raising questions about the EEOC’s testing program, though doing so on the grounds that he supported additional resources for complainants.¹⁰²

The EEOC subsequently revisited testing under then-Chair Naomi Earp’s Republican majority, laying out a road map to “[e]xplore the use of matched-pair testing” in the 2007 E-RACE report.¹⁰³ The agency pledged to consider both “whether and how the Commission should use matched-pair testing to combat barriers to employment, including its use in assessing compliance with consent decrees and most effectively working in coordination with FEPAs or other partners.”¹⁰⁴ To our knowledge, the EEOC has not seriously entertained a testing program since then.

Public Agency Authority to Deploy Testing

Both the EEOC and OFCCP have sufficient legal authority to deploy testing as a tool to support their missions. Indeed, both of these agencies have previously done so in their mid-1990s pilots.

The EEOC’s longstanding guidance, described above, indicates that it could even bring charges based on discrimination uncovered by testers, regardless of who funded the testing. For example, testers in outside studies—funded by philanthropy or otherwise—can unambiguously file charges with the EEOC and seek to enforce their claims under Title VII. The EEOC then has to consider the facts and circumstances of an individual charge when deciding whether to dedicate resources toward pursuing it.

At least one law professor, Michael J. Yelnosky, has questioned whether the EEOC has the authority to conduct or support audit testing itself.¹⁰⁵ He cites a provision of Title VII limiting the EEOC to examining only evidence related to “the charge under investigation,”¹⁰⁶ and distinguishes the agency’s Title VII enforcement authority from its authority under the Age Discrimination in Employment Act or even the authority of other agencies like the Occupational Safety and Health Administration.¹⁰⁷ Yelnosky calls for an amendment to Title VII specifically authorizing the EEOC to use audit testing.¹⁰⁸

Although the vast majority of EEOC resources are devoted retroactively to resolving individual charges of discrimination, the agency has substantial authority to take proactive action.

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In particular, the agency can pursue Commissioner's Charges (under Title VII of the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act) and Directed Investigations (under the Age Discrimination in Employment Act, and the Equal Pay Act).¹⁰⁹ These mechanisms "allow EEOC to investigate the full spectrum of potential violations when the agency learns of a problem or there is reason to believe that discrimination may be more widespread or of a different nature than an individual charge alleges."¹¹⁰ As another professor, Leroy D. Clark, responded to Yelnosky contemporaneously, Title VII also expressly provides that the EEOC may "cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals" – a strikingly broad grant of authority that does not, on its face, carve out testing collaborations.¹¹¹

Given that, the EEOC could certainly explore using audits to help bring claims against employers where applicants themselves cannot show discrimination, or to focus the agency's enforcement resources more broadly toward particular industries or geographies. In doing so, the agency could fund audit testing using congressional appropriations meant to support their systemic investigation efforts.

OFCCP likewise has broad authority to investigate violations of its executive order, including "the employment practices of any Government contractor or subcontractor... conducted in accordance with the procedures established by the Secretary of Labor."¹¹² The agency has an established process to decide which contractors to review.¹¹³ The agency generally publishes a (public) Corporate Scheduling Announcement List providing 2,500–5,000 establishments with at least 45 days advance notice that they will be receiving a compliance review, and encouraging them to take advantage of OFCCP's compliance assistance program.¹¹⁴ That list is compiled using a neutral scheduling methodology that the agency publishes as well.¹¹⁵ OFCCP uses the same employer data disclosures that the EEOC uses, but then applies certain practical considerations, for example, balancing reviews across OFCCP district offices (no more than three affirmative action plan reviews per office) and employers (no more than 15 establishments of any parent company nationwide and no more than five establishments of any company per OFCCP district).

This methodology allows OFCCP to focus additional resources on industries that have high rates of violations. In fact, at the recommendation of the Government Accountability Office (GAO), the OFCCP scheduling process also focuses a third of its scheduling list on industries "that OFCCP determined as having the highest rates of discrimination findings."¹¹⁶ OFCCP could use funds appropriated for its enforcement program to pursue audit testing to help determine where to direct its limited resources.

To be sure, OFCCP generally does not pursue individual claims of discrimination. But the agency does have the authority to "investigate complaints by employees or prospective employees of a government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified" in the Order.¹¹⁷ Applying the principles of the EEOC's guidance on testing,

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testers are essentially prospective employees of a government contractor, whose complaints OFCCP could investigate.¹¹⁸

Finally, because EEOC and OFCCP could pursue employment testing to support their missions, the agencies could enter into contracts with outside entities to conduct testing to help accomplish their goals. Indeed, each of these agencies did just that in previous pilots, subject to all appropriate federal contracting rules.

OFCCP launched its own testing pilot around the same time.¹¹⁹ According to an evaluation study that it commissioned, the agency’s pilot likewise involved contracting with an outside nonprofit organization that “has developed an effective testing methodology which has been used in over 2,000 tests.”¹²⁰ The pilot project was designed to answer three questions:

- 1** | Is it feasible to test employers with government contracts for employment discrimination?
- 2** | What can the results of a testing project indicate about an employer?
- 3** | Will testing enhance OFCCP’s ability to identify employers that discriminate in hiring?¹²¹

OFCCP asked the nonprofit to look at contractors in banking, financial services, transportation, and delivery, focusing on identifying discrimination in entry-level, low-skill jobs that may have relatively high wages (transportation and delivery) or career growth potential (banking and finance).¹²² The nonprofit then hired matched pairs of testers and trained them over “several days of developing biographies, drafting, résumés, conducting mock interviews and field testing,” as well as meeting with experienced workers from those industries.

OFCCP Report Findings

The summary report found that the testing was “useful” despite the small sample size.¹²³ Beyond the top-line, mixed responses, the report noted other evidence of discrimination, such as:

HIRING DISPARITIES—In at least one test, a White tester was interviewed, offered the job, and declined, while his Black paired tester was never contacted (before or after the White tester declined).

REFERRALS—In multiple tests, White testers were given access to other vacancies, while Black testers were not.

STEERING—In one test, the White testers were tracked toward an upwardly mobile job, while the matched Black tester was considered for a part-time position, and then never contacted again. In another set of two tests, each involving the same bank, the White tester was

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interviewed and steered toward a branch in a White area both times; the first Black tester was interviewed and steered toward a branch in a predominantly Black neighborhood, and the second was never contacted.

INTERVIEWS—In one test, Black testers were turned away because the job was not available, while White testers were engaged about part-time opportunities. In another test, the Black tester had a 15-minute interview, compared to two hours and ten minutes for the White tester.¹²⁴

The summary report found that testing was promising, including that:

- > The OFCCP will be able to use the results of such a program to help place contractors into three distinct classifications: 1) employers who have hiring practices that comply with the regulations of Executive Order 11246; 2) employers with hiring practices that warrant further investigation; 3) and employers that have discriminatory hiring practices that may warrant enforcement action. Moreover, the data gathered from conducting a testing program will allow OFCCP to determine what practices and policies of an employer's hiring process require modification, thus aiding in the provision of technical assistance to that employer and others.
- > The pilot's findings demonstrate that testing will enable OFCCP to identify employers that may treat applicants differently based on factors such as race, national origin or gender. A well-designed testing program can produce detailed information that would otherwise not be available. Moreover, this data can be used to target limited agency resources so that additional compliance mechanisms can be used more effectively. OFCCP's access to information regarding contractors from complaints, compliance reviews, and mandatory annual data collection forms (known as EEO-1s) will be instrumental here. If OFCCP wants to take enforcement action against an employer, testing will provide meaningful empirical information to serve as the basis for such action. It can also serve to support decisions not to take enforcement action.¹²⁵

OFCCP doubtless took note of congressional opposition to the EEOC testing program, and the agency ultimately launched no regular testing program of its own.

NYC Commission on Human Rights Testing Program

New York City passed a law in 2015 authorizing the New York City Commission on Human Rights (NYCCHR), the agency charged with enforcing the city’s Human Rights Law, to establish an employment discrimination testing program to investigate local employers, labor organizations, and employment agencies.¹²⁶ Live-tester auditing in employment represents only a portion of the overall testing program, which also conducts online and telephone testing, not to mention testing involving housing and public accommodations. Over the years, NYCCHR has used its overall testing program to decide where to initiate its own proactive complaints “without relying on individual complainants who may be hesitant to come forward and report such violations.”¹²⁷

While the law requires the Commission to conduct at least five live-tester audit investigations, the agency routinely conducts more than that. The scope of the resource-intensive audit-testing program is nonetheless limited by the available staff—a total of 5 testers at any given time, each limited to 20 hours per week.¹²⁸ In 2016, the Commission conducted a total of 16 audit tests in employment, four concerning gender and 12 involving race.¹²⁹ The regulated community took notice, with management-side employment lawyers counseling clients to be aware of the increased enforcement.¹³⁰



Revisiting Audit Testing Now to Advance Equity in Hiring

There are many reasons for federal agencies charged with addressing employment discrimination to revisit audit testing as a tool of enforcement today. Especially in the wake of the COVID-19 crisis, a deeply unequal recovery for people of color seems likely for the foreseeable future,¹³¹ and the “last hired, first fired” problem has a significant impact.¹³²

Even aside from the pandemic, audit testing is an important tool for uncovering hidden discrimination and focusing proactive enforcement, which can in turn have a substantial impact on the economy. Hiring is the singular gateway to economic opportunity in our society, and hiring discrimination has cascading effects on economic equity. But hiring discrimination is especially hard

to identify and remedy from the perspective of a job applicant.¹³³ Proactive enforcement can provide a key incentive to encourage employers to improve the hiring process and create more opportunities for categories of workers who are too often marginalized in particular occupations or industries.

Audit testing is also an opportunity to center equity in the enforcement of civil rights laws by focusing additional resources on discrimination against the most marginalized subgroups in our society.¹³⁴ This may involve different groups depending on the industries, occupations, and geographies involved.

Past Calls for Audit Testing

This report follows a long history of scholars calling for additional use of audit testing by government agencies to target employment discrimination. As early as 1990, the Urban Institute’s then-president William Gorham put it this way:

“Discrimination against race, ethnicity, or gender is illegal in this country, just as not paying income taxes is illegal. But while the Internal Revenue Service has a carefully drawn, systematic strategy for enforcing the tax code, to date there is no comparable strategy to enforce the laws against discrimination, despite their importance. Auditing the behavior of employers, real estate agents, and bankers for evidence of discrimination in hiring, housing, and credit lending could be an essential part of such a strategy.”¹³⁵

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In that same volume, the Urban Institute’s Fix, Galster, and Struyk suggested that DOJ or the EEOC “might consider using random or targeted testing to determine which employers are inadvertently discriminating on the basis of national origin or alienage in response to the 1986 Immigration Reform and Control Act.”¹³⁶ Roderic V.O. Boggs, Joseph M. Sellers, and Marc Bendick, Jr., wrote a comprehensive essay on the use of testing in civil rights enforcement, including methodological considerations, around the same.¹³⁷ In that essay, they emphasized the need for both the federal government and philanthropy to provide more resources to support audit testing in employment.¹³⁸

In the late 1990s, Marc Bendick, Jr., published a thoughtful paper on the role that audit testing can play in improving agency enforcement of civil rights laws.¹³⁹ He explained how “[c]ombining testing and non-testing information represents one way to incorporate testing into a broader strategy for EEO enforcement.”¹⁴⁰ For one thing, he explained how testers could substitute for complainants to help agencies pursue enforcement in industries where they know systemic discrimination exists but no workers have come forward.¹⁴¹ Bendick reiterated a call for EEOC to pursue more strategic enforcement efforts in 2012 testimony on the Commission’s strategic enforcement plan.¹⁴²

Former EEOC Chair Paul Igasaki encouraged the EEOC to further explore the use of testers in employment cases in a 2001 law review article recounting his tenure on the Commission, including for the 1997 pilot program.¹⁴³

In the waning days of the George W. Bush administration, the EEOC launched its E-RACE Initiative, which was “designed to improve EEOC’s efforts to ensure workplaces are free of race and color discrimination.”¹⁴⁴ One of the key strategies of this effort was to “convene an internal work group to explore and assess whether and how the Commission should use audit testing to combat barriers to employment, including its use in assessing compliance with consent decrees and most effectively working in coordination with [Fair Employment Practices Agencies] or other partners.”¹⁴⁵

And in 2019, Hamilton and Neighly called for a “substantial increase in resources [for the EEOC] to conduct employment audits to discover—and prosecute—racial discrimination.”¹⁴⁶



CONSIDERATIONS FOR DESIGNING AN AUDIT TESTING PROGRAM TO IDENTIFY HIRING DISCRIMINATION

Any federal, state, or local government agency that seeks to use audit testing to help identify hiring discrimination has to consider a number of design questions for its program.

As a first step, agencies should strongly consider partnering with academic and other experts who have substantial experience in audit testing, including its promise and limitations.¹⁴⁷ In this section, we briefly lay out some other key considerations in designing audit testing programs.



Purpose of Audit Testing

It is most important to be clear from the start about the purpose of any testing program. An agency could use audit testing with any one or a combination of the following goals:

- 1** | to provide background research on the prevalence or characteristics of discrimination in order, for example, to issue reports or support a legislative reform;¹⁴⁸
- 2** | for program evaluation on the effectiveness of their overall enforcement program;
- 3** | to help the agency decide how to target their proactive enforcement resources, for example, in certain industries or geographical areas;¹⁴⁹
- 4** | to investigate specific targets to corroborate or dispel allegations of discrimination (usually combined with other investigation techniques);¹⁵⁰
- 5** | to identify complainants or witnesses who can file charges or testify in particular enforcement actions;¹⁵¹
- 6** | to augment monitoring in settlement agreements or consent decrees;
- 7** | to incentivize firms to take affirmative action to eradicate discrimination in their hiring processes.¹⁵²

The purpose or purposes will have a substantial impact on the design of the testing program,¹⁵³ not to mention potentially different costs. For example, testing to identify potential complainants or witnesses may require testers who are articulate in describing their experiences, who will agree to keep in touch for a longer period of time, and who have no issues in their background that could damage their credibility in an enforcement action.¹⁵⁴ Indeed, Boggs, Sellers, and Bendick call this sort of enforcement-related testing a “methodological first cousin” to other forms of testing, and even suggest that would-be complainants from the protected class be given a slight “edge” in order to heighten the inference of discrimination.¹⁵⁵ However, if an agency is simply testing to identify areas for additional proactive enforcement—including where to perform a more systemic investigation—they need not be concerned whether individual testers can withstand cross examination, just that they are reliable reporters.

Sometimes audit testing has hybrid goals. For example, an audit test for purposes of program evaluation may suggest new target industries for a particular enforcement agency. Testing for purposes of background research may suggest targets for follow-up investigations using non-testing methods.

Audit testing can have spillover effects as well. Media reports of an agency conducting tests can encourage employers to come into compliance with the law. A recent study suggests that communications around enforcement can have significant effects on compliance, with one press release accomplishing the same amount of deterrence as 210 additional inspections.¹⁵⁶

Form of Discrimination

Depending on the laws it is trying to enforce, an agency must of course define for which protected class it is testing. Testing for more than one protected class, for example, testing for discrimination involving both race and gender, requires running multiple audit tests.

Hiring Stage

It is also important to determine the stage of the hiring process for which the agency seeks to test. To test for hiring discrimination in initial screening, deploying large numbers of carefully crafted resumes for correspondence testing and judging based on which resumes receive calls back is much more efficient than using in-person testers.¹⁵⁷ It is worth mentioning that correspondence studies necessarily rely on proxies for protected classes (for example, using “Black-sounding” names to signal race), which leads to some additional uncertainty.

Agencies testing for hiring discrimination at the interview stage will need live testers, whether by phone (or video) or in person. Any sustained shift to telephone- or video-based interviews post-pandemic may make this sort of interview testing easier as well. There are other pros and cons to live testers.¹⁵⁸ On the one hand, live testers require more time and resources to recruit and train. Depending on the testing design, live testers must get past the résumé stage to an interview stage in order to conduct the test, so it is difficult and expensive to conduct enough

live tests to build a strong quantitative case. On the other hand, properly trained, testers can record detailed observations that refine or expand the scope of employment practices tested, for example, by noting the relative lengths of their interviews or if they were told of other openings; and they may even be able pinpoint individuals making discriminatory decisions.

Choosing the Sample

Agencies can make use of publicly available and confidential data (including past enforcement data) to inform their audit tests, depending on what they want to learn about employers in a certain industry or locality. Federal civil rights law has long required larger companies (with 100 or more employees) and certain federal contractors (with 50 or more employees and \$50,000 or more in federal grants) to report annually the total number of employees in each of a small and rigid number of racial, ethnic, and (binary) gender categories.¹⁵⁹ These “EEO-01” reports (also known as Standard Form 100) have been used by the EEOC and OFCCP since 1966.¹⁶⁰ In addition, agencies can turn to external information—including publicly available data compiled by online employer review platforms like Indeed and Glassdoor and even worker advocacy groups—to refine their samples. Finally, if they are targeting firm-level violations, agencies can stage tests so as to avoid detection, for example by targeting geographically dispersed offices of the same firm.

Conducting the Test

Agencies have to decide whether to conduct audit tests themselves or contract with outside organizations to conduct the tests. It is telling that most of the previous government enforcement efforts described above involved contracts with outside testers. Some agencies can and do hire

their own testers, including DOJ for a portion of its fair housing testing, but outside nonprofit organizations often are better placed to have relationships with or a pipeline to potential testers with deep knowledge of the industry to which they are applying, and thus more convincing applicants.

Personnel

Depending on the factors described above, there are also important questions around the personnel necessary to conduct effective audit testing. In addition to experts to help design a testing program, a team may require statisticians, coders, attorneys, and possibly live testers. Recruitment of the latter may be complicated given the need to identify tightly matched pairs.

Funding

As the EEOC discovered in its audit testing pilot, audit testing programs require adequate resources to be effective. In the long term, government funding will be needed to maintain an adequate nationwide audit testing program targeting employment discrimination, and to send the signal that this is important work. HUD’s Fair Housing Initiatives Program, which issues grants to nonprofit organizations working to prevent or eliminate housing discrimination and help enforce the Fair Housing Act,¹⁶¹ sets an important precedent for the creation of a sustainable funding source for testing at the federal level, even though employment testing is different enough to require a different approach.¹⁶²

Currently, there is no dedicated funding for fair employment testing at the national level. In the meantime, philanthropy can play a key role by funding audit testing efforts in order to develop further evidence of the possible role of testing in rooting out employment discrimination and informing policy efforts. Agencies could also suggest that employers themselves fund audit testing programs, not unlike “mystery shopper” programs that retail businesses use to improve customer service.¹⁶³ Groups like the Equal Rights Center today have corporate clients who contract with them for compliance testing. Employers who claim a commitment to improving their hiring practices—whether proactively, due to affirmative action programs¹⁶⁴ or as a result of a settlement agreement or consent decree¹⁶⁵—may establish audit testing programs as part of their auditing and assessment strategy. Agencies must be careful to conduct their own oversight of such programs and should provide stiff penalties for employers who abuse them.

Research Agenda

Audit testing has a well-established method for identifying discrimination, but future testing programs could be strengthened by additional research on a number of questions, such as:

- Are there untapped opportunities for computerizing audit studies?¹⁶⁶
- Can audit testing effectively detect bias in algorithms used for screening applicants or in aptitude or personality tests given to applicants?¹⁶⁷
- Can this methodological tool be adapted to spot bias in more advanced positions (beyond entry-level) or in promotions?
- Can we draw a connection between Devah Pager’s groundbreaking audit testing research into discrimination against individuals previously involved with the criminal justice system and “fair chance” laws?
- How can audit testing be coordinated with strategic communications efforts by federal agencies in order to address hiring discrimination more effectively?¹⁶⁸
- Can testing be used to deepen our understanding of the conscious and unconscious mechanisms of bias in the workplace, thereby enabling improvements in employers’ remedial actions, the content of injunctive relief specified in legal settlements, etc.?¹⁶⁹
- What is the best ecosystem to ensure that agency testing initiatives are successful? What are the entities involved, what are their roles, and how should they interact with each other to maximize impact?¹⁷⁰

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- > Generally, what kind of testing evidence makes a strong case in the enforcement context? This information currently exists primarily through case law in the housing context, but that has taken decades to develop.
- > What are the best ways to address limitations on an employment testing program caused by the very protections we wish to enforce? For example, for live testing, it is likely most sustainable to employ testers on a full-time basis, but how can full-time testers be recruited without running afoul of Title VII requirements?



CONCLUSION

The Civil Rights Act of 1964 enshrined in U.S. law the defining movement's values and a framework for needed reforms based on ongoing experimentation, improvement, and enforcement.

If the United States is to fulfill the promise of the Civil Rights Act, which Black southerners made possible through considerable sacrifice, we must take the next bold steps in truly rooting out race-based discrimination and advancing racial equity, including promoting fair employment opportunities. Private philanthropy has supported groundbreaking studies and there are examples of government agencies implementing audit testing to uncover systemic hiring discrimination. The exciting conclusion: audit testing of employment practices works, and the time is now for government leaders to get serious about funding and implementing it.

Our country has entered another era in the movement for racial justice that calls for deep transformative policy making, creative course-correction, and thoroughly informed systemic solutions. While philanthropic investments should continue, government at the local, state, and especially at the federal level, is called upon now to dedicate major next-generation resources to research, evaluation, and enforcement efforts that will utilize audit testing strategically, focusing on industries, occupations, and geographies that have exhibited entrenched racial inequality in hiring.

Audit testing can become a key tool in our efforts to dismantle occupational segregation and build an inclusive good jobs economy that levels the playing field for workers of color. Innovative policies recently adopted in Milwaukee and New York City offer a glimpse of what's possible at the municipal

level. At the federal level, the EEOC and OFCCP have an opportunity to employ audit testing as a tool to improve their respective enforcement of civil rights laws, as already evidenced by previous pilots with state and local fair employment practices agencies (FEPAs). Federal agencies can also incentivize employers, unions, and allied public interest groups to fund audit testing to encourage broader compliance and high-road employment.

In particular, the EEOC and OFCCP have the authority to oversee and build out robust audit testing programs in partnership with local and state FEPAs. Supporting such efforts through more aggressive agency oversight and enforcement funding would constitute especially timely priorities for the Biden administration.

APPENDIX

Responding to Critiques of Testing

While audit studies have produced compelling results, they have drawn their share of criticism. For example, economist James Heckman questioned whether the Urban Institute’s early study adequately pinpointed discrimination, providing three main critiques:¹⁷¹

First, that the study did not distinguish between average and marginal discrimination; in other words, even if many firms discriminate, that may not actually affect workers who face such discrimination at the margins, especially if they can get jobs elsewhere.¹⁷² But Heckman’s argument presumes the neoclassical assumption of a perfect market—an assumption that is, at minimum, inconsistent with the persistent group inequality we see today resulting from inter-group labor market discrimination.¹⁷³ If his argument were true it would be tautological. He is arguing that discrimination doesn’t exist for the marginal worker because market mechanisms are anti-discriminatory.

Heckman also argues that by focusing on ads in newspapers, the Urban Institute’s methodology under-sampled jobs found through friends, which he found to be the “main route” of youth employment, as opposed to public job postings.¹⁷⁴ But if anything, this methodological critique suggests that audit testing *underestimates* discrimination, especially given research on how relatively homogeneous social networks among White people in particular can diminish job prospects for people of color.¹⁷⁵ If workers of color have less information about job opportunities, they have less chance even to apply for jobs, let alone lose out to equally (or less) qualified White workers.

Finally, Heckman hypothesized that there may be productivity-linked employment attributes that employers could see but that testing studies did not control for, and that might lead to particularly problematic outcomes given that testers often end up in the “distribution tails” of candidate pools. In other words, more White testers had uncontrolled “positive” productivity-linked employment attributes (sometimes called “soft skills”) that won them jobs over the Black testers. (In a prior article, Heckman and Siegelman had suggested that differences in outcomes could be attributable in part to all of the Latino testers in one study wearing facial hair or having an accent.)¹⁷⁶

Senator Alan Simpson voiced similar concerns about the use of audit testing in employment on the grounds that it was more complex and subjective than in housing sales and rentals:

“While the Department of Housing and Urban Development has conducted similar tests of discrimination in public housing [sic], the employer-employee relationship is far more complex than that of landlord-tenant. There are so many more variables present in deciding whether to hire someone, that I believe that it is necessary for Congress to establish some reasonable ground rules with respect to this sort of ‘testing.’”¹⁷⁷

The more concrete version of this critique fails under even basic scrutiny. For example, we have no evidence that Latino testers in the study Heckman and Siegelman criticized had more facial hair than the White testers nor any evidence that presence or lack of facial hair is indicative of job performance a priori. Moreover, as Heckman and Siegelman signal, it is hard to separate responses to accents from discrimination based on ethnicity. And if employers were using facial hair to determine qualification, that very well may be evidence of discrimination in the first place.¹⁷⁸ Beyond that, there is no reason to suspect that a well-designed research study would introduce bias, so we cannot assume that it has without evidence.¹⁷⁹ On the other hand, we have ample evidence of discrimination from studies based on simple job applications from perfectly matched (often fictitious) candidates.

But Heckman signals a broader (related) critique that while Black and White testers may be similar on average (at the mean or median), hiring decisions are made in the tails of distributions not at the mean, and the White distribution could be more variable such that there is a greater concentration in the upper tail. Once again, he presents no evidence at all that the studies at issue have this methodological limitation. And, even if there were such evidence, uncontrolled methodological limitations could result in greater than measured discrimination as easily as less than measured discrimination.¹⁸⁰ Regardless, these critiques could be addressed through easy methodological changes, such as better matching of the tested pairs.¹⁸¹ The best correspondence and live-pair testing alike already address these concerns.

Beyond methodological accuracy, critics of audit testing have raised more philosophical or even ethical concerns, including:

- > Testing requires testers to “deceive” or even “entrap” human subjects without their knowledge.
- > Testing wastes the time of employers, who spend time screening and even interviewing candidates who have no intention of taking the jobs to which they applied, and who may not even exist.
- > Testing is not a helpful way of identifying discrimination beyond entry-level jobs, and it cannot adequately account for bias in promotions.¹⁸²

True, matched-pair testing necessarily requires applying for positions without disclosing the nature of the audit, but it does not by its nature involve attractive “lures” that seek to entice individuals to act in an illegal manner.¹⁸³ Model live-testing programs are given limited information about the nature of their test targets, their partners’ experiences, and even what type of discrimination is under investigation. In terms of resources, testing does result in employers screening more candidates than they would otherwise, but the difference is incremental, because most employers screen multiple candidates for open positions. Given the extent of employment discrimination and occupational segregation in our labor force, and the effectiveness of this tool at identifying hiring discrimination that is otherwise extremely hard to see, the potential benefits of audit testing

appear to outweigh the costs, especially as compared to the economic and social costs of status quo discrimination. This is likely why so many university Institutional Review Boards have approved audit testing, weighing the costs and benefits. And while testing is most established in entry-level hiring—which is incredibly important for career trajectories—that does not preclude designing and piloting new methodologies for more senior positions, for example, with résumé screening.

Testing as a Basis for Private Litigation

Against this backdrop, advocates have attempted to bring litigation based on evidence developed through auditing programs over the years, but case law is mixed as to whether employment testers have legal standing to sue for violations. In *Kyles v. J.K. Guardian Sec. Serv., Inc.*, the Seventh Circuit ruled that testers who experience discrimination when applying for a job do have standing to sue under Title VII.¹⁸⁴ The court reasoned that by making it unlawful for an employer “to limit, segregate, or classify his employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee...because of such individual’s race...,” Congress created a far-reaching substantive right that extends well beyond a mere refusal or failure to hire.¹⁸⁵ The court likewise reasoned that testers advance the same policy goals that led Congress to authorize individuals as “private attorneys general” to file suit to challenge discriminatory employment practices, even though they may not have a genuine interest in the job at hand.¹⁸⁶

On the other hand, in *Fair Employment Council of Greater Washington Inc. v. BMC Marketing Corp.*, the D.C. Circuit ruled in 1994 that tester plaintiffs had no cause of action under Title VII, given that they were not actually seeking employment and would not (and could not) have entered into an employment contract, so they lacked any injury in fact and standing.¹⁸⁷ The court distinguished the Supreme Court’s decision in *Havens*, reasoning that the Fair Housing Act provided “an enforceable right to truthful information concerning the availability of housing,” which Title VII does not provide with respect to employment.¹⁸⁸

The EEOC itself has weighed into this debate. Between the *Fair Employment Council* and *Kyles*, the EEOC updated its enforcement guidance—still in effect—on whether testers can file charges and litigate claims of employment discrimination.¹⁸⁹ The agency traced broad standing doctrine under employment discrimination laws, and civil rights laws generally, and noted that courts have found the purpose and structures of Title VII and Title VIII (the Fair Housing Act, under which *Havens* was decided) to be “functionally identical.”¹⁹⁰ Then, the agency recounts early cases conferring standing on testers. The EEOC guidance explicitly takes issue with the *Fair Employment Council of Greater Washington* ruling, by identifying factors that the D.C. Circuit overlooked, including that Title VII does not require a showing of future harm, that testers are indeed individual victims of discrimination, and that the decision undermines the “private attorneys general” function of Title VII.¹⁹¹

ENDNOTES

- 1 See Annelies Goger & Luther Jackson, *The Labor Market Doesn't Have a 'Skills Gap' – It Has an Opportunity Gap*, BROOKINGS (Sept. 9, 2020), <https://www.brookings.edu/blog/the-avenue/2020/09/09/the-labor-market-doesnt-have-a-skills-gap-it-has-an-opportunity-gap/#cancel>
- 2 See Kendra Bozarth & Andrea Hanks, *Structural Racism Is Exacerbating the Coronavirus Pandemic for Black People – Especially Black Women*, MS. MAGAZINE (Apr. 9, 2020), <https://msmagazine.com/2020/04/09/structural-racism-is-exacerbating-the-coronavirus-pandemic-for-black-people-especially-black-women/>; Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus – Racism and Economic Inequality*, ECON. POLICY INST. (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/>
- 3 Gould & Wilson, *supra* note 3.
- 4 *Immigrant Eligibility for Pub. Programs During COVID-19*, PROTECTING IMMIGRANT FAMILIES, <https://protectingimmigrantfamilies.org/immigrant-eligibility-for-public-programs-during-covid-19/> (last visited Jan. 4, 2021).
- 5 Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>
- 6 *Governors' Role in Promoting Disability Employment in COVID-19 Recovery Strategies*, NATIONAL GOVERNORS ASSOCIATION (March 2021), https://www.nga.org/wp-content/uploads/2021/03/SEED_Memo.pdf
- 7 Julie Kashen, Sarah Jane Glynn, & Amanda Novello, *How COVID-19 Sent Women's Workforce Progress Backward*, CTR. FOR AM. PROGRESS (Oct. 30, 2020, 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward/>
- 8 See Press Release, Nat'l Employ. Law Project, *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>. See also DAVID S. PEDULLA, *MAKING THE CUT: HIRING DECISIONS, BIAS, AND THE CONSEQUENCES OF NONSTANDARD, MISMATCHED, AND PRECARIOUS EMPLOYMENT HISTORIES* (Princeton Univ. Press 2020).
- 9 See generally Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace* (Inst. For New Econ. Thinking, Working Paper No. 114, 2020), https://www.ineteconomics.org/uploads/papers/WP_114-Goldman-Weil.pdf. Reva Siegel coined the term “preservation-through-transformation” to describe a similar pattern whereby new protections lead to opponents finding new rhetoric and new justifications to justify long standing outcomes. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119-20 (1997). Thanks to Rashad Robinson for recounting activist Shirley Sherrod's succinct description of this phenomenon: racism is a shapeshifter. See also Matt Watkins, *Justice and the Virus: Racial Patterns*, CTR. FOR COURT INNOVATION (June 3, 2020), <https://www.courtinnovation.org/publications/racial-patterns>
- 10 See *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Emp. Opportunity Comm'n: A Message from Chair Jenny R. Yang*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 7, 2016), <https://www.eeoc.gov/advancing-opportunitya-review-systemic-program-us-equal-employment-opportunity-commission>
- 11 U.S. DEPT. OF LABOR, OFCCP ORDER NO. 295 ADM NOTICE/OTHER, DIR 2011-01, ACTIVE CASE ENFORCEMENT (ACE) PROCEDURES (2010).

- 12 See DARRICK HAMILTON & MADELINE NEIGHLY, ROOSEVELT INST., *THE RACIAL RULES OF CORPORATE POWER: HOW EXTRACTIVE CORPORATE POWER HARMS BLACK AND BROWN COMMUNITIES AND HOW RACE-CONSCIOUS SOLUTIONS CAN CREATE AN INCLUSIVE ECONOMY* 27 (2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Racial-Rules-of-Corporate-Power_Issue-brief_201911-1.pdf (“[T]he EEOC should be authorized and funded to conduct randomized, proactive audits (tests for discrimination) of companies to detect racial discrimination,” including matched-pair audits.) Others have advanced the cause of audit testing in employment for decades. See, e.g., Roderic V.O. Boggs, Joseph M. Sellers, & Marc Bendick, Jr., *Use of Testing in Civil Rights Enforcement* in CLEAR & CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 344 (Raymond J. Struyk & Michael Fix, eds., Urb. Inst. Press 1993). See generally Frances Cherry & Marc Bendick, *Making It Count: Discrimination Auditing and the Activist Scholar Tradition* in AUDIT STUDIES: BEHIND THE SCENES WITH THEORY, METHODS, AND NUANCE (S.M. Gaddis, ed., Springer 2018).
- 13 Indeed, for some types of correspondence (paper-based) auditing, it is increasingly standard to send as many as four testers. See Patrick Kline & Christopher Walters, *Audits as Evidence: Experiments, Ensembles, & Enforcement* 2 (Inst. For Research on Labor & Employ., Working Paper No. 108-19, 2019), <https://irle.berkeley.edu/files/2019/09/Audits-as-Evidence.pdf> (“Starting with the seminal work of Bertrand and Mullainathan (2004), it has become standard to sample thousands of jobs and send each of them four applications”).
- 14 DISCRIMINATION IN AMERICA: FINAL SUMMARY, NAT’L PUBLIC RADIO, HARVARD T.H. CHAN SCHOOL OF PUB. HEALTH, & THE ROBERT WOOD JOHNSON FOUNDATION 8, 11 (2018), https://www.rwjf.org/content/dam/farm/reports/surveys_and_polls/2018/rwjf443620
- 15 *Id.* at 7.
- 16 *Id.*
- 17 *Id.*
- 18 Vanita Gupta, Head of the Civil Rights Division, US Department of Justice, *Ensuring Access to Jobs for People with Disabilities* (May 12, 2015), <https://www.justice.gov/archives/opa/blog/ensuring-access-jobs-people-disabilities>
- 19 Barbara R. Bergmann, *The Effect on White Incomes of Discrimination in Employment*, 71 J. OF POLITICAL ECON. 294, 313 (1971).
- 20 See, e.g., Kim A. Weeden, *Occupational Segregation*, STAN. CTR. ON POVERTY & INEQ. (SPECIAL ISSUE) 33 (2019), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2019.pdf; Darrick Hamilton & William Darity, Jr., *Crowded Out? The Racial Composition of American Jobs* in RESEARCHING BLACK COMMUNITIES 77 (James S. Jackson, et al., eds., Univ. of Mich. Press 2012).
- 21 See Madison Matthews & Valerie Wilson, *Separate Is Still Unequal: How Patterns of Occupational Segregation Impact Pay for Black Women*, WORKING ECON. BLOG (Aug. 6, 2018, 3:50 PM), <https://www.epi.org/blog/separate-is-still-unequal-how-patterns-of-occupational-segregation-impact-pay-for-black-women/>. See also Valerie Wilson, Janelle Jones, Kayla Blado, & Elise Gould, *Black Women Have to Work 7 Months into 2017 to Be Paid the Same as White Men in 2016*, WORKING ECON. BLOG (July 27, 2017, 12:49 PM), <https://www.epi.org/blog/black-women-have-to-work-7-months-into-2017-to-be-paid-the-same-as-white-men-in-2016/> (dispelling several myths about the wage gap for Black women).
- 22 Matthews & Wilson, *supra* note 19.
- 23 See Arthur H. Goldsmith, Derrick Hamilton, & William Darity, Jr., *Does A Foot in the Door Matter? White-Nonwhite Differences in the Wage Return to Tenure & Prior Workplace Experience*, 73 SOUTHERN ECON. J. 267, 270 (2006).
- 24 *Id.* at 294.

- 25 *Id.* at 268, 294.
- 26 *Id.* at 274.
- 27 See, e.g., Owen Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL. 37, 37 (1997) (arguing that the caste system created by slavery and perpetuated for another hundred years by Jim Crow justifies affirmative action policies in order to eradicate it).
- 28 See Giovanni Russonello, *Why Most Americans Support the Protests*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html>
- 29 See generally JULIE KASHEN & RAKEEN MABUD, TIME'S UP FOUND., NEVERTHELESS, IT PERSISTS: DISRUPTING THE VICIOUS CYCLE OF INSTITUTIONALIZED SEXISM (2020), https://timesupfoundation.org/wp-content/uploads/2020/07/TIMES-UP_Jul2020_Structural_Sexism_Paper.pdf
- 30 See, e.g., JAIME M. GRANT, LISA A. MOTTET, & JUSTIN TANIS, NAT'L CTR. FOR TRANSGENDER EQUALITY AND NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REP. OF THE NAT'L TRANSGENDER DISCRIMINATION SURVEY 3 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (finding based on a survey that Black transgender people had an unemployment rate double the overall transgender sample and four times the overall population, among other results).
- 31 Megan Buckles, *How to make policies work for black women with disabilities*, CENTER FOR AMERICAN PROGRESS (February 15, 2022), <https://www.americanprogress.org/article/how-to-make-policies-work-for-black-women-with-disabilities/>
- 32 See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (2020).
- 33 See The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2020); The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2020); Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (2020); Sections 501 & 505 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794a (2020); The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2020); Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq. (2020).
- 34 The Supreme Court has now ruled that Title VII's prohibition of discrimination on the basis of sex extends in effect to sexual orientation and transgender status. See *Bostock v. Clayton County*, 590 U.S. __ (2020).
- 35 See Danyelle Solomon, Connor Maxwell, & Abril Castro, *Systemic Inequality and Economic Opportunity*, CENTER FOR AMERICAN PROGRESS (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/>
- 36 See *History of Executive Order 11246*, U.S. DEPT. OF LABOR: OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Jan. 4, 2021).
- 37 *Id.* It should be noted that OFCCP's administrative enforcement scheme was recently challenged in federal litigation by Oracle. See Complaint, Oracle America, Inc., v. U.S. Dept. of Labor, No. 1:19-cv-3574 (D.D.C., Nov. 27, 2019). That case challenged OFCCP's longstanding authority to pursue administrative enforcement of Executive Order 11246, coming in response to litigation filed by OFCCP against Oracle. See Paige Smith, *Oracle Attacks DOL Enforcement Power Ahead of Pay Bias Trial*, BLOOMBERG L. (Dec. 5, 2019), <https://news.bloomberglaw.com/daily-labor-report/oracle-attacks-dol-enforcement-power-ahead-of-pay-bias-trial>. Oracle recently agreed to dismiss that case after the Department decided not to appeal an adverse decision in an enforcement action. Press Release, U.S. Dept. of Labor, Statement by OFCCP Director Craig Leen Regarding Updates Between OFCCP and Oracle America (Dec. 3, 2020), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20201203-0>

- 38 See Exec. Order 11246, 41 C.F.R. §§ 60-1 et seq. (West 2021). The Department has subsequently published a series of Secretary's Orders delegating this authority to the Director of OFCCP. See, e.g., Secretary's Order 7-2009, 74 Fed. Reg. 58834 (Nov. 13, 2009).
- 39 29 U.S.C. § 793 (2020).
- 40 38 U.S.C. § 4212 (2020).
- 41 The National Conference of State Legislatures maintains a list of state laws. *Discrimination & Harassment in the Workplace*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 18, 2019), <https://www.ncsl.org/research/labor-and-employment/employment-discrimination.aspx#>. Numerous cities and even counties have their own antidiscrimination laws in employment as well. See, e.g., Movement Advancement Project, *Employment Nondiscrimination Map*, https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws (last visited Jan. 5, 2021).
- 42 See *EEOC Litigation Statistics, FY1997 - FY2019*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/enforcement/eeoc-litigation-statistics-fy-1997-through-fy-2019> (last visited Jan. 4, 2021).
- 43 See Solomon, Maxwell, & Castro, *supra* note 34.
- 44 For example, California's Fair Employment and Housing Act covers all employers with 5 or more employees. See CAL. GOV. CODE, tit. 2, § 12926(d) (West 2021) ("[e]mployer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities"). In contrast, Title VII only covers employers with 15 or more employees. See 42 U.S.C. § 2000e(b) (2020) ("[t]he term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person"). Likewise, Michigan's civil rights laws protect young workers in addition to older workers covered by federal law. See *Zanni v Medaphis Physician Services Corp (Zanni II)*, 612 N.W. 2d 845, 847 (Mich. Ct. App. 2000) ("[W]e conclude that the plain language of the statute provides no basis to limit the protections of § 202 to older workers").
- 45 See *What You Can Expect After a Charge is Filed*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed> (last visited Jan. 4, 2021).
- 46 See United States Courts, Table C-3, U.S. District Courts – Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2020, <https://www.uscourts.gov/statistics/table/c-3/judicial-business/2020/09/30>; United States Courts, Civil Nature of Suit Code Descriptions (Feb. 2019), https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf
- 47 See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POLY REV. 103, 106 (2009) (finding that between 1979 and 2006, federal plaintiffs won in 15 percent of cases filed due to employment discrimination, versus 51 percent for other types of civil cases).
- 48 Hugh Baran and Elisabeth Campbell, *Forced arbitration helped employers who committed wage theft pocket \$9.2 billion in 2019 from workers in low-paid jobs*, NATIONAL EMPLOYMENT LAW PROJECT (June 7, 2021) <https://www.nelp.org/publication/forced-arbitration-cost-workers-in-low-paid-jobs-9-2-billion-in-stolen-wages-in-2019/>
- 49 Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST COMPANY (July 31, 2017), <https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits>
- 50 See Jenny R. Yang & Jane Liu, *Restructuring Our Employment Discrimination Enforcement System to Create Accountability by Confronting Fundamental Power Imbalances in the Employment Relationships* (2021), <https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/>

- 51 See Paul Igasaki, *Is Complaining Worth the Risk*, IMDIVERSITY (2013), <https://imdiversity.com/villages/career/is-complaining-worth-the-risk/>
- 52 See, e.g., Major G. Coleman, William A. Darity, & Rhonda V. Sharpe, *Are Reports of Discrimination Valid? Considering the Moral Hazard Effect*, 67 AM. J. OF ECON. & SOC. 149, 149 (2008).
- 53 For a basic overview of the legal standard in Title VII cases, see Jennifer Issacs, *Proving Title VII Discrimination in 2019*, ABA, https://www.americanbar.org/groups/young_lawyers/projects/no-limits/proving-title-vii-discrimination-in-2019/ (last visited Jan. 4, 2021). See also WORKPLACE FAIRNESS, PROVING DISCRIMINATION, <https://www.workplacefairness.org/proving-employment-discrimination#3> (last visited Jan. 4, 2021) (providing a basic overview of the types of evidence required to prove a hiring discrimination case).
- 54 Indeed, studies suggest that Black applicants are, if anything, likely to *underreport* claims of discrimination. Cf. Coleman et al., *supra* note 50.
- 55 Cf. Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POLY REV. 93, 103-13 (2018) (explaining that similar wage-and-hour laws are often broken because of the many ways in which workers are deterred from enforcing their rights).
- 56 See generally *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Emp. Opportunity Comm'n*, *supra* note 10. Cf. David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change*, 60 J. OF INDUS. REL. 437 (2018) (describing the author's own efforts as Wage and Hour Administrator at the U.S. Department of Labor to direct more enforcement resources toward proactive investigations in order to improve compliance overall).
- 57 *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Emp. Opportunity Comm'n*, *supra* note 10.
- 58 For more background on EEOC's systemic enforcement efforts, see generally Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133 (2015).
- 59 Jenny Yang & Cathy Ventrell-Monsees, *Employment: Three Strategies to Advance Equity*, 60 DEMOCRACY: J. OF IDEAS 4 (Special Symposium) (2020), <https://democracyjournal.org/magazine/special-symposium/employment-three-strategies-to-advance-equality>
- 60 Office of Federal Contract Compliance Programs, DIRECTIVE (DIR) 2022-02, (effective date March 31, 2022) rescinded and replaced DIR-2018-06, DIR 2018-02, and DIR 2021-02.
- 61 OFCCP and EEOC have a memorandum of understanding that, in addition to these referrals, provides that individual charges received by OFCCP are considered dual-filed. See EEOC-OFCCP Memorandum of Understanding on Coordination of Functions (2020), <https://www.eeoc.gov/sites/default/files/2020-11/Fullypercent20Executedpercent20OFCCPpercent20EEOCpercent20DOJpercent20MOUpercent2011-3-20.pdf>. The EEOC has also issued regulations considering complaints filed with OFCCP under Section 503 as "charges dual filed" when they also fall within the jurisdiction of the Americans with Disabilities Act. See 29 C.F.R. § 1641.5.
- 62 For a fuller discussion of OFCCP's investigation process, see the pullout box titled *Public Agency Authority to Deploy Testing*, below. See also *Corporate Scheduling Announcement List Frequently Asked Questions*, U.S. DEPT. OF LABOR: OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/faqs/scheduling-lists#Q1> (last visited Jan. 4, 2021) (listing OFCCP's use of compliance reviews, corporate management compliance evaluations, functional affirmative action program reviews, Section 503 focused review, VEVRAA focused reviews, and compliance checks).
- 63 See U.S. DEPT. OF LABOR, OFCCP FED. CONT. COMPL. MAN. 3-134 (2014) https://www.dol.gov/sites/dolgov/files/OFCCP/FCCM/508_FCCM_05012020.pdf (last visited Jan. 4, 2021).

- 64 U.S. DEPT. OF LABOR, *supra* note 10.
- 65 See Guy Brenner, OFCCP Rescinds Active Case Enforcement Procedures, NAT'L LAW REV. (Dec. 3, 2018), <https://www.natlawreview.com/article/ofccp-rescinds-active-case-enforcement-procedures>
- 66 See Kline & Walters, *supra* note 13.
- 67 See, e.g., Urb. Inst., *Exposing Housing Discrimination: A Conversation with Marge Turner and Justin Carter*, YOUTUBE (June 11, 2013), <https://www.youtube.com/watch?v=rP7WBiqq8Dk>
- 68 See RONALD E. WIENK, ET AL, U.S. DEPT. OF HOUSING & URB. DEV., OFFICE OF POLICY DEV. & RES., MEASURING RACIAL DISCRIMINATION IN AM. HOUSING MKTS: THE HOUSING MKT PRACS. SURV. (1979), <https://files.eric.ed.gov/fulltext/ED182397.pdf>
- 69 *Id.* at ES-2.
- 70 See, e.g., EQUAL RIGHTS CTR., OPENING DOORS: AN INVESTIGATION OF BARRIERS TO SENIOR HOUSING FOR SAME-SEX COUPLES 14 (2014), https://equalrightscenter.org/wp-content/uploads/senior_housing_report.pdf (finding that 48 percent of 200 tests across 10 states resulted in LGB testers with same-sex spouses experiencing adverse treatment compared to testers with opposite-sex spouses, and thanking the Gill Foundation and the Retirement Research Foundation for financial support).
- 71 See generally, MARGERY AUSTIN TURNER, ET AL., URB. INST., DISCRIMINATION IN METROPOLITAN HOUSING MKTS: NAT'L RESULTS FROM PHASE I HDS 2000 (2002), <https://www.urban.org/sites/default/files/publication/60776/410821-Discrimination-in-Metropolitan-Housing-Markets.PDF>; MARGERY AUSTIN TURNER, ET AL., U.S. DEPT. OF HOUSING & URB. DEV., HOUSING DISCRIMINATION AGAINST RACIAL & ETHNIC MINORITIES 2012: FULL REPORT (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf; MARGERY AUSTIN TURNER, ET AL., URB. INST., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES (2005), <https://www.urban.org/sites/default/files/publication/42931/900833-Discrimination-Against-Persons-with-Disabilities.PDF>; DIANE LEVY, ET AL., URB. INST., A PAIRED-TESTING PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf; MARY K. CUNNINGHAM, ET AL., U.S. DEPT. OF HOUSING & URB. DEV., A PILOT STUDY OF LANDLORD ACCEPTANCE OF HOUSING CHOICE VOUCHERS (2018), <https://www.huduser.gov/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>; MARGERY AUSTIN TURNER, ET AL, URB. INST., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS (2002), <https://www.urban.org/sites/default/files/publication/59891/1000504-All-Other-Things-Being-Equal.PDF>; DOUGLAS A. WISSOKER, WENDY ZIMMERMAN, & GEORGE FALSTER, URB. INST., TESTING FOR DISCRIMINATION IN HOME INSURANCE (1997), <https://www.urban.org/sites/default/files/publication/67051/307555-Testing-for-Discrimination-in-Home-Insurance.pdf>
- 72 See *Paired Testing and the Housing Discrimination Studies*, U.S. DEPT. OF HOUSING & URB. DEV.: EVID. MATTERS (2014), <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>
- 73 U.S. DEPT. OF HOUSING & URB. DEV., BUDGET IN BRIEF: FISCAL YEAR 2021 23 (2020), https://www.hud.gov/sites/dfiles/CFO/documents/BudgetinBrief_2020-02_06_Online.pdf
- 74 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 364 (1982) (“A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against...”).
- 75 42 U.S.C. § 3616a.

- 76 See *Fair Housing Initiatives Program (FHIP)*, U.S. DEPT. OF HOUSING & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHIP#_What_Is_the (last visited Jan. 5, 2021); See *Fair Housing Enforcement Organizations Use Testing to Expose Discrimination*, U.S. DEPT. OF HOUSING & URB. DEV.: EVID. MATTERS (2014), <https://www.huduser.gov/portal/periodicals/em/spring14/highlight3.html> (describing some of the testing conducted by three fair housing organizations in Chicago, Milwaukee, and Spoke, respectively).
- 77 U.S. DEPT. OF HOUSING & URB. DEV., *supra* note 70, at 25.
- 78 *Fair Housing Program*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/crt/fair-housing-testing-program-1> (last visited Jan. 5, 2021). This program also “on occasion” conducts tests involving places of public accommodations under Title II of the Civil Rights Act. *Id.*
- 79 These studies are discussed in Michael Fix, George C. Galster, & Raymond J. Struyk, *An Overview of Auditing for Discrimination*, in CLEAR & CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA (Raymond J. Struyk & Michael Fix, eds., Urban Inst. Press 1993). See also MARC BENDICK, JR., ADDING TESTING TO THE NATION’S PORTFOLIO OF INFORMATION ON EMPLOYMENT DISCRIMINATION, A NAT’L REPORT CARD ON DISCRIMINATION IN AM.: THE ROLE OF TESTING 47-68 (Michael Fix & Margery Turner, eds., Urb. Inst., 1999), <https://www.urban.org/sites/default/files/publication/66646/308024-National-Report-Card-on-Discrimination-in-America.PDF>
- 80 Fix, Galster, & Struyk, *supra* note 76 at 18.
- 81 *Id.* at 22.
- 82 *Id.*
- 83 See, e.g., Devah Pager & Hana Sheperd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181 (2008).
- 84 See generally Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. OF SOC. ISSUES 221 (2012).
- 85 Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).
- 86 *Id.* at 992.
- 87 See generally Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937 (2003).
- 88 *Id.* at 946.
- 89 *Id.* at 956.
- 90 *Id.* at 955.
- 91 *Id.* at 957-58.
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- 93 See Katherine Q. Seelye, Devah Pager, *Who Documents Bias in Job Market, Dies at 46*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/obituaries/devah-pager-dead.html>; Angela Hanks, *Ban the Box & Beyond*, CTR. FOR AM. PROGRESS (July 27, 2017, 9:03 AM), <https://www.americanprogress.org/issues/economy/reports/2017/07/27/436756/ban-box-beyond/>

- 94 Vegar Bjørnshagen and Elizabeth Ugreninov, Disability Disadvantage: Experimental Evidence of Hiring Discrimination against Wheelchair Users, *EUROPEAN SOCIOLOGICAL REVIEW* (October 2021), <https://academic.oup.com/esr/article/37/5/818/6190466>
- 95 See Marc Bendick Jr. & Elias M. Cohn, *Race Discrimination and Segregation in Manufacturing Jobs: Evidence from Matched Pair Testing of Staffing Agencies*, *SOC. SCI. J.* (Apr. 2, 2021), <https://doi.org/10.1080/03623319.2021.1884776>
- 96 See Lincoln Quillian, Devah Pager, Ole Hexel, & Arnfinn H. Midtbøen, *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination In Hiring Over Time*, 114 *PROC. OF NAT'L ACAD. OF SCI.* 10870 (2017).
- 97 See Press Release, U.S. Equal Emp. Opportunity Commission, EEOC Announces Pilot Projects to Test for Employment Discrimination (Dec. 5, 1997), <https://www.eeoc.gov/newsroom/eeoc-announces-pilot-projects-test-employment-discrimination>
- 98 *Id.*
- 99 Michael J. Yelnosky, *Employment Testers Revisited*, published in *LAB. & EMP. LAW INITIATIVES & PROPOSALS UNDER THE OBAMA ADM. – PROC. OF N.Y.U. 62ND ANN. CONF. ON LABOR 685* (Zev J. Eigen, ed., 2011) [hereinafter Yelnosky I].
- 100 Interview with Paul Igasaki, former Vice Chair, EEOC (May 11, 2020).
- 101 *The Future Direction of the Equal Emp. Opportunity Comm'n: Hearing Before the Subcomm. On Employer-Employee Relations of the H. Comm. on Educ. & the Workforce*, 105th Cong. (1998), <http://commdocs.house.gov/committees/edu/hedcew5-78.000/hedcew5-78.htm>
- 102 *Id.*
- 103 *E-RACE Goals & Objectives*, EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/initiatives/e-race/e-race-goals-and-objectives> (last visited Jan. 5, 2021).
- 104 *Id.*
- 105 See Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 *U. MICH. J.L. REF.* 403 (1993) [hereinafter Yelnosky II]; Michael J. Yelnosky, *Salvaging the Opportunity: A Response to Professor Clark*, 28 *U. MICH. J.L. REF.* 151 (1994) [hereinafter Yelnosky III].
- 106 Yelnosky II, *supra* note 106, at 463 (citing 42 U.S.C. § 2008e-8(a)). Yelnosky also cites to *EEOC v. Ocean City Police Dep't*, 820 F.2d 1378, 1380 (4th Cir. 1987) (holding that the agency “is not empowered to conduct general fact-finding missions concerning the affairs of the nation’s work force and employers. The only legitimate purpose for an EEOC investigation is to prepare for action against an employer charged with employment discrimination, or to drop the matter entirely if the ... charge ... [is] unfounded”).
- 107 Yelnosky III, *supra* note 123, at 170.
- 108 See Yelnosky II *supra* note 123, at 469; Yelnosky III, *supra* note 123, at 154.
- 109 See *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Emp. Opportunity Comm'n: A Message from Chair Jenny R. Yang*, *supra* note 10, at fn 49-50 and text accompanying.
- 110 *Id.*

- 111 See Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REF. 1, 38 (1994) (citing 42 U.S.C. § 2000e-4(g)). Clark does suggest that “[i]f any need exists for Congressional attention to the tester process,” it would be to amend Title VII to both authorize the agency to conduct testing using “fabricated credentials,” though he downplays the necessity of taking that step. *Id.* at 46-48. Indeed, Senator Alan Simpson produced his own alternative version of the Civil Rights Amendments of 1991 that “would prohibit employment testers from misrepresenting their education, experience, or other qualifications for the job being offered.” Fix, Galster, & Struyk, *supra* note 76, at 49 n.43. Senator Simpson’s amendment was never enacted. The fact that such legislation was proposed but not enacted provides some support for a finding that Congress did not consider testing to rise to the level of fraud or misrepresentation, understanding its importance as an enforcement tool. See, e.g., *Philip Morris v. Vilsack*, 896 F. Supp. 2d 512, 523 (E.D. Va. 2012) (“The rejection of an amendment, or reenactment of the operative provision in subsequent legislation, is probative evidence of congressional acquiescence . . .”).
- 112 Executive Order 11246, As Amended, § 206(1), <https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended> (last visited: Jan. 4, 2021).
- 113 Courts have found that OFCCP’s authority to enforce an administrative warrant under the Fourth Amendment requires the agency to have either “specific evidence of an existing violation” or to show that “reasonable legislative or administrative standards.” See *Bank of America v. Solis*, 2014 WL 4661287, No. 09-2009, at *4 (July 2, 2014).
- 114 *Id.*
- 115 See, e.g., OFCCP METHODOLOGY FOR DEVELOPING THE SUPPLY & SERVICE SCHEDULING LIST FY 2019, RELEASE-1 (2019), <https://www.dol.gov/sites/dolgov/files/ofccp/scheduling/SL19R1-Methodology-Final-FEDQA508C.pdf>
- 116 GOV’T ACCT. OFFICE, STRENGTHENING OVERSIGHT COULD IMPROVE FEDERAL CONTRACTOR NONDISCRIMINATION COMPLIANCE 37 (2016), <https://www.gao.gov/assets/680/679960.pdf>
- 117 Executive Order 11246, As Amended, § 206(2), <https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended> (last visited: Jan. 4, 2021).
- 118 Holding aside its own authority, OFCCP may have sufficient authority to deploy audit testing under authority delegated from the EEOC as well. OFCCP and EEOC’s joint memorandum of understanding essentially delegates certain EEOC enforcement authority to OFCCP when investigating complaints or charges that allege a Title VII basis: “Pursuant to this MOU, OFCCP shall act as EEOC’s agent for the purposes of receiving complaints/charges. All complaints/charges of employment discrimination filed with OFCCP alleging a Title VII basis shall be received as complaints/charges simultaneously dual-filed under Title VII.” See EEOC-OFCCP Memorandum of Understanding on Coordination of Functions, *supra* note 58. While OFCCP often transfers individual complaints to OFCCP under the same MOU, they pledge to “retain, investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in dual filed complaints/charges.” *Id.* See also 29 C.F.R. § 1641.5 (an EEOC regulation considering complaints filed with OFCCP under Section 03 as “charges dual filed” when they also fall within the jurisdiction of the Americans with Disabilities Act).
- 119 *Testers Project Executive Brief*, U.S. DEPT. OF LABOR, <https://web.archive.org/web/19990422170052/http://www.dol.gov/dol/esa/public/media/reports/ofccp/testers.htm> (last viewed Jan. 5, 2021).
- 120 *Id.*
- 121 *Id.*
- 122 *Id.* Tests in the finance field did not work out because they were conducted outside the normal hiring season for those jobs. *Id.*

- 123 *Id.*
- 124 *Id.*
- 125 *Id.*
- 126 See 2015 N.Y.C. Local Law No. 2015/33 (Apr. 20, 2015). The Council also enacted a one-year pilot housing discrimination testing program. 2015 N.Y.C. LOCAL LAW NO. 2015/32 (Apr. 20, 2015).
- 127 See N.Y. COMM. ON HUM. RIGHTS, 2016 ANNUAL REP. 4 (2016), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/AnnualReport2016FINAL.pdf>. The Commission largely used its own testers and partnered with the Fair Housing Justice Center to test source-of-income discrimination in housing. *Id.* at 15.
- 128 Non-matched-pair employment testing involved, for example, “search[ing] job applications online and identif[y]ing if the application required a criminal background check in violation of the Fair Chance Act.” *Id.*
- 129 *Id.* at 9. In the same year, the Commission conducted 74 matched-pair tests for housing discrimination. *Id.*
- 130 See, e.g., Epstein, Becker, & Green, New York City Investigation of Hiring Practices, NAT’L L. REV. (July 3, 2015), <https://www.natlawreview.com/article/new-york-city-investigation-hiring-practices>
- 131 See, e.g., Congressional Budget Office, *Interim Economic Projections for 2020 and 2021*, CONG. BUDGET OFFICE, <https://www.cbo.gov/publication/56368> (projecting the unemployment rate to remain above 10 percent for the remainder of 2020) (last visited Jan. 5, 2021).
- 132 Some have suggested it is harder to get reliable results from audit employment testing in a slack labor market. See, e.g., KATE FITZSIMMONS, MATT MCMURRER, ET AL., THE USE OF UNDERCOVER TESTERS TO IDENTIFY AND ELIMINATE DISCRIMINATION IN THE SELECTION AND HIRING OF EMPLOYEES: A SPECIAL REP. PREPARED FOR THE IOWA CIV. RIGHTS COMM’N 16 (2010), <https://legalclinic.org.uiowa.edu/sites/legalclinic.org.uiowa.edu/files/2020-04/SpecialReportToTheICRCEmploymentTesters.pdf> (citing an interview with Marc Bendick, Jr.) However, in renewed testing efforts, these concerns can be readily addressed by appropriate timing and targeting of testing.
- 133 See generally Coleman et al., *supra* note 50.
- 134 See, e.g., Janelle Jones, Black Women Best, DATA FOR PROGRESS (July 15, 2020), <https://www.dataforprogress.org/blog/2020/7/15/black-women-best>
- 135 See Fix, Galster, & Struyk, *supra* note 76, at xix.
- 136 See *Id.* at 45.
- 137 See generally Boggs, Sellers, & Bendick, Jr., *supra* note 10.
- 138 *Id.* at 369.
- 139 Marc Bendick, Jr., *Adding Testing to the Nation’s Portfolio of Information on Employment Discrimination*, in A NAT’L REP. CARD ON DISCRIMINATION IN AM.: THE ROLE OF TESTING 47 (Michael Fix & Margery Austin Turner, eds., Urb. Inst. 1999).
- 140 *Id.* at 62 (emphasis in original).
- 141 *Id.* at 62–63.

- 142 *Meeting of July 18, 2012 Public Input into the Dev. of Equal Emp. Opportunity Comm'n Strategic Enforcement Plan* (Statement of Marc Bendick, Jr., Ph.D), <https://www.eeoc.gov/meetings/meeting-july-18-2012-public-input-development-eeocs-strategic-enforcement-plan/bendick>. The passage of time has not diminished the appropriateness of these recommendations. See Frances Cherry & Marc Bendick, Jr., *Making It Count: Discrimination Auditing and the Activist Scholar Tradition*, in *AUDIT STUDIES: BEHIND THE SCENES WITH THEORY, METHOD, AND NUANCE* 45 (S.M. Gaddis, ed., Springer 2018).
- 143 Paul M. Igasaki, *Doing the Best with What We Had: Building a More Effective Equal Employment Opportunity Commission During the Clinton-Gore Administration*, 17 *LAB. LAW* 261, 281-82 (2001).
- 144 *E-RACE Goals & Objectives*, *supra* note 121. Yelnosky discussed this initiative in a paper subsequently published in a book chapter at the beginning of the Obama administration, but the Obama EEOC does not appear to have pursued the testing element. See Yelnosky I, *supra* note 116, at 685.
- 145 *E-RACE Goals & Objectives*, *supra* note 121.
- 146 See HAMILTON & NEIGHLY, *supra* note 12, at 27.
- 147 In addition to the experts cited repeatedly in this paper, including Marc Bendick, Jr., and Kate Scott and Elias Cohn at the Equal Rights Center, see *generally* *AUDIT STUDIES: BEHIND THE SCENES WITH THEORY, METHOD, AND NUANCE* 45 (S.M. Gaddis, ed., Spriner 2018).
- 148 See FITZSIMMONS, MCMURRER, ET AL., *supra* note 151, at 9.
- 149 See Boggs, Sellers, & Bendick, Jr., *supra* note 10, at 356.
- 150 See *Id.* at 359.
- 151 See *Id.* at 350, 361.
- 152 See *Id.* at 356.
- 153 See *Id.* at 350.
- 154 *Id.*
- 155 *Id.* at 351.
- 156 See Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety & Health Laws*, 110 *AM. ECON. REV.* 1866, 1888 (2020).
- 157 A recent working paper by Patrick Kline and Christopher Walters suggests that sending 10 carefully crafted applications to each open position could help researchers (or an enforcement agency) detect between 7 and 10 percent of the authors' estimated 17 percent of discriminatory jobs with minimal error rates. See Patrick M. Kline & Christopher R. Walters, *Reasonable Doubt: Experimental Detection of Job-Level Employment Discrimination 1* (Nat'l Bureau of Econ. Res., Working Paper No. 26861, 2020).
- 158 The authors wish to thank the Equal Rights Center for these and other insights based on their extensive experience in matched-pair testing.
- 159 See *EEO-1 Instruction Booklet*, EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eo-1-survey/eo-1-instruction-booklet> (last visited Jan. 5, 2021).
- 160 See *EEO-1 Frequently Asked Questions and Answers*, EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eo-1-survey/eo-1-frequently-asked-questions-and-answers> (last visited Jan. 5, 2021).

- 161 42 U.S.C. § 3616a.
- 162 Depending on the purpose of the testing program, the Department of Labor could consider whether a portion of its program evaluation budget could support one or more testing studies as well.
- 163 Companies are not averse to using mystery shopper programs to audit their customer service. See, e.g., Kevin Peters, *Office Depot's President on How 'Mystery Shopping' Helped Spark a Turnaround*, HARV. BUS. REV. MAG. (Nov. 2011) <https://hbr.org/2011/11/office-depots-president-mystery-shopping-turnaround>. Likewise, companies should strongly consider auditing their own hiring processes using testing. Audit testing has a better track record than some mystery shopper programs. See, e.g., Gerald Blessing & Martin Natter, *Do Mystery Shoppers Really Predict Customer Satisfaction and Sales Performance?*, 95 J. OF RETAILING 47, 48 (2019) (observes a low correlation between mystery shopper assessments and customer evaluations but no correlation against sales).
- 164 See *Sample Affirmative Action Programs*, U.S. DEPT. OF LABOR, <https://www.dol.gov/agencies/ofccp/compliance-assistance/sample-affirmative-action-programs> (last visited Jan. 5, 2021).
- 165 The authors wish to thank Pat Shiu for this suggestion.
- 166 See generally Joanna N. Lahey & Ryan A. Beasley, *Computerizing Audit Studies*, 70 J. ECON. BEHAV. ORGAN. 508 (2009).
- 167 See generally Pauline Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. (ONLINE) 189 (2017).
- 168 The authors wish to thank David Pedulla for suggesting this sort of analysis.
- 169 See generally Marc Bendick, Jr. & Ana Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. OF SOC. ISSUES 238 (2012).
- 170 The authors wish to thank the Employment Rights Center for the final three suggestions.
- 171 See James Heckman, *Detecting Discrimination*, 12 J. OF ECON. PERSPECTIVES 101 (1998).
- 172 *Id.* at 102-03.
- 173 See Darrick Hamilton, *Issues Concerning Discrimination and Measurements of Discrimination in U.S. Labor Markets*, 6 AFR. AM. RES. PERSP. 98 (2000).
- 174 See Heckman, *supra* note 93, at 103.
- 175 *Id.* at 101-02.
- 176 See James J. Heckman & Peter Siegelman, *The Urban Institute Audit Studies: Their Methods and Findings*, in CLEAR & CONVINCING EVID.: MEASUREMENT OF DISCRIMINATION IN AM. 187, 216 (Raymond J. Struyk & Michael Fix, eds., Urb. Inst. Press 1993).
- 177 Fix, Galster, & Struyk, *supra* note 76, at 32.
- 178 Admittedly, the courts have not been sympathetic to claims of bias related to hairstyles, especially for Black women. See Renee Henson, *Are My Cornrows Unprofessional? Title VII's Narrow Application of Grooming Policies, and its Effect on Black Women's Natural Hair in the Workplace*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 521, 524-25 (2017).
- 179 See David Neumark, *Detecting Discrimination in Audit & Correspondence Studies*, 47 J. OF HUM. RESOURCES 1128 (2011); David Neumark & Judith Rich, *Do Field Experiments on Labor and Housing Markets Overstate Discrimination? A Re-Examination of the Evidence*, 72 ILR REV. 223 (2019).

- 180 Hamilton, *supra* note 95, at 101-02.
- 181 *Id.* at 102.
- 182 These and other concerns are concisely summarized on the Urban Institute’s backgrounder on Paired Testing. See *Paired Testing*, URB. INST., <https://www.urban.org/research/data-methods/data-analysis/quantitative-data-analysis/impact-analysis/paired-testing> (last visited Jan. 5, 2021).
- 183 Fix, Galster, & Struyk, *supra* note 76, at 17.
- 184 222 F.3d 289, 296 (7th Cir. 2000).
- 185 *Id.* at 298 (citing 42 U.S.C. § 2000e-2(a)(2)).
- 186 *Id.* at 299.
- 187 28 F.3d 1268, 1270-71 (D.C. Cir. 1994).
- 188 *Id.* at 1272 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982)) (emphasis added).
- 189 See EEOC Enforcement Guidance: Whether “Testers” Can File Charges & Litigate Claims of Employment Discrimination, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-whether-testers-can-file-charges-and-litigate-claims-employment> (last visited Jan. 5, 2021). Note that the guidance reiterates the Commission’s prior 1990 position that that testers and civil rights or community organizations that send testers may file charges at the Commission under Title VII, arguing that the longstanding case law under the Fair Housing Act (Title VIII) should be equally applicable. See EEOC Policy Guidance: Whether “Testers” Have Standing to File Charges of Employment Discrimination Against Employers, Employment Agencies and/or Labor Organizations Which Have Discriminated Against Them Because of Their Race, Color, Religion, Sex or National Origin (Nov. 20, 1990) *as reprinted in* EEOC Compl. Man., Vol. II (BNA) at No. N.915-062. Meanwhile, the EEOC’s more recent enforcement guidance on the consideration of arrest and conviction records likewise mentioned that matched-pair testing “may reveal that candidates are being treated differently because of a protected status.” EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions#sdendnote58anc> (last visited Jan. 5, 2021). The Fifth Circuit subsequently enjoined the EEOC from enforcing that guidance on the grounds that the agency did not comply with the notice-and-comment rulemaking process required by the Administrative Procedure Act, 5 U.S.C. § 553. See *Texas v. EEOC*, 933 F.3d 433, 437 (5th Cir. 2019).
- 190 EEOC Enforcement Guidance: Whether “Testers” Can File Charges & Litigate Claims of Employment Discrimination, *supra* note 111 (citing *Waters v. Heublein*, 547 F.2d 466, 469 (1976), *cert. denied*, 433 U.S. 915 (1977)).
- 191 The EEOC’s guidance also found that “[a]n organization that uses testers to identify a pattern or practice of discrimination by employers and employment agencies has standing to file charges on behalf of the testers [and] has standing on its own behalf if it can demonstrate a perceptible injury to its activities which is fairly traceable to the alleged illegal action.” *Id.* As the agency noted, this is in keeping with the second part of the D.C. Circuit’s holding in *Fair Employment Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994).