

Measuring Hiring Discrimination

JAMES P. SCANLAN

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It is hard to imagine a more absurd statement than that the more discrimination young black men face when they seek jobs, the greater are the chances that they will find jobs. Yet, such are the difficulties sometimes encountered in identifying a revealing statistic that it may not be at all absurd to say that the more discrimination we find against young black men, the greater are the chances that they will find jobs.

In May 1991, the Urban Institute released a study of hiring discrimination against young black men in Washington, D.C., and Chicago.¹ The widely publicized study examined the treatment of tester pairs of apparently equally qualified young black and white men who applied for 576 jobs randomly selected from the employment sections of the local newspapers. The testers recorded their treatment at each stage of the selection process. When one tester was offered a job, he immediately declined in order to allow the employer the opportunity to offer the job to the other tester.

In announcing the results of the Urban Institute study, its authors highlighted two sets of figures. First, 20 percent of the time, the white tester advanced farther in the selection process than the black tester, while the black tester advanced farther than the white tester only 7 percent of the time. Second, whites were favored in job offers 15 percent of the time, compared with 5 percent of the time for blacks. The authors noted that when differential treatment occurred, it was about three times as likely to favor the white applicant as the black.²

From comparisons like these, the authors found that hiring discrimination against young black men was "entrenched and widespread."³ They also made a

number of subsidiary findings: blacks experience unfavorable treatment at substantially higher rates in Chicago than in Washington; the likelihood of discrimination against blacks does not vary substantially between the suburbs and the central city; blacks are more likely to face discrimination in jobs involving client sales and service than in blue collar positions; and unfavorable treatment found against blacks was less severe than the unfavorable treatment of Hispanics found in an earlier study.⁴ The authors concluded that "the prevalence of disparate treatment in the hiring process means that greater efforts are needed to detect discrimination and to provide victims with access to justice."⁵

Not everyone was as distressed by the results of the study as its authors had been. One syndicated columnist, pointing to the 20 percent of cases where blacks were disfavored in advancing through the selection process, noted that the study's authors "were appalled that the number was so high. I was relieved to hear it is so low."⁶ Similar views were expressed in a lengthy editorial in *The New Republic*, which uncritically accepted its findings regarding the severity of discrimination in different locales and in different types of jobs. But the editors strongly objected to the authors' pessimistic characterization of the results of the study. Emphasizing that in 80 percent of the cases no discrimination in job offers was found against blacks or whites and that in "73 percent of the job searches [there was] no evidence of discrimination at all," the editors found "good news" in the "relatively low level of bias" reflected in the study. They concluded that the preoccupation with civil rights legislation was misguided and that attention would be better focused upon the decline in public education and other factors causing blacks to enter the labor market without competitive job skills.⁷

¹ Margery A. Turner *et al.*, *Opportunities Denied, Opportunities Diminished: Discrimination in Hiring* (Washington, D.C.: Urban Institute, 1991). References to this work herein are to a finalized version of the study, which was released in November 1991.

² Urban Institute, "Media Advisory," May 14, 1991, at 1-2.

³ Turner, *supra*, at 2, 61.

⁴ *Id.* at 63-64.

⁵ *Id.* at 65.

⁶ C. Page, "Sanguine Side of Job Bias Survey," *Washington Times*, May 22, 1991, Section E, at 1.

⁷ In Black and White, " *The New Republic*, June 10, 1991, at 7-8.

A Flawed Approach

None of these appraisals, however, constitutes a useful evaluation of the severity of the differential treatment identified in the Urban Institute study. For each, including the Urban Institute's own, is based on the wrong numbers.

The problem lies in a fact that the study's authors omitted entirely from their press releases and gave only passing mention even in the study itself, and that *The New Republic's* editors would maintain was irrelevant: in only 33 percent of cases was either tester offered a job.⁸ That 33 percent included the 15 percent of cases where only whites were offered jobs and the 5 percent where only blacks were offered jobs (even though the tester offered the job quickly declined) – situations the Urban Institute defined as favoritism in job offers. It also included another 13 percent of cases where both testers were offered jobs either because the first offeree declined or because more than one job was available – situations the Urban Institute considered free of favoritism.⁹

But the Urban Institute also considered to be free of favoritism the 67 percent of cases where the employer did not offer either tester a job. Cases where an employer never gets to the point of choosing between equally qualified black and white applicants can tell us nothing about the employer's willingness to offer them jobs on a nondiscriminatory basis. Thus, 67 percent of

⁸ Turner, *supra*, at 38. Initially relying on the fact that favoritism in job offers was found in 20 percent of cases, the editors of *The New Republic* had incorrectly stated that "[I]n 80 percent of the job searches, both the white and the black applicants were offered equivalent jobs. "In Black and White," at 7. In a letter to the editors, the authors of the study brought to *The New Republic's* attention the fact that, in addition to 20 percent of cases where only one tester received an offer, both testers received job offers in 13 percent of cases, not 80 percent. But they did not press the implications of fact that job offers were made to one or both testers in only 33 percent of the cases. *The New Republic's* editors insisted that their conclusions still held, even if jobs were offered only 33 percent of the time. See "Correspondence: Discriminating Evidence," *The New Republic*, August 5, 1991, at 6. Despite reason to believe that the failure to give greater attention to the 33 percent figure in the original report or press release had invited *The New Republic's* initial misunderstanding, the authors of the Urban Institute study gave that figure no greater emphasis in the final version.

⁹ A situation was treated as an instance of unfavorable treatment with respect to job offers when one tester was offered a job and the other was not offered the job even though the first tester immediately declined the offer.

the cases must be excluded from the universe of observations from which we may draw meaningful conclusions about that willingness. The same applies to the situations where the employer never had reason to distinguish between the testers with regard to advancement through the process, situations that the study did not, and probably could not, identify.

Any doubts one may have on this score ought to be dispelled by the following considerations, which should also make evident why black employment prospects are brightest where the most employment discrimination is found. Where there are many applicants for few jobs, infrequently will employers give either of the testers enough attention for there to occur observable distinctions in the way the two are treated. Hence, in such circumstances, both the authors of the Urban Institute study and the editors of *The New Republic* would find relatively few instance of discrimination, though they might differently characterize what they found. By contrast, when each job has few applicants, employers often will give the testers much attention, providing a basis for the Urban Institute's methodology to reveal much discrimination.

The point is succinctly illustrated by data on which the Urban Institute relied for finding more job offer discrimination in Washington than Chicago, but with the addition of data showing the proportion of cases where both testers were offered a job. The data are shown in Table 1, along with data previously described for both localities combined.

Table 1
Percentage of Tests in Which Testers Received Job Offers

	(1) Black Only	(2) White Only	(3) Both	(4) Total Any	(5) Total Black	(6) Total White
Chicago	5	10	9	24	14	19
Washington	6	19	15	40	21	34
Total	5	15	13	33	18	28

As shown in Columns 1 and 2 of Table 1, in Washington, only the white tester was offered a job 19 percent of the time, while only the black tester was offered a job 6 percent of the time; in Chicago, only the white tester was offered a job 10 percent of the time compared with 5 percent for the black tester. It was on the basis of these figures, along with similar data on advancing through the process,¹⁰ that the

¹⁰ In Washington, the white tester advanced farther in the selection process 23 percent of the time, compared with 7 percent

Urban Institute found discrimination to be more prevalent in Washington than Chicago.¹¹

Yet, though the fact would be relegated to a footnote, in Washington, one or both testers were offered a job 40 percent of the time (including 15 percent of cases where both were offered jobs); in Chicago, by contrast, one or both testers was offered a job only 24 percent of the time (including 9 percent for both).¹² Thus, not only is the greater discrimination found in Washington tied to the greater frequency of job offers there, but, as shown in Column 5, black testers got job offers 21 percent of the time in Washington (6 percent plus 15 percent) compared with only 14 percent of the time in Chicago (5 percent plus 9 percent).¹³

for the black tester; in Chicago, the white tester advanced farther in the selection process 17 percent of the time, compared with 8 percent for the black tester. Turner, *supra*, at 41.

¹¹ *Id.* at 41, 64.

¹² *Id.* at 57 n.1.

¹³ There are other reasons for questioning conclusions about the relative severity of discrimination in Washington and Chicago. An appendix that was added to the final report (Turner, *supra*, Appendix D) presented data on differential treatment separately for each of the five tester pairs conducting the studies in each of the two cities. For eight of the ten total tester pairs, including all five Washington pairs, the percentage of cases where the white was favored ranged from 19 to 29 percent, compared with a range of zero to 9 percent where the blacks were favored, with the percentage of cases where the white was favored being at least 2.3 times the percentage of cases where the black was favored for the six pairs where the rate at which blacks appeared to be favored was above zero. But for the two tester pairs in Chicago, the rate of favoritism for blacks and whites was exactly equal (11.4 percent), or the black rate of favoritism (17.5 percent) was slightly higher than the white rate (15 percent). If we were to assume that there was something sufficiently different about these two tester pairs that they should be excluded from the report, in Chicago the rate at which whites would appear to be favored would be 20 percent compared with 3 percent for blacks, while in Washington the rate at which whites appeared to be favored would be 23 percent compared with 7 percent for blacks. As discussed *infra*, while the authors of the Urban Institute study would suggest that differences in rates of differential treatment observed among the various tester pairs may involve the types of jobs they applied for, that consideration merely highlights another issue involved in comparisons of the severity of discrimination in different cities as well as in central city/suburb comparisons as to each city. If differences in rates of differential treatment are observed with regard to different types of jobs, geographical comparisons must be adjusted to take into account the different composition of the jobs that the testers applied for in each area.

The same considerations call into question the Urban Institute's conclusion that discrimination against blacks found in the recent study was less prevalent than discrimination against Hispanics found in an earlier Urban Institute study. In that study, Anglos were favored in job offers 22 percent of the time, while Hispanics were favored in job offers 8 percent of the time.¹⁴ But in that study both testers also received offers in another 20 percent of cases.¹⁵ Thus, in the earlier study, Hispanics received job offers 28 percent of the time, while in the recent study blacks received job offers only 18 percent of the time.

A Better Focus

There may nevertheless be things to be learned from the Urban Institute's study, provided one goes about analyzing the data with a proper focus-and very cautiously. It seems, for example, some conclusions may be drawn about discrimination in job offers by examining the limited universe of cases where the employer actually made choices between the testers. Although there might be argument for excluding entirely cases where both testers received offers when many jobs were available, basically the 33 percent of cases where one or both testers were offered jobs should serve as the denominator of the fraction that might tell us something about the frequency with which job offer decisions were tainted by discrimination.

But in quantifying discrimination against blacks, the numerator cannot be limited just to those cases where the Urban Institute found the white to be favored because the black candidate was not offered a job even after the white declined. Employers also made choices regarding whom to offer a job first. After all, in real life, one cannot count on competing candidates automatically to decline, as the Urban Institute's testers did. Moreover, in cases where only one tester was offered a job, no one knows whether, after the first tester refused, the employer then offered the job to a third applicant, of apparently identical qualifications to the two testers, who then accepted the offer. So seeming favoritism in sole offers may be little distinguishable from seeming favoritism in first offers.

¹⁴ Harry Cross et al., *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers* (Washington, D.C.: The Urban Institute Press, 1990), at 45.

¹⁵ Cross, *supra*, at 49

Of course, since the employer must always offer a job first to one candidate or the other, we cannot read every first offer to reflect favoritism. Instead, we should include in the numerator only the net difference between numbers of first offers. To use an example that the data suggest may well approximate reality, if the 13 percent of cases where both testers received offers is made up of 9 percent where whites received first offers and 4 percent where blacks received first offers,¹⁶ then 5 percent would be included in the numerator used to determine the amount of discrimination against blacks.

We cannot, however, simply add this 5 percent to the 15 percent of cases where only whites were offered jobs. Even as to the latter cases, there are difficult questions about how to separate discrimination from random variation caused by such factors as differences of opinion about qualifications or the simple matter of who applied first. In the Urban Institute's Hispanic study, for example, both Anglos and Hispanic were favored much more often when they applied first than when they applied second, even with respect to receiving sole job offers. The authors of the study, however, chose to ponder how discrimination may vary depending on whether one applies first or second,¹⁷ rather than to read the difference as a sign that some part of what appear to be racially motivated decisions is simply a reflection of the advantages of applying first.

It must be kept in mind that the tester who applies second not only applies after the tester who applies first but also after everyone who applies in between. So easily a large part, and perhaps all, of the cases where blacks appeared to be favored in job offers were simple random variation. This would mean that, if we were to determine that, say, 4 percent of cases where blacks appeared to be favored in job offers merely reflected random factors, the same 4 percent ought to be subtracted from the 15 percent of cases that are treated as instances where whites are favored in job offers.

These and certain other issues cannot be entirely resolved here and, in any event, ought not to be resolved without examination of more data than is

¹⁶ It seems reasonable to assume that the racial breakdown of first offers in the 13 percent of total cases where both testers received offers would tend to approximate somewhat the racial breakdown of cases where only one tester received an offer.

¹⁷ Cross, *supra*, at 47-48.

made available in the Urban Institute's study. Nevertheless, assuming the reliability of the tester approach employed in the study, we can reasonably conclude that among cases where the employer actually reached the point of deciding which tester to offer a job, certainly more than a third of the time, and easily more than half, the employer favored the white applicant over the seemingly equally qualified black. That is, the numerator for determining discrimination against blacks should be at least 12 and could possibly exceed 20,¹⁸ and the denominator would be 33, or perhaps a little less, depending on how one wants to treat situations where many jobs are available. Presumably, the incidence of discrimination with respect to advancement in the process would be even greater, though we cannot actually quantify it because we cannot identify a reliable denominator.

At any rate, the impression of discrimination conveyed even by the information solely on job offers is substantially greater than what one would derive from reading *The New Republic* editorial and even greater than what one would derive from reading the Urban Institute's report. It is an especially disturbing impression when read in light of the Urban Institute's sensible observation that employer's who advertise in newspapers are less likely to discriminate than those who do not.¹⁹

The Urban Institute chose the approach of using all cases in the denominator because it wanted to say that, when competing with an equally qualified white, a black applicant faces such and such chance of being discriminated against. This is something different from the chance of being discriminated against when the employer is actually making a meaningful choice between the two applicants. The study, however, did not endeavor to mirror reality with respect to the proportion of cases in which the black and white applicants would be the leading contenders for the job.

¹⁸ That is, there would be a probable range of 2 to 7 percentage points for first offers to the white tester where both testers received job offers and a probable range of 10 to 14 percentage points for sole offers to the white tester.

¹⁹ Turner, *supra*, at 20. Interestingly, however, as the Urban Institute study also noted (*id.*), employers who have advertised in newspapers are presumably ready to make a hiring decision, while employers who have not advertised may let applications languish without action. Thus, the method of estimating the amount of discrimination employed by the Urban Institute would likely find a very small amount of discrimination among employers who have not advertised in newspapers.

Moreover, doing so would probably be impossible; in any event, the results would still vary dramatically depending on the numbers and the qualifications of persons seeking a particular opening. These are factors that would vary from job to job, locale to locale, and even week to week – with the result that the likelihood that a black will be found to face discrimination when he seeks a job usually will be highly correlated with his chance of finding a job. Besides, imagine if jobs were offered in only 5 percent of cases and they were offered solely to whites; young black men would find little consolation in the fact that they were discriminated against only 5 percent of the time.

Other Approaches to Measurement

In his recent book arguing against the wisdom of the nation's employment discrimination laws,²⁰ Richard A. Epstein has also pointed out the Urban Institute's failure to consider the implications of the fact that in 67 percent of cases neither tester was offered a job. Epstein observed that the results could be stated most strongly in support of the Urban Institute's conclusion of widespread discrimination by reference to the more than 50 percent difference between the black offer rate of 18 percent and white offer rate of 28 percent (the figures in Column 5 and 6 of Table 1).

Initially, this characterization of the degree of discrimination seems very appealing, for it avoids the complex issues regarding first offers and random error discussed earlier. On further analysis, however, it becomes clear that Epstein's approach is flawed precisely for failing to address certain of those issues. For example, we cannot ignore the fact that, as noted earlier, in real life a black applicant cannot expect a white applicant automatically to decline a job offer in cases where the white receives a first offer. Thus, suppose that the 13 percent of total cases where both candidates received job offers was comprised of 9 percent where the white received the first offer and 4 percent where the black received the first offer. If only one job was available in each case, then in the real world whites would have received offers as often as 24 percent of the time, while blacks would have received jobs as little as 9 percent of the time, a disparity of 167

percent rather than the 50 percent identified by Epstein.²¹

We must also consider the Urban Institute's approach whereby it characterized the amount of discrimination in terms of the ratio of the percent of cases where whites were favored to the percent of cases where blacks were favored. Focusing on the 20 percent rate at which whites advanced farther in the employment process than blacks, compared with 7 percent of cases where blacks advanced farther, as well as the 15 percent versus 5 percent disparity in sole job offers, the study's authors repeatedly emphasized that when discrimination occurs, it is three times as likely to be discrimination against the black than against the white.²²

This approach might seem to offer meaningful information about the severity of discrimination against blacks and to offer it even with respect to the issue of advancing farther in the process. But such a comparison actually is not very useful, for a number of reasons. To begin with, the size of the disparity will vary greatly depending on how well one can separate out random variation. Suppose, for example, we concluded that, of the 5 percent of total cases in which blacks seemed to be favored in job offers, 3 percent reflect random variation (which would mean that we should assume the same thing about 3 percent of total cases where whites seem to be favored); then instead of finding whites three times as likely to be favored in job offers (15 percent versus 5 percent), whites would be six times as likely to be favored (12 percent versus 2 percent). And, if we incrementally determine that all instances where blacks appeared to be favored merely reflect random variation, we would move toward finding enormous disparities, followed by having nothing to say at all.

Moreover, disparities in discrimination are far less important than the amount of discrimination. And, in fact, although the tendency is rarely recognized, as far as most adverse conditions in life that disparately affect two demographic groups are concerned, disparities increase as the conditions abate. For example, when infant mortality declines, the disparities between black and white infant mortality rates increase; when poverty declines, it becomes more "feminized." The nearly universal failure to

²⁰ Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1992), at 55-57.

²¹ Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1992), at 55-57.

²² "Media Advisory," *supra*, at 2; Turner, *supra*, at 38-39, 62-63.

understand these tendencies is itself a compelling illustration of the confusion pervading so much social science commentary where statistics are involved.²³

Discrimination may or may not operate the same way. It is possible that discrimination in favor of blacks increases at the same time that discrimination against blacks declines. But, if in fact discrimination is simply another phenomenon that disparately affects blacks and whites in the same manner as, say, infant mortality – which is how the Urban Institute seemed to treat it – we would expect the disparity in the rates at which white and blacks are adversely affected by discrimination to increase as discrimination declines.

Thus, the focus on the ratio of the rates at which blacks and whites are discriminated against could provide an equally perverse corollary to the tendency for black job prospects to be greatest where the most discrimination is found: the less discrimination there is, the more we find.

Cities and Suburbs

Some might argue that even the characterization of discrimination employed by the Urban Institute suggests that discrimination is widespread, and thus the nuances of characterization are largely academic. Even if that were true with regard to the study's broadest findings, however, it would not be true with regard to the determinations of the relative amounts of discrimination. Whether there is more discrimination in this or that community or more discrimination against blacks or Hispanics are issues that may affect resource allocation and other policy decisions.

Consider also one of the study's conclusions that its authors apparently deemed to have particularly significant policy implications. The authors believed that it was important to determine whether discrimination was more severe in the suburbs than in central cities. If this was the case, they reasoned, then attitudinal changes should precede or at least accompany efforts to increase minority access to

²³ For discussion of some of the contexts where failure to understand this tendency has led to the misinterpretation of statistical information, see my articles "Bias Data Can Make the Good Look Bad," *American Banker*, Apr. 27, 1993; "The Perils of Provocative Statistics," *The Public Interest*, Winter, 1991, at 3-14 [\[link\]](#); "Comment on McLanahan, Sorensen, and Watson's 'Sex Differences in Poverty, 1950-1989,'" *Signs: the Journal of Women in Culture and Society*, Winter, 1991, at 409-13 [\[link\]](#); "An Issue of Numbers," *The National Law Journal*, Mar. 5, 1990, at 13 [\[link\]](#); "'Feminization of Poverty' Is Misunderstood," *Current*, May, 1988, at 16-19 [\[link\]](#).

suburban employment.²⁴ Finding discrimination not to vary between cities and suburbs, the authors interpreted their results to contradict the view that blacks encounter more discrimination in the suburbs than in the cities.²⁵

If there had existed a perception that discrimination was more likely in the suburbs than in the central cities, I am uncertain that there is a strong basis for it. Employers, particularly larger and more sophisticated employers, may well be readier to hire blacks at rates approximating the black percentage of applicants when that figure is 5 percent, as in the suburbs, than when it is 50 percent or above, as it may often be in central cities. Whatever reasons employers may have for discriminating, those reasons are weaker in the former situation than the latter. Moreover, suburban employers are less likely to automatically associate their black applicants with the negative images often attached to inner city blacks.²⁶

In any case, whatever intuitive basis there may be for supposing that there is more discrimination in one area or the other, because of the deficiencies in the Urban Institute study's methodology, it is doubtful that its findings on the issue are very reliable. First, as fully discussed already, the fewer applicants there are per job, the more discrimination one will find. Probably there are far fewer applicants per job in the suburbs; but, in any event, there are likely to be substantial differences between these ratios in cities and in the suburbs. Second, the more qualified the testers are relative to the competition, the more discrimination one will find, since the testers will more frequently receive serious attention from the employer. Probably, the testers will be more qualified relative to their competition in the cities. But, again, in any event, there are likely to be substantial differences between the two markets.

Unfortunately, data were not presented showing numbers of offers to one or both testers in cities and suburbs. Even without that data, however, we can recognize that the problems with the methodology make it impossible to credit the authors' conclusions

²⁴ Turner, *supra*, at 10.

²⁵ *Id.* at 10, 65

²⁶ See Joleen Kirschenman and K. M. Neckerman, "We'd Love to Hire Them But..." in Christopher Jencks and Paul M. Pertersen (eds.) *The Urban Underclass* (Washington D.C.: The Brookings Institution, 1991), at 202-32.

about the relative likelihood of discrimination in the two types of locales.

Apart from the methodological issues discussed above, I am less ready than the editors of *The New Republic* to accept the complete reliability of the tester approach employed in the Urban Institute study. Among other things, one has to rely too much on the authors' appraisals of the similarity of the candidates. And the very confidence of authors' view that they accomplished the formidable task of matching the tester pairs for all 'job relevant characteristics'²⁷ gives one pause.

In this regard, data presented in the final version of the study on outcomes by audit pair is particularly troubling. As discussed in note 13 *supra*, for two of the five tester pairs in Chicago, the black tester appeared to be favored just as often, or slightly more often, than the white tester. While the authors of the study conclude that most of the variation in outcomes by tester pair is the result of the differences in types of jobs applied for, their statistical support for that assertion is not persuasive, and they rely just as much on the fact that they "were extremely confident of the comparability of the audit teams."²⁸

Yet, with respect to two of the tester pairs, the departure from the norm is sufficient to raise a question as to whether the authors' confidence is well placed. It also raises questions of whether the black tester in these two cases was in fact a sufficiently superior candidate to counterbalance (almost exactly) the pervasive discrimination that is suggested by the treatment observed as to the other eight pairs of testers, or whether it is the other eight pairs of testers who may have been incorrectly appraised as comparable.

It does appear, however, that such studies are becoming increasingly popular. In the finalized version of its report, released in November 1991, the Urban Institute called for nationwide tester studies of hiring discrimination against blacks and Hispanics,²⁹ and additional studies have recently been undertaken by the Fair Employment Council of Washington, D.C.³⁰ Before additional resources are devoted to such

undertakings, however, it might be wise to give some further thought on how to analyze the results.

²⁷ *Id.* at 25.

²⁸ *Id.* at 51-53.

²⁹ *Id.* at 65-66.

³⁰ See Marc Bendick, Jr. et al., "Discrimination Against Latino Job Applicants: A Controlled Experiment," *Human Resources Management*, Winter, 1991, at 469-484; Marc Bendick, Jr. et al.,

Measuring Employment Discrimination Through Controlled Experiments (Washington, D.C.: Fair Employment Council of Greater Washington, 1993). These studies raise similar, as well as different, issues about methodologies for evaluating the amount of discrimination.