

Changing Contexts and New Directions for the Use of Testing

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Abstract

For decades, testing has been an effective investigative tool for documenting housing discrimination in fair housing enforcement efforts and scholarly research. This article discusses evidence gathered from recent testing investigations in the New York City region and how many violators of fair housing laws have tailored their practices to elude detection. Some changes in housing provider practices portend serious challenges for researchers and enforcement practitioners who have traditionally relied only on paired testing methodologies to identify discriminatory housing practices. In view of these changes, we offer guidance on preliminary steps that might develop credible testing approaches for the purpose of investigating or studying contemporary housing market practices. We provide some recommendations for structural changes and suggest new directions for both research and enforcement organizations. We submit that efforts to eliminate discrimination from our nation's housing markets would be greatly enhanced if we better understood housing provider practices and the changing nature of housing discrimination.

Introduction

Testing has long been a powerful instrument for documenting housing discrimination. It is a valuable research method for understanding housing market practices and the varied experiences of particular groups of homeseekers. In the fair housing enforcement context, testing has proved to be the single most effective investigative tool for collecting evidence of illegal housing discrimination.

Testing faces limitations in both research and enforcement. It conversely has the potential to be more widely used in segments of the housing market where it has not been employed and in ways that are not always considered by researchers and enforcement practitioners. This article

offers some lessons from previous testing that apply to conventional rental and sales testing and also to the new frontiers where testing might be applied more widely and effectively.

In the research context, paired testing has been used extensively to study race and national origin discrimination in the nation's housing markets (Turner et al., 2012). Testing has been used to study other forms of housing discrimination; for example, disability and sexual orientation (Friedman et al., 2013). Paired testing has also been used to identify discriminatory practices in other markets; for example, mortgage lending, homeowners insurance, employment, restaurants, hotels, and taxicab services (Fix and Struyk, 1992; Pager, 2007; Smith and Cloud, 1997; Turner et al., 2013).

Since the passage of the federal Fair Housing Act 47 years ago, paired testing has been used to gather evidence of illegal housing discrimination. More than four decades of legal challenges to discriminatory housing practices based on testing evidence have led to many changes in housing-provider policies and practices. One outcome of these changes, for certain, has been greater compliance.

Mounting evidence, however, from recent testing investigations and fair housing litigation indicates that some housing providers, those intent on violating fair housing laws, have become adept at disguising or altering their practices in a way that effectively reduces their chances of being detected by researchers, government enforcement agencies, and, most importantly, ordinary consumers. New and more subtle forms of discrimination have been identified, leading Douglas Massey (2005) to conclude that racial discrimination in housing has become a "moving target."

In view of these changes, along with changes in the housing market in general and particularly in the way housing and housing-related services are provided, this article explores how testing might be more effectively used in both research and enforcement contexts to identify housing discrimination. We offer some guidance about preliminary steps that might be taken to develop credible testing approaches to investigate or study housing market practices in segments of the housing market that have received less attention since the passage of fair housing laws and to more effectively use testing in rental and sales markets, where this tool has long been employed. Finally, we point to some recommendations for structural changes and new directions for both research and enforcement organizations that suggest how testing might be used to simultaneously advance our knowledge about discriminatory housing practices while seeking to eradicate these practices from our nation's housing markets. Perhaps the most important lesson is the need to better understand the context in which housing is provided and discrimination occurs when developing testing programs for either research or enforcement.¹

¹ Testing, by definition, is a covert activity and, to control the process, testers are often assigned personal, financial, and homeseeking characteristics that are not their own. Testers are trained and deployed to simulate or replicate consumer behavior in order to gather information and capture observations about the ordinary business practices of housing providers. In this sense, testers are proxies for ordinary consumers. Testers generally do not possess any specialized expertise about housing market practices. Testers follow directions, adhere to assigned characteristics, carry out their assignments, and report on their test experiences in an accurate, complete, and unbiased manner. Most testing, although we hasten to emphasize not all testing, is focused on obtaining observations about housing practices and the treatment of people during the preapplication stage of a housing transaction. The person responsible for supervising the testers is the principal investigator or test coordinator. Testing can be used to obtain information and observations about the policies and practices of housing providers and compare them against the requirements of fair housing laws. Testing frequently provides a comparison that may indicate whether similarly qualified populations are receiving equal treatment and equal access to housing without regard to their race or some other protected characteristic under fair housing laws. While not detailed in this article, we note that the architecture applied to the type of paired testing used in social science research is often very different from the protocols used to conduct testing investigations for the purpose of enforcing fair housing laws.

Contemporary Housing Discrimination: Lessons From New York City

The Fair Housing Justice Center (FHJC) is a regional civil rights organization that conducts testing throughout New York City and seven surrounding New York counties. Since 2010, systemic testing investigations conducted by FHJC have resulted in the filing of numerous fair housing lawsuits. The testing evidence in recent FHJC cases provides insights and reveals some interesting characteristics about the nature of contemporary housing discrimination.

For instance, it is clear that some housing providers take steps to avoid or minimize contact with unwanted populations by not advertising at all or by selectively advertising the available housing in ways that will reach only certain populations.² FHJC recently completed a testing investigation involving a landlord who controls hundreds of rental units in a predominantly White Bronx neighborhood. The landlord refrained from advertising available apartments, instead relying entirely on referrals from existing White tenants to fill vacancies. This system made it less likely that the rental manager would ever have contact with African-American applicants, virtually assuring that his buildings would remain predominately White. Through an intricately designed testing investigation that arranged for African-American testers to have contact with the rental manager, FHJC was able to observe the manager informing African-American testers that no apartments were available but showing available apartments to White testers. Apart from misrepresenting the availability of apartments to African-American testers, the manager also confided to a White tester that the landlord does not advertise available apartments because “if you run ads, you get all kinds of things.” Instead, the company relied on its mostly White tenant population to locate and refer prospective applicants to fill vacant apartments.

In recent years, FHJC has identified many housing providers who never publicly advertise or selectively advertise available rental units. Although housing providers may have many reasons for using fewer public sources to reach prospective renters or buyers, discrimination is more likely to occur when providers restrict knowledge of, or access to, available housing by limiting advertising primarily to favored populations. When testing investigations compel these same housing providers to have contact with testers of different races, FHJC frequently finds differential treatment in the form of misrepresentations about the availability of apartments or quotes of higher rents and security deposits to African-American and Latino testers.

An abundance of evidence also indicates that some violators disguise their discriminatory contact with a friendly disposition, polite conversation, and good manners. Another recent FHJC testing case involved a New York City landlord that controls a thousand rental apartments that, again, were never publicly advertised. Multiple tests revealed that the rental manager at one of the buildings tested was conversant, friendly, and encouraging when approached by African-American testers while all the time maintaining that no apartments were available. The same agent acted in a more businesslike and less conversant fashion toward White testers who visited the apartment building, merely telling them about and showing them available apartments. The congenial

² The authors recognize that implicit bias can also affect housing market practices, but our focus here is on those individuals and businesses that are intentionally evading the law.

conduct of the agent camouflaged the fact that he was lying to African-American prospective renters. Whereas a paired-testing approach was effectively employed to document the discriminatory practices in this case, it is unlikely that this housing provider would ever have been sampled in a research study, given the lack of advertised apartments, and it is equally unlikely that an African-American consumer would have filed a housing discrimination complaint, given the exceedingly friendly demeanor of the rental manager. Other violators may inform all prospective homeseekers about a set of stringent requirements, qualifications, or procedures for renting an apartment or buying a home, and then, as applicants express stronger interest and have additional contact, an agent may offer to waive, change, or reduce the requirements for the more “desirable” applicants. Applying what appear to be facially neutral policies in an unequal manner can exclude or “disqualify” unwanted populations while maintaining the outward appearance of a fair process. In several recent rental cases, FHJC sent out matched paired testers, one White and one African-American tester, both posing as part of married households. Agents initially told both testers that an application was pending on the only available apartment. When testers returned with their tester spouses of the same race, however, the facts changed. The White testers were told (once the agent could see that the spouse was also White) that the application was no longer pending and that multiple apartments were now available for rent, but the housing remained at all times unavailable to the African-American testers. Recent enforcement testing suggests that contacts by testers to housing providers, as part of initial visits by matched paired testers, may not always capture the housing-provider practices in a way that adequately discloses or confirms whether fair and equal treatment is being provided. Additional contact between the testers and the housing provider may be needed to assess whether all applicants are ultimately being afforded equal access and equal treatment, including the same terms and conditions.

Some critics have argued that multiple contacts between testers and housing providers raise potential ethical concerns because agent time is consumed with additional deceptive inquiries. Courts have understood, however, that it is frequently difficult to develop proof in housing discrimination cases and that evidence provided by testers is valuable, if not, indispensable. One court described the situation as follows.

It is surely regrettable that testers must mislead commercial landlords and homeowners as to their real intentions to rent or buy housing. Nonetheless; we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination. The evidence produced by testers benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society’s continuing struggle to eliminate the subtle but deadly poison of racial discrimination.³

Still other facially neutral policies may be adopted and enforced in an apparently neutral manner, but in a way that effectively excludes populations based on race or national origin. Two housing cooperatives (co-ops) containing more than 1,000 detached homes in the Bronx maintained their predominately White neighborhoods by simply requiring that any prospective buyers provide three written references from existing shareholder residents. FHJC was successful in obtaining evidence of alleged discrimination by these developments after conducting only one paired test in which

³ *Richardson v. Howard*, 712 F.2d 319 (7th Cir. 1983).

an African-American couple and a White couple had dozens of contacts during a 2-month period with a real estate agent who had specialized in selling homes in these two co-op developments for more than four decades. The testing investigation confirmed how the requirement was being applied at each of the co-ops and how it was being used to unfairly advantage White homebuyers and discriminate against African-American homebuyers. A subsequent lawsuit resulted in a real estate broker having to surrender her license, eliminating the three-shareholder-reference requirement at both developments, and implementing activities to ensure future compliance with fair housing laws.

Other recent FHJC investigations disclosed that some Section 8 rental assistance programs operated by White suburban communities maintained policies that were masquerading as “residency preferences” that favored current residents, but that were effectively operated as illegal, discriminatory residency requirements.⁴ These policies excluded racial minorities from participating in the programs. The combination of testing (and not always paired testing) coupled with public document requests enabled FHJC to elicit valuable information and unravel *how* or *why* the stated policies were being applied in a discriminatory manner. In one instance, a White tester posing as a nonresident called a Section 8 rental assistance program operated by a suburban town to inquire about obtaining a voucher. The town’s website and management plan stated that residents received first preference but that nonresidents would receive lower priority on the waiting list. The White tester was told that a preference was given to current residents, but she was also told that she might want to consider moving to the town so that she could apply to the program and receive the higher preference. The employee followed up by sending the White tester an application in the mail. When African-American and Latino testers posing as nonresidents inquired about the possibility of obtaining a voucher, they were openly discouraged from adding their names to the waiting list and were not provided an application. Instead, the minority testers were told to apply to housing authorities in the communities where they resided, despite the fact that the waiting lists for those Section 8 programs had been closed for some time.

A testing investigation can often be helpful in cases that initially appear to involve only allegations that certain policies or practices have a disparate impact. For example, for cases in which a racially homogeneous community has adopted a residency preference for more benign reasons, the preference may unlawfully restrict access to housing and reinforce patterns of residential segregation. In some of those cases, implementation of these policies may not simply be a matter of impact. A carefully designed testing investigation can often yield additional insights and information that may have probative value and occasionally provide evidence of intentional discrimination.

By engaging in linguistic or other types of profiling to screen inquiries from prospective home-seekers, providing deceptive or misleading information to prospective applicants, or using third parties to selectively screen prospective applicants, some housing providers manage to continue their discriminatory practices with little concern that their exclusionary practices will be exposed or, more importantly, that housing discrimination complaints will be filed. For example, FHJC recently documented that a landlord in a predominately White Westchester County suburb was lying to African-American testers about apartment availabilities and falsely representing that he was

⁴ The authors acknowledge that residency preferences may be benign in some situations, but in other circumstances they may be exclusionary and involve intentional discrimination.

just a “worker” and not the person responsible for renting out apartments. In another recent FHJC testing case, an agent for a landlord in Queens not only consistently lied to African-American testers about apartment availabilities, but also he provided a fictitious name to the African-American testers, while providing White testers with his real name.

We know that unconscious or implicit bias can infect a housing market transaction at any stage. Given that some violators are now more sophisticated and adroit at eluding detection in addition to the role that unconscious or implicit bias can play, what do these changes portend for the use of paired testing by researchers or enforcement agencies? The surreptitious practices described in the previous paragraphs have important lessons for both fair housing research and enforcement.

Implications for Research and Enforcement

For future research into housing market practices, what are the implications? First, when discriminating housing providers who collectively control access to thousands of housing units elect not to advertise available units in newspapers or online search websites so they can avoid unwanted populations based on race or national origin, it follows that they would never be tested in paired-testing studies that sample only advertised units. Second, if the nature of housing discrimination has changed to the point at which the conduct is not readily apparent or initially revealed in early contacts with testers, it follows that a standardized or “one-size-fits-all” approach to paired testing may not be capable of detecting some of the most pernicious discriminatory conduct. For the reasons stated, these realities and changes in housing-provider conduct raise serious questions about the efficacy and usefulness of conducting future national paired-testing studies, similar to those that the U.S. Department of Housing and Urban Development (HUD) has conducted every decade to measure the level of disparate treatment on the basis of race and national origin. Instead, we believe these changes argue for other types of research, including some that employ testing as a research method, that may advance our knowledge about housing discrimination.

Likewise, if government enforcement agencies continue to rely primarily on consumer complaints to identify illegal housing discrimination, it follows that many of these housing providers will never become the object of any enforcement action. The realities of contemporary housing discrimination based on race and national origin strongly suggest that a predominantly complaint-responsive approach to enforcing fair housing laws is inadequate. New enforcement priorities are needed—those that place a greater emphasis on proactive testing to uncover systemic discrimination. An examination of demographic data and other publicly available information has enabled fair housing organizations to more strategically use scarce testing resources and identify violators with much greater precision. Testing organizations have also demonstrated that systemic testing investigations are capable of pulling back the curtain and illuminating some of the more subtle or furtive discriminatory practices that are not always detected when ordinary matched paired testing is conducted.

The ability to obtain a more complete picture of housing market practices and housing-provider conduct may depend on the quality, sequence, timing, and extent of the contacts and interaction between testers and housing providers. For instance, traditional paired testing that has been used in major research studies involves testers having an initial contact with a housing provider to inquire about and view available housing. As previously described, however, experienced

enforcement-testing practitioners are learning that some housing providers may provide relatively equal treatment during this initial contact. Thus, research solely focused on an initial inquiry may not be able to capture the types of differences in treatment that might be observed after multiple contacts between testers and housing providers. The changes we describe in housing-provider practices may suggest that housing discrimination is less obvious or more difficult to observe than it once was, but not necessarily less prevalent. As Krysan et al. (2011: 23) concluded, “the door is not slammed in the face of the minority home seeker so much as it is flung wide open for the white tester.” Perhaps a more appropriate image would be that of a “revolving door” as unsuspecting homeseekers are too often politely and courteously escorted into, out of, and ultimately away from the desired housing. The stealth-like character of contemporary housing discrimination means that many homeseekers have virtually no way to know that they are being unlawfully discriminated against in housing. As a result of these changes, most enforcement-testing practitioners rarely limit themselves to using only simple paired tests to investigate housing discrimination. By designing tests that allow for more followup by testers, by having testers convey greater interest in the available housing, and by using new and more creative test structures, test coordinators are better able to uncover and document unlawful housing discrimination. Some enforcement-testing practitioners have even devised effective ways to employ testing to investigate claims of in-place discrimination involving harassment, provision of different services, reasonable accommodations, nonrenewals, and evictions.

In the area of sales and rentals, in which paired testing has been and still is effectively used, segments of housing markets and phases of housing transactions have not been widely investigated or studied through the use of testing. Investigating gated communities; condominiums and housing co-ops; supportive housing and other special needs housing; tax credit housing and government-assisted housing programs; assisted-living facilities, nursing homes, and continuing-care facilities; mortgage lending and appraisal practices; and other real estate-related services are just some of the areas in which we contend testing has not been used as extensively or effectively as it could be. The following section provides some guidance on preliminary steps that can be taken to apply this vital tool to studying or investigating other housing transactions or segments of the housing market about which far less is known; it also provides some guidance about how this tool can be used more effectively in markets where testing continues to be widely used.

Striking a Balance

We navigate a delicate balancing act in this article. We want to inform fair housing organizations, researchers, enforcement agencies, and policymakers about how testing might be more effectively employed to document contemporary housing discrimination. At the same time, we must avoid revealing minute details about investigative techniques and methods that are currently used to uncover unlawful discrimination to those who persist in violating the law. Disclosing specific testing techniques or approaches could cause violators to further refine, disguise, or conceal their practices so they can more easily circumvent detection. Effecting a change in housing-provider practices, of course, is an objective of fair housing law enforcement, but the change sought is compliance with the law and not further subterfuge that allows unlawful behavior to continue.

What we can and will do is describe some of the preliminary steps that might be taken before conducting any research or enforcement testing aimed at documenting discriminatory housing practices.

Expanding the Use of Testing

We know that changes in housing-provider practices and efforts to elude detection may explain why traditional paired testing fails to detect some discriminatory practices in the sales and rental markets. What accounts for the fact that less testing has been conducted in certain segments of the housing market (for example, gated communities; condominiums and housing co-ops; supportive and special needs housing; senior housing, assisted-living facilities, and nursing homes; mortgage lending; and home appraisals)? Resource limitations, of course, are a constant factor. The lack of information and training available to practitioners to learn how to test certain types of housing or housing services, the complexity or perceived level of difficulty of the testing, and the financial or human resources needed to implement the testing are all likely factors. The moving targets, of course, constitute another challenge. It is also the case that testing is not the only way or necessarily the best way in every circumstance to gather information about discriminatory housing practices. Because testing has a unique ability to shine a bright light on housing market practices and capture vital observations about how providers of housing and housing services treat consumers based on protected characteristics, however, it is often the most powerful investigative tool. The power of paired testing resides principally in the intuitive understanding that if similarly situated homeseekers who differ in only one respect (for example, race, ethnicity, or gender) are treated differently in the homeseeking process, it is fairly easy for jurors, judges, enforcement agencies, sophisticated analysts, and ordinary citizens to see that something is wrong. To overcome the limitations noted earlier (no advertising or selective advertising by housing providers, the need for multiple contacts between testers and housing providers, the need to employ alternative test structures to paired testing, and so on), however, some new and creative approaches to testing may be required. To design these new approaches, it is imperative that we better understand what is being tested and how consumers conventionally learn about and access the housing or housing services to be tested.

What Are We Testing?

Whether a research organization is planning to implement a study that employs testing as a data-gathering method to inform policy or an enforcement agency is preparing to conduct a systemic testing investigation to enforce compliance with the law, learning more about the type of housing, housing program, or housing service to be tested is a critical first step. Why is this important? In the final analysis, it is important that testers make requests and ask questions that might (1) credibly come from ordinary consumers and (2) elicit the vital information that enables one to compare the policies and practices of the entity being tested against a set of treatment variables (for research) or against the requirements of fair housing laws (for enforcement). Understanding more about how housing providers or housing programs and services operate can often provide important clues about where potential bias might be infecting or adversely affecting consumer transactions. A few examples follow.

- Examining advertising and marketing materials, reports, journal articles, newspaper and magazine articles, websites, census data, and other publicly available information can often be useful, depending on the type of entity to be tested. If the entity to be tested is a government agency (for example, housing authorities and tax credit allocation agencies), using open records laws to request key public documents can also provide insights that might inform the testing protocols.
- If the entity to be tested is regulated, licensed, or certified by local, state, or federal governments (for example, nursing homes, assisted-living facilities, continuing-care communities, condominium and co-op boards, mortgage brokers, and housing counseling agencies), identifying the rules and requirements that govern their operations can also be helpful in structuring any kind of testing investigation.
- In more complex testing (for example, nursing homes, mortgage lending, supportive housing, and appraisals), it may make sense to consult experts in the field who understand some of the nuances, trends, and factors that might need to be controlled in any testing investigation or study.
- One of the most obvious ways to gauge consumer activity is to talk with consumers who have had firsthand experience in searching for or using the type of housing or housing service to be tested.

Although any of the above sources can be beneficial, a very important caveat is in order. The information contained in marketing materials, reports, newspaper articles, and other written materials may not be true. The prescriptions of laws and regulations may not be followed by the entities to be tested. The opinions of experts may be dead wrong. Experiences shared by ordinary consumers, although useful, may not provide all the information that is needed to fashion a testing approach. Although consulting these sources is almost always a worthwhile exercise to guide an investigation or testing study, it is important to assess how valuable and accurate the information is by doing some exploratory testing before commencing any comprehensive testing study or investigation. There is no substitute for information obtained by people “on the ground” who have direct contact with the entity or entities to be tested.

Finding the Path

One of the most important tasks before conducting any testing study or investigation is to learn how consumers currently find out about the type of housing or services to be tested. In other words, *what is the path one needs to follow to inquire about the housing or service?*

A popular misconception is that if one is offering a commodity or service in an open market, it naturally follows that one would want to advertise and market that commodity or service as widely as possible, detailing the positive features and benefits, to gain a competitive advantage, generate demand, and attract consumers. This approach may well be how it works for department stores, car manufacturers, or restaurant chains, but it is not how it works in housing markets. For many housing consumers, a search involves a veritable maze that they must navigate, complete with trap doors, dead ends, circuitous routes, hidden compartments, misleading signs, and other types of barriers. The housing market is anything but open for many renters and buyers. Some members of the research community have suggested that we need to learn more about how various populations search for and locate housing. Although that information may be helpful, public policy might be

better served by research that examines the marketing and advertising practices that providers of housing and housing services use. Better understanding of the demand and supply sides would be informative, but it is the supply side that most needs to be demystified and better understood. That is, it is more important to further examine how housing providers provide their goods and services than how consumers shop for them. At any rate, finding the most direct path to an apartment or home can be a daunting and time-consuming task for any consumer.

For both research and enforcement purposes, the common goal is to learn more about how one actually inquires about the housing or service to be tested. Even after the initial background investigation has been conducted, however, including possibly some pretests (in a research context), or “scouting” or “advance reconnaissance” (in an enforcement context), complications may well persist, depending on the type of housing or housing service to be tested. For instance, assigning a tester to make an advance visit to a suburban apartment complex that has a clearly marked leasing office is fairly simple to accomplish. After one visit, the tester will likely be able to collect all kinds of useful information about the necessity for appointments, office hours, staffing, available housing, price ranges, and so on. This information can be extraordinarily helpful in developing a viable research design or investigative approach. Contrast that situation with a guarded and gated condominium community that never advertises available units and has no onsite sales office. In this situation, it may be necessary to have testers talk with a security guard, speak to existing residents who are coming or going from the development, meet with real estate agents who sell condos in the area, and/or talk with service workers and others who are coming and going from the complex. It may take multiple contacts and approaches before the path becomes clear about how consumers might learn of and inquire about available condos in this development. Knowing the path and knowing who to contact are critical to structuring any kind of credible testing approach, particularly when that path is well concealed or rarely traveled.

An essential first step to any testing involves determining how homeseekers identify and access the housing and housing services to be tested. For instance, if a common approach made by consumers to obtaining assisted living for aging relatives involves family members inquiring about housing on their behalf, then perhaps some type of proxy test may be an appropriate way to document how assisted-living facilities treat different types of homeseekers. Housing counselors in transitional housing agencies that serve homeless populations often call on behalf of their clients to look for permanent housing. Simulating these types of calls may elicit valuable information about housing-provider practices and identify discriminatory preferences. For any type of testing, finding out how consumers access the housing is the first step. This is particularly the case in areas of the housing market about which less is known, such as gated communities, tax credit housing, subsidized housing, special needs housing, home appraisal services, mortgage brokers, and various types of senior housing.

Experienced enforcement-testing practitioners understand that providers of housing and housing services are structured in many various ways so that a one-size-fits-all approach to testing may or may not be possible across an entire market. Enforcement-testing practitioners frequently vary and adapt their approaches accordingly from site to site to ensure that each testing approach is credible. Variations in how housing providers are structured and how they interact with consumers, however, may provide unique challenges for researchers who require a standardized testing methodology

to conduct tests across a large swath of housing providers. A significant amount of exploratory testing may be necessary to determine whether a singular testing approach can be replicated across an entire market and produce reliable information about housing discrimination.

Valuable information obtained from the exploratory testing along with the earlier background material collected may make it possible to design a test structure. Without disclosing all the specific options, it is important to underscore that traditional paired testing may not always be the only or best approach. Depending on the circumstances, enforcement practitioners have developed test structures over the years that employ one, two, three, four, or more testers to document housing discrimination; these approaches have yielded credible and objective evidence of illegal discrimination. The basic lesson is that far more needs to be known about the context in which the testing is to take place before the details of the testing protocol can be finalized.

Future Directions and Recommendations

First and foremost, researchers and enforcement-testing practitioners need to collaborate more. This is not to say that every research project will have enforcement benefits or that every enforcement investigation will yield new theoretical insights or contain policy implications. Researchers and enforcement practitioners both, however, would clearly benefit from regular dialogue and a cross-fertilization of ideas. Such convenings would make it possible for enforcement practitioners to share creative testing approaches that have been effectively employed to overcome and document some of the more evasive and deceptive practices that are being detected in local housing markets. Researchers are in a better position to decide if any of these newer testing methodologies could be replicated in fair housing research studies.

At least some members of the research community have been moving in this direction. Linguistic profiling, whereby non-White homeseekers are denied housing or treated differently based on the racial or ethnic identity associated with their voice, has been documented (Baugh, 2000; Fischer and Massey, 2004; Massey and Lundy, 2001). In a similar way, so called *cybersegregation*, in which non-White homeseekers are denied during online housing searches based on the racial or ethnic identity that is associated with their name, has been demonstrated (Ahmed and Hammarstedt, 2008; Hanson, Hawley, and Taylor, 2011). Both lines of research have opened up areas for enforcement actions. These two newly explored types of discrimination, reflecting again the moving target, indicate the importance of flexibility on the part of law enforcement agencies.

The findings of a 2002 Urban Institute study of mortgage lending practices that involved the use of paired testing to examine what happens to homebuyers of different races and national origins at the preapplication stage of a mortgage lending transaction blazed some new trails, and the findings yielded significant benefits for enforcement practitioners (Turner et al., 2002). Using the information from this study, FHJC adapted and refined the lender testing protocols for use in a recent enforcement investigation and, in 2015, brought the first federal lawsuit under the Fair Housing Act against a major bank based solely on testing evidence.⁵ Another positive development in the

⁵ *FHJC et al. v. M&T Bank et al.*, Case No. 15 Civ. 00779 (S.D.N.Y. 2015).

wake of the foreclosure crisis has been stepped-up enforcement of fair lending and other consumer protection laws in financial services (Consumer Financial Protection Bureau, 2014; Pratt, 2014).

We have not seen, however, any substantial testing or research in general on the nontraditional segments of the housing market noted above (for example, gated communities and homeowner associations; tax credit housing and subsidized housing programs; nursing homes, assisted-living facilities, and continuing-care facilities; home appraisal practices). We previously noted some of the reasons for this lack of research. These issues are complex and dynamic and these areas are difficult to access. Perhaps that is all the more reason why greater collaboration is needed between researchers and fair housing enforcement professionals. New areas of inquiry into these less explored areas might inform policy, open up avenues for expanded enforcement, or both.

The changes we described in housing-provider practices lead us to conclude that research methods used to measure the level of housing discrimination by sampling advertised housing and using traditional paired-testing techniques, as has been done in the past, are less likely to yield reliable or meaningful measures of differential treatment based on race or national origin today. Given the reality of limited funds for both research and enforcement, future testing should be strategically targeted to look at segments of the housing market we know less about by using a variety of testing approaches and techniques.

Future testing can be more informative if the supply side is targeted more than it has been in the past. That is, we need to learn more about how housing providers market their products and services. Consumer behavior and knowledge are important. Consumers, however, can more effectively protect their interests if they have a better understanding of how various actors in the housing market work. Evidence indicates, for example, that those who are better informed about fair housing laws are more likely to be supportive of stronger fair housing enforcement (Abravanel, 2002). Research is critical to understanding how housing markets work. Equally, if not more, important is the vital need to better protect the rights of consumers in the various housing and housing-related markets.

In 1968, when the federal Fair Housing Act was enacted, most housing discrimination based on race and national origin was still fairly overt. The use of testing made it possible for private civil rights organizations and researchers to document discriminatory practices. Legislative action, most notably the 1988 amendments to the Fair Housing Act, resulted in strengthened enforcement efforts. Decades of enforcement by private fair housing groups and increased involvement of government enforcement agencies since 1989 have led to significant changes in housing-provider practices, including greater compliance.

Some changes in provider practices, however, have not been as positive. Providers of housing and housing services who remained intent on violating fair housing laws became more sophisticated and adept at concealing their discriminatory activities from ordinary consumers. As recent evidence suggests, an almost stealth-like quality permeates contemporary housing discrimination, which is designed to elude detection by consumers and government enforcement agencies. If consumers are unaware that they are being discriminated against, it follows that they will not file complaints. If no complaints are filed, no government enforcement action will result. If no enforcement action takes place, discrimination continues. This pernicious cycle, fueled by changes in provider practices,

suggests that the current emphasis on a passive, complaint-driven approach to enforcement of fair housing laws by government is inadequate. Although a complaint-responsive mechanism must be preserved (and we suggest it could also be vastly improved if testing were more widely used by all enforcement agencies), a greater emphasis must be placed on conducting targeted, systemic testing investigations. A new fair housing enforcement paradigm is needed, one characterized by a more coordinated, proactive, strategically targeted, and better resourced approach with testing as a centerpiece. Whether government enforcement agencies develop their own internal testing capability as the Civil Rights Division of the U.S. Department of Justice did more than two decades ago, or whether these agencies contract with nonprofit fair housing testing programs that possess that testing capability, this investigative tool must be used more often and more effectively if, as a nation, we hope to make progress in eliminating housing discrimination. A starting point is a better understanding of how housing and housing-related services are provided and how discrimination occurs in today's (and tomorrow's) housing markets.

Testing Outside the Comfort Zone

Testing has been the single most powerful tool for documenting housing discrimination. We are learning, however, the limitations of using paired testing as a means of uncovering housing discrimination, even in many traditional rental and sales situations. Also, some segments of the housing market have not been subjected to significant testing, and these missed segments constitute another important shortcoming. In developing future testing studies, HUD should consider devoting resources to exploring those housing-provider practices about which less is known (for example, nursing homes, condominiums, and co-ops). Partnerships with enforcement practitioners to formulate innovative and credible testing approaches could enhance and strengthen HUD's research and enforcement efforts. Researchers and enforcement-testing practitioners need to go beyond what has emerged as fairly traditional approaches to testing. Exploring creative and effective testing approaches in the sales and rental markets and in less tested parts of the market could yield valuable observations about housing market practices. It will require that we leave the comfort zone of traditional paired testing and explore new applications and frontiers, increase opportunities for collaboration between researchers and enforcement-testing practitioners, and confront the challenges presented by structural variations and changes in housing-provider practices. Whether future testing is aimed at informing public policy, expanding our knowledge about the nature and effect of housing discrimination, or enforcing fair housing laws, the shared goals of researchers and enforcement practitioners should be to eliminate the invidious discrimination that too often infects housing market transactions, restricts access to housing opportunities, and reinforces segregation.

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