

TAX A BANK, SAVE A HOME: JUDICIAL, LEGISLATIVE, AND OTHER CREATIVE EFFORTS TO PREVENT FORECLOSURES IN NEW YORK

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INTRODUCTION

“It is ironic that we generally provide assigned counsel at arraignment to people caught in public with an open can of beer—and rightly so—but if those people appear in court because they are about to lose the roof over their heads, they are on their own,”

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mused Chief Judge Jonathan Lippman in his 2011 State of the Judiciary speech.¹ More than musing, the Chief Judge was addressing a dire problem facing homeowners across New York State.² New York's Task Force to Expand Access to Civil Legal Services reports that each year 2.3 million litigants appear in civil courts without counsel.³ Over two-thirds of homeowners facing foreclosure appear at mandatory settlement conferences without a lawyer.⁴ In New York City, the percentage is even higher.⁵

Recognizing that many of our communities have been ravaged by the burst of the housing bubble, resulting in a 100 percent increase in foreclosure filings since 2006, Chief Judge Lippman announced the Foreclosure Prevention Pilot Program (pilot program or pilot project) to ensure that all homeowners who cannot afford a lawyer are nevertheless provided with legal assistance throughout the foreclosure proceeding.⁶ The importance of this program cannot be overstated. New Yorkers continue to lose their homes in record numbers,⁷ even as the foreclosure crisis is called into doubt.⁸ It is well documented that private companies unlawfully robo-signed foreclosure documents, and banks foreclosed on service members' homes while they were fighting for the country abroad, both in clear violation of federal laws.⁹ Further, studies continually show that foreclosures disproportionately affect Black and Latino communities, as well as older New Yorkers.¹⁰

This Note calls for the expansion of the pilot project in order

¹ JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 8 (Feb. 15, 2011).

² *Id.*

³ TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2 (2011).

⁴ ANN PEAU, 2011 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 3, 5-6 (2011).

⁵ *Id.*

⁶ LIPPMAN, *supra* note 1, at 7.

⁷ Prashant Gopal, *Foreclosures Surging in New York-New Jersey Market*, BLOOMBERG (Feb. 26, 2014), <http://www.bloomberg.com/news/2014-02-26/foreclosures-climaxing-in-new-york-new-jersey-market-mortgages.html>.

⁸ Julie Schmit, *Report: Foreclosure Crisis Is Winding Down*, USA TODAY (Dec. 12, 2013), <http://www.usatoday.com/story/money/business/2013/12/12/foreclosure-rate-crisis-florida/3987881/>.

⁹ Press Release, Department of Justice, Service Members to Receive \$39 Million for Violations of the Servicemembers Civil Relief Act (Apr. 4, 2013), *available at* <http://www.justice.gov/opa/pr/2013/April/13-crt-383.html>; *see also*, Joe Nocera, *Big Problem for Banks: Due Process*, N.Y. TIMES (Oct. 22, 2010), http://www.nytimes.com/2010/10/23/business/23nocera.html?pagewanted=all&_r=0.

¹⁰ Catherine Dunn, *Foreclosure Crisis Fades to Black and Brown*, CITY LIMITS (Aug. 15, 2011), <http://www.citylimits.org/news/articles/4363/foreclosure-crisis-fades-to-black-and-brown#.U089V9zLEoc>; *see also*, N.Y. COMMUNITIES FOR CHANGE, FORECLOSURE CRI-

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to create a sustainable statewide program that provides homeowners with counsel when they are at risk of losing their home. The New York State (NYS) Legislature should pass the bill, currently supported by twenty-one lawmakers, to provide an attorney for individuals in foreclosure.¹¹ Further, lawmakers should amend the bill to levy a tax on banks proportional to their percentage of foreclosures, which would fund the right to counsel program. This Note seeks to show that public policy, current legal protections, and a cost/benefit analysis compels the state to provide free legal representation in foreclosure proceedings to those individuals who cannot afford their own.

In Section I, this Note shares the stories of two families, their battles to stay in their homes, and the toll that the foreclosure process has taken on their lives. Section II delves into the number and nature of foreclosures in New York, and the percentage of individuals who risk losing their homes without the assistance of an attorney. Section III discusses the foreclosure prevention pilot project, an exemplary model helping homeowners in five New York zip codes, and calls for the expansion of the program statewide. Section IV analyzes the effects of foreclosure. Section V examines some of the current efforts to help struggling homeowners. Section VI includes the American Bar Association and New York State Bar Association's calls for the right to counsel in cases involving shelter and other life essentials. Section VII looks at legislative efforts to help struggling homeowners and attempts to stop fraudulent foreclosures. Finally, Section VIII examines a possible solution to ensure that all homeowners have attorneys when facing the threat of losing the roof over their head.

I. THE HUMAN FACE OF FORECLOSURE

A. *Lisa and John: The Only Home They've Ever Known*

Lisa and John¹² have been married twenty-five years, living in their home in Jamaica, Queens the entire time. John, born in 1962, has lived in the home ever since his father passed away and left the house to him. John watched six of his children grow up in the

SIS: DISPROPORTIONATE IMPACT ON AFRICAN-AMERICAN AND LATINO HOUSEHOLDS AND NEIGHBORHOODS (2011).

¹¹ See Assembly Bill 4193 (N.Y. 2013), available at <http://assembly.state.ny.us/leg/?bn=A04193&term=2013>; S. Bill 1723 (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S1723-2013>.

¹² The parties' names in this and the next subsection have been changed to protect their privacy.

home. Lisa and John raised three children of their own in the home, all of whom have since grown up and moved out.

Early spring sunlight poured onto the couple from a large window on the fifth floor of the Jamaica Supreme Court where I met John and Lisa in April 2013. “God sent Nick and Julie down to do the best they can do,” Lisa told me, referring to Nick, her Legal Aid Society attorney, and Julie, the legal assistant working on her case.¹³

Lisa and John’s problems started in 2009 when John lost his union job from the Crowne Plaza Hotel, near John F. Kennedy Airport in Queens, New York. He worked at the hotel for many years until developers bought it out. John held on as the hotel shuttered its restaurant and closed parts of the hotel. Finally, when Con Edison shut the electricity, the employees were forced to leave. He is still locked in a legal battle for thousands of dollars in back pay. Lisa has been looking for full-time work for some time now. She is underemployed—a “full-time worker who is only getting two days of work per week,” as she described. When John and Lisa got behind on their mortgage payments, the bank started calling and sending letters. They tried to refinance their loan but every time they submitted paperwork, the bank told them something was missing or expired. They were told they sent the wrong form or the wrong pay stub. John and Lisa sent what was asked for, but it was never enough. They were in constant fear of losing their home, the home John’s parents left for him; the only home they have ever known.

“Now I can sleep at night. I couldn’t sleep before,” Lisa said as she wiped away tears. “I lost fifty pounds. There was a dark cloud above me,” she lamented the stress of trying to negotiate with the bank on their own. The couple was “happy to go before a judge” for the first time in this traumatic, three-year process. When Lisa and John first went before Judge Grays, they were asked if they had legal representation. They replied, no. The Judge then offered the services of Queens Legal Aid Society attorneys who were in the courtroom. The attorneys walked up and offered their cards to the couple. After an initial meeting, John and Lisa had secured Nick and Julie, their team from Legal Aid. “Now we have a person directly working with us. I feel so relieved,” said Lisa.

Lisa and John are terrified to lose their home. Like so many other New Yorkers, they are struggling financially, but are doing

¹³ Interview with Lisa, Legal Aid Society Client in Queens, N.Y. (April 2013) (on file with author).

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everything they can to make ends meet. Lisa is trying to find a second job. John works constantly. Their twenty-one year old daughter told them, if they need money to save the house, she would give it to them. While Lisa and John's children are grown, their four-year-old grandson has his own room in the home, full of toys. "He never wants to leave. He's spoiled," Lisa says with a smile. Soaked in mid-day sunlight, Lisa looks to John. "I love him so much. He's working to save our home. He's working hard. Killing himself. I don't even see him; he's working so hard. I love him." Though the process is far from over for Lisa and John, at least now, armed with an attorney with their best interests in mind, the family stands a fighting chance to save their home, and continue creating another twenty-five years of memories in the only home they've ever known.

B. Ignacio and Julieta: An American Nightmare

"It should be the American dream, instead it's an American nightmare," Julieta¹⁴ reflected as her father Ignacio looked on. She was referring to the home in Corona, Queens, that she bought with her father fifteen years ago, which is now at risk for foreclosure. Ignacio and Julieta were in court for their fifth hearing before the judge when I met them in April 2013, in Jamaica. Ignacio "feels better with an attorney, protected by the law," in a way that he never did as the family fought the bank on their own over the past three years in an effort to save their home.

Ignacio loves New York and has lived here for the past forty-three years with his wife. The couple came to New York on July 7, 1969, from the Dominican Republic and have never left, raising four children here, including Julieta. Both father and daughter have suffered tremendously through the process. Julieta, speaking of her dad, said, "He never got sick in his entire life." But the threat of losing his home was enough to hospitalize Ignacio, now sixty-eight years old. He had a nervous breakdown, and was hospitalized with stress. He suffered headaches and had to slow down his work as a self-employed electrician, further compounding their financial problems. Julieta as well suffers from stress-related headaches everyday. "My [six-year-old] son doesn't see me smiling as much now. I yell at him when he doesn't deserve it. I'm just so stressed," said Julieta as she wiped away tears.

"Having an attorney gives you some perspective. When you're stressed, you believe it's the end of the world to lose your home.

¹⁴ Interview with Julieta, Legal Aid Society client, in Queens N.Y. (April 2013) (on file with author).

You don't see clearly; don't think clearly. An attorney gives you time to breathe," Julieta said thoughtfully. "I don't know half the time what people are talking about [in court]. It's all legalese."

Julieta understands all too well the difference between having an attorney and going it alone. She tried to negotiate with her lender for three years before finally going to court and finding a Legal Aid attorney. In the process, the family fell victim to a loan modification scam and lost \$4,000. The company held themselves out as attorneys, took the family's money, and then disappeared. "They took the money little by little. We believed they could help. They didn't help. They didn't do anything," said Ignacio, visibly angry.

The family's troubles started around 2007 when Julieta lost her job with a mortgage company. At the same time, she separated from her husband, losing a valuable income. As Ignacio's work slowed down, the family fell behind on mortgage payments. The ethos of the family is to pay their debts because they don't want to fall behind. "I like to work. I like to earn. I raised four children, and I've never been on welfare," said Ignacio.

Julieta attempted to file for loan modification without the assistance of counsel. Every month she had to submit new or different documents. When the bank waited too long, the documents would go stale and she would have to resubmit them. In the end, Julieta was denied the loan modification. She believes that she was denied because during the application process, she had difficulty paying the full mortgage each month, though she made substantial partial payments. She went as far as to charge mortgage payments on her credit card. Finally, she realized that without an incentive to lower their monthly payments, the bank would never approve the modification. "I had to screw up my credit in order to get a mortgage loan modification. It felt horrible," said Julieta.

For a second time, Julieta applied for a loan modification. This time she hired a private attorney. At \$600 an appearance, she could only afford to have him come to court with her once. When she was summoned to court again, she went alone. Even though she got a notice listing a Legal Aid attorney, her private attorney, whom she could no longer afford, advised her not to contact Legal Aid and to go alone. "He just wanted money," Julieta said.

"It gives you peace, inner peace" to have an attorney that you can afford, Julieta declared. Now the family has an attorney advocate with their interests in mind. They don't have the additional stress of paying an attorney to help save their home. They continue

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to fight the bank for a loan modification that would allow them to stay in their home, but at least now they have peace of mind to know they aren't alone in the struggle.

II. FORECLOSURES IN NEW YORK

The 2008 financial crisis hit low- and middle-income homeowners especially hard.¹⁵ An overwhelming majority of New Yorkers lost their homes trying to defend themselves without the assistance of an attorney or even the ability to fairly negotiate with their mortgage lender.¹⁶ From 2006 to 2009, foreclosure case filings nearly doubled from almost 27,000 in 2006 to nearly 48,000 in 2009.¹⁷ In the wake of the devastating foreclosure crisis, the New York State Legislature passed CPLR 3408, a law requiring mandatory settlement conferences to prevent premature and unlawful evictions of families from their homes, through the mandated watch of the courts.¹⁸ Additionally, an October 2010 Administrative Order aimed at fighting “robo-signing,” where bank representatives claimed to have personally reviewed thousands of documents in an impossibly short time, effectively reduced the number of foreclosure cases.¹⁹ Even so, foreclosure filings are back at dangerously high digits, with a projected 44,035 in 2013 alone.²⁰ This figure is double the filings in the previous two years combined. What is more, almost half of homeowners (forty-six percent)

¹⁵ See ROBERT I. LERMAN & SISI ZHANG, URBAN INST., *COPING WITH THE GREAT RECESSION: DISPARATE IMPACTS ON ECONOMIC WELL-BEING IN POOR NEIGHBORHOODS* 7 (2012), available at <http://www.urban.org/uploadedpdf/412728-coping-with-the-great-recession.pdf>; TIMOTHY SMEEDING, RUSSELL SAGE FOUND. & STANFORD CTR. ON POVERTY AND INEQUALITY, *INCOME, WEALTH, DEBT AND THE GREAT RECESSION* 1 (2012), available at http://web.stanford.edu/group/recessiontrends/cgi-bin/web/sites/all/themes/barron/pdf/IncomeWealthDebt_fact_sheet.pdf.

¹⁶ A. GAIL PRUDENTI, 2012 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 3–4 (2012), available at <https://www.nycourts.gov/publications/pdfs/2012ReportOfChiefAdministratorOfTheCourts.pdf>.

¹⁷ *Id.* at 2.

¹⁸ Press Release, N.Y. State Governor's Office, Governor Paterson Signs Comprehensive Foreclosure Legislation into Law (December 15, 2009), available at http://www.governor.ny.gov/archive/paterson/press/press_12150901.html. See generally Mark C. Dillon, *The Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, but not Legislatively Perfect*, 30 PACE L. REV. 885 (2010).

¹⁹ See Admin. Ord. No. 548-10 (Oct. 20, 2010) (as amended by Admin. Ord. No. 431-11 (Mar. 2, 2011)), available at http://www.nycourts.gov/attorneys/pdfs/AdminOrder_2010_10_20.pdf; see also MFY LEGAL SERVS., *JUSTICE DECEIVED: HOW LARGE FORECLOSURE FIRMS SUBVERT STATE REGULATIONS PROTECTING HOMEOWNERS* 13–14 (2011).

²⁰ A. GAIL PRUDENTI, 2013 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 2 (2013), available at <https://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf>

still square off against banks and face the prospect of losing their homes on their own, without the assistance of counsel.²¹

A. *Complexity of Foreclosure Proceedings*

Foreclosure is an extraordinarily complicated legal process, and those navigating it alone are at a severe disadvantage.²² *Pro se* homeowners do not have the expertise or knowledge to assert legitimate claims and defenses, and many have trouble understanding their substantive rights.²³ They often miss the procedural safeguards critical to keeping families in their homes.²⁴

Melissa Huelsman, an attorney representing individuals in predatory lending and mortgage fraud, notes “it’s hard to tell [pro bono attorneys] to leap into this area of law because it’s difficult and complex.”²⁵ Foreclosure proceedings combine federal laws, state laws, local procedural regulations, and “labyrinthine paper trails that purportedly lead to promissory notes.”²⁶ Huelsman finds this complexity leaves even the most educated and determined homeowners confused and unable to defend themselves.²⁷ Further compounding the problem is the financial industry’s securitization of residential mortgages—that is, packaging of loans together into a security so they can be sold to investors.²⁸ Once sold, the lender loses its stake in whether the borrower can make payments. More than sixty-six percent of home mortgages have been securitized since 2001.²⁹

²¹ *Id.* at 4.

²² For an illustration of how just how complicated the foreclosure process can be for *pro se* litigants, note that federal Southern District of New York in Manhattan released a 166-page Pro Se Foreclosure Manual. *See* DIST. EXEC.’S OFFICE U.S. D. CT. S. DIST. OF N.Y., A MANUAL FOR PRO SE LITIGANTS APPEARING BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (2011).

²³ *Id.* at 2; *see also* *Homepage*, FORECLOSUREPROSE.COM, <http://www.foreclosureprose.com/> (last visited May 20, 2014),

²⁴ *See* JUDITH S. KAYE & ANN PFAU, N.Y. STATE UNIFIED COURT SYS., RESIDENTIAL MORTGAGE FORECLOSURES: PROMOTE EARLY COURT INTERVENTION 2–4 (2008) (listing the foreclosure conference procedures).

²⁵ Brian Reed, *Lawyers Make Pro Bono Leap into Foreclosures*, NPR (May 17, 2009, 12:27 AM), <http://www.npr.org/templates/story/story.php?storyId=104063764&ft=1&f=1003>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Andreas Jobst, What Is Securitization?, FIN. & DEV., Sept. 2008, at 49, *available at* <http://www.imf.org/external/pubs/ft/fandd/2008/09/pdf/basics.pdf>

²⁹ Steven Seidenberg, *Salvage Plan: Beleaguered Homeowners Hope the Administration’s New Program Will Break the Logjam Over Mortgage Loan Workouts*, A.B.A. J. (May 1, 2009, 11:19 AM), http://www.abajournal.com/magazine/article/salvage_plan/.

B. Homeowners Without Attorneys Are Severely and Unfairly Disadvantaged

“I’m a strange guy—I don’t want to put a family on the street unless it’s legitimate,” said Brooklyn State Supreme Court Judge, Arthur M. Schack.³⁰ “If you are going to take away someone’s house, everything should be legal and correct,” Justice Schack continued.³¹ He is an anomaly in state courts, throwing out almost half of the foreclosure motions that came before him in 2008 and 2009.³² But judges are compelled to be neutral arbiters. As Supreme Court Chief Justice John Roberts reminded us during his confirmation hearings, “Judges are like umpires. They don’t make the rules; they apply them . . . they make sure everybody plays by the rules. But it is a limited role.”³³ But where the deck is stacked against homeowners, someone needs to ensure that the banks and mortgage lenders play by the rules. A homeowner’s attorney and advocate is the person who must play that role.

An attorney is necessary to evaluate key defenses, assess procedural irregularities, negotiate with lenders, and counsel homeowners through loan modification, short sales or other relief under federal law or state law.³⁴ There are myriad reasons why an attorney is not only helpful but also necessary to a homeowner attempting to save their home.³⁵ Attorneys raise claims to protect homeowners from lenders and servicers who broke the law,³⁶ ensure the legal process is properly followed,³⁷ and help homeowners obtain bankruptcy protections.³⁸ Attorneys help homeowners renegotiate mortgage payments, navigate the federal government’s Home Affordable Modification Program (HAMP), and ensure that home-

³⁰ Michael Powell, *A ‘Little Judge’ Who Rejects Foreclosures, Brooklyn Style*, N.Y. Times, (Aug. 31, 2009), http://www.nytimes.com/2009/08/31/nyregion/31judge.html?pagewanted=all&_r=0.

³¹ *Id.*

³² *Id.*

³³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts).

³⁴ See John Pollock, *Lassiter Notwithstanding: The Right to Counsel in Foreclosure Actions*, 43 CLEARINGHOUSE REV. 9–10, 447, 448 (2010) (noting “only an attorney can evaluate the options properly and advise the homeowner as to the most efficacious strategy”).

³⁵ NABANITA PAL, BRENNAN CTR. FOR JUSTICE, *FACING FORECLOSURE ALONE: THE CONTINUING CRISIS IN LEGAL REPRESENTATION* 8 (2011).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

owners do not fall victim to “rescue” scams.³⁹

C. Homeowners in New York Have Insufficient Legal Representation

From November 1, 2010 through September 30, 2011, two-thirds of homeowners were unrepresented in foreclosure proceedings in New York.⁴⁰ The number grew for foreclosures in New York City, with three-quarters, or 78 percent of homeowners facing complicated foreclosure proceedings on their own.⁴¹ In 2012, thanks in part to the pilot program discussed below, the amount of homeowners with representation grew, though remained dangerously inadequate.⁴² In 2013, a disturbing forty-six percent of homeowners were still at risk for losing their homes without the benefit of an attorney.⁴³

According to a study by NeighborWorks America, under the evaluation of the Urban Institute, the assistance of skilled legal counsel makes a significant difference.⁴⁴ The study evaluated a loan-counseling program in 2010. They found that homeowners with legal counsel were 1.6 times more likely to avoid foreclosure than those homeowners who did not receive legal counsel through the program.⁴⁵ Homeowners receiving counseling through the program secured better loan modification outcomes than those not represented by counsel.⁴⁶ A full empirical study is needed to assess the increase in positive outcomes for homeowners represented in foreclosure, especially in light of the successful pilot project described below.

III. THE FORECLOSURE PREVENTION PILOT PROJECT

“You’ve done the first thing right, you’ve got legal representation,” said Judge Marguerite A. Grays, presiding over a proceeding in New York’s now-mandatory foreclosure settlement part in Jamaica’s Supreme Court.⁴⁷ In a reassuring tone, Judge Grays told a nervous homeowner, an African-American woman who appeared

³⁹ *Id.* at 7.

⁴⁰ PRUDENTI, *supra* note 20, at 3–4.

⁴¹ *Id.* at 5.

⁴² *See infra*, notes 47–71 and accompanying text; *see also* PRUDENTI, *supra* note 16, at 5 (noting counsel represented just 51% of homeowners).

⁴³ PRUDENTI, *supra*, note 20, at 6.

⁴⁴ NEIL MAYER ET AL., NATIONAL FORECLOSURE MITIGATION COUNSELING PROGRAM EVALUATION: PRELIMINARY ANALYSIS OF PROGRAM EFFECTS SEPTEMBER 2010 UPDATE 10 (2010).

⁴⁵ *See id.* at 11.

⁴⁶ *See id.*

⁴⁷ Presiding Justice Marguerite A. Grays, Queens Cty. Sup. Ct., Residential Foreclo-

to be in her forties, that she would set a schedule for the court to monitor “a fair review of the documents” by the bank needed to refinance the homeowner’s mortgage.⁴⁸

The settlement conferences in Jamaica are quite different than those in other civil courts around the state.⁴⁹ Jamaica, along with Rosedale, South Ozone Park, and Corona are all Queens County neighborhoods chosen as part of the foreclosure prevention pilot program.⁵⁰ Homeowners facing foreclosure in these communities get attorney assistance at no cost, while their neighbors face the risk of losing their home without the help of a lawyer, if they are too poor to afford one.⁵¹

The pilot project is one of the most direct efforts to help homeowners affected by the financial crisis who are struggling to stay in their homes.⁵² Spearheaded by Jonathan Lippman, Chief Judge of the New York State Court of Appeals, the foreclosure prevention program is the first of its kind in the county.⁵³ The project provides an attorney at no cost to all homeowners in foreclosure proceedings in four zip codes in Queens, and one in Orange County.⁵⁴ The lawyers are experienced housing and foreclosure prevention attorneys from legal service organizations such as The Legal Aid Society, MFY Legal Services, Queens Legal Services, Legal Services of the Hudson Valley, and JASA.⁵⁵

Legal services organizations receive a list of all cases scheduled in the foreclosure settlement part alerting them to potential clients.⁵⁶ Simultaneously, the court sends a letter to homeowners with the legal service groups’ contact information along with their court

sure Pt., Remarks in Open Court in Unidentified Proceeding (Apr. 24, 2013) (based on notes from court observations, on file with author).

⁴⁸ *Id.*

⁴⁹ See generally *Civil Term – Part Rules, Office of the Residential Foreclosure Part*, N.Y. COURTS, http://www.courts.state.ny.us/courts/11jd/supreme/civilterm/partrules/civil_partrules_rf.shtml (last visited Sept. 15, 2014) (providing an overview, including court rules and procedures, of the Residential Foreclosure Part in Queens County).

⁵⁰ David Streitfeld, *New York Courts Vow Legal Aid in Housing*, N.Y. TIMES (Feb. 16, 2011), <http://www.nytimes.com/2011/02/16/business/16housing.html>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Pfau, *supra* note 4, at 4.

⁵⁵ See generally *Queens Legal Services Foreclosure Prevention Work Featured on NY1*, LEGAL SERVICES N.Y.C., http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=556&Itemid=98 (last visited May 20, 2014); *Foreclosure Prevention Project*, MFY LEGAL SERVS., <http://www.mfy.org/projects/foreclosure-prevention-project/> (last visited May 20, 2014).

⁵⁶ Culled from interviews with various attorneys working in the Foreclosure Prevention and Predatory Lending Project at the Legal Aid Society of New York.

date.⁵⁷ Legal Aid Society of Queens holds weekly intake sessions for new clients in Jamaica.⁵⁸ If the homeowner did not secure counsel at his or her first court date, the judge generally offers the assistance of counsel before proceeding.⁵⁹ One foreclosure prevention attorney explained that often, homeowners come to court with an individual who is part of a loan modification scam, or come to court alone believing they already have legal assistance after paying thousands of dollars to the loan modification schemers, even though it is illegal to charge upfront loan modification fees.⁶⁰

As a part of the pilot project, every homeowner, regardless of his or her ability to pay, has the right to be represented by counsel.⁶¹ No one is turned away except if the individual owns more than one residence, or the home in foreclosure is not his or her primary residence.⁶² Once the attorney takes on a client, they voraciously represent the homeowner throughout the entire process, from settlement conference to document review, through loan modification negotiations and to potential litigation.⁶³

Full representation “creat[es] a significant barrier to business as usual,” stated Clarissa Gomez, a staff attorney with Legal Aid Society’s Foreclosure Prevention and Predatory Lending project.⁶⁴ She continued, “now banks must do a proper review of documents. Then we review the banks’ calculations if they deny a person’s loan modification.”⁶⁵ In addition, attorneys prepare defenses, evaluate options, negotiate for more time, and ensure the banks follow proper procedures.⁶⁶

Upon revealing the project, Judge Lippman “hope[d] to expand this effort across the State” by the end of the 2011.⁶⁷ Though the program is successfully protecting homeowners in four communities in Queens County, and Middletown, Orange County, the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Interview with Clarissa Gomez, Foreclosure Prevention and Predatory Lending Staff Attorney, Legal Aid Soc’y of N.Y., in Brooklyn, N.Y. (April 2013) [hereinafter Clarissa Gomez interview] (on file with author); Daniel Massey, *Mortgage Holders Are Marks: Loan Modification Specialists Take Money, Do Little In Return*, CRAIN’S N.Y. BUS. (Nov. 30, 2008), <http://www.crainsnewyork.com/article/20081130/FREE/811309973#>.

⁶¹ Clarissa Gomez interview, *supra* note 60.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Clarissa Gomez interview, *supra* note 60.

⁶⁷ LIPPMAN, *supra* note 1, at 9.

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efforts have not yet been replicated elsewhere, to the detriment of struggling homeowners across the state.⁶⁸

The common-sense pilot project recognizes the financial and social costs of foreclosure to homeowners, the court, the banks, and the State. As a homeowner, having an attorney helps even the playing field.⁶⁹ It further improves the efficacy and efficiency of the judicial process, and helps fulfill New York's guarantee of due process, statutory, and constitutional protections.

IV. THE EFFECTS OF FORECLOSURE

The effects of foreclosure can be devastating to families.⁷⁰ Losing one's home can lead to lowered self-esteem, panic disorders, major depression, and other stress-related medical conditions such as hypertension and headaches.⁷¹ Foreclosure breeds displacement, housing instability, homelessness, and reliance on public shelter systems.⁷² Further, foreclosures result in financial insecurity and economic hardship.⁷³ Both the physical move and the stress of housing insecurity can negatively affect a child's educational development.⁷⁴

Foreclosures exact an extremely high toll on communities.⁷⁵ Foreclosure leads to declining property value, reduced tax rolls, neighborhood deterioration due to property abandonment and vandalism, high population turnover, and local government fiscal stress.⁷⁶ In 2009, the Center for Responsible Lending published a report about the economic costs of foreclosure.⁷⁷ Their research found that in 2009, foreclosures would cause 69.5 million neighboring homes to experience a devaluation of \$501.9 billion in total, resulting in homeowners living near foreclosed properties to

⁶⁸ Gopal, *supra* note 7.

⁶⁹ MAYER, *supra* note 44.

⁷⁰ *The Emotional Meaning of Home*, PSYCH CENTRAL, <http://psychcentral.com/lib/2008/the-emotional-meaning-of-home/> (last visited May 20, 2014).

⁷¹ *Id.*

⁷² G. THOMAS KINGSLEY, ROBIN SMITH & DAVID PRICE, URBAN INST., *THE IMPACT OF FORECLOSURES ON FAMILIES AND COMMUNITIES* 2-5 (2009), *available at* http://www.urban.org/UploadedPDF/411909_impact_of_foreclosures.pdf.

⁷³ *Id.* at 2.

⁷⁴ *Id.*

⁷⁵ Gary Klein & Shennan Kavanagh, *Causes of the Subprime Foreclosure Crisis and the Availability of Class Action Responses*, 2 NE U. L.J. 1, 138 (2010).

⁷⁶ *Id.*

⁷⁷ CTR. FOR RESPONSIBLE LENDING, *SOARING SPILLOVER: ACCELERATING FORECLOSURES TO COST NEIGHBORS \$502 BILLION IN 2009 ALONE; 69.5 MILLION HOMES LOSE \$7,200 ON AVERAGE* 1 (2009), *available at* <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf>.

see their property values decrease an average on \$7,200.⁷⁸ The study further estimated that from 2010 to 2014, foreclosures would affect 91.5 million nearby homes, reducing property values \$1.86 trillion combined, and \$20,300 per household.⁷⁹

The economic consequences for localities are high, with hundreds of millions of dollars spent each year on the emergency shelter system.⁸⁰ In 2009, the annual cost of providing emergency shelter for one homeless family was \$36,000.⁸¹ In 2013, families spent an average of fourteen and a half months in the shelter system.⁸²

V. HOW DID WE GET HERE? THE PATH TO RECORD-BREAKING FORECLOSURES

The foreclosure crisis that hit communities hard across New York, and led to record-high foreclosure filings, is partially rooted in the subprime mortgage crisis.⁸³ Leading up to the 2008 economic crisis, subprime loans were increasingly made to borrowers described as those who have high debt-to-income ratio,⁸⁴ impaired credit history,⁸⁵ and/or other characteristics that are correlated with a high probability of default.⁸⁶ Between 1995 and 2005, the percentage of subprime mortgage refinance loans increased from five percent to twenty percent of all mortgages made.⁸⁷

Predatory lending tactics exacerbated the subprime mortgage

⁷⁸ *Id.* at 2.

⁷⁹ *Id.*

⁸⁰ See Andrew Scherer, Executive Director of Legal Services of New York, *The Importance of Collaborating to Secure a Civil Right to Counsel*, in PARTNERS IN JUSTICE: A COLLOQUIUM ON DEVELOPING COLLABORATIONS AMONG COURTS, LAW SCHOOL CLINICAL PROGRAMS AND THE PRACTICING BAR (2005), available at <http://www.civilrighttocounsel.org/pdfs/Scherer.pdf>; Klein & Kavanagh, *supra* note 75.

⁸¹ PATRICK MARKEE, COAL. FOR THE HOMELESS, RESEARCH PROVES THAT FEDERAL HOUSING PROGRAM WORK TO REDUCE FAMILY HOMELESSNESS 1 (2009), available at http://coalhome.3cdn.net/80ce159675bc25236d_8sm6bnaso.pdf.

⁸² Nikita Stewart, *As Homeless Shelter Population Rises, Advocates Push Mayor on Policies*, N.Y. TIMES (Mar. 11, 2014), http://www.nytimes.com/2014/03/12/nyregion/as-a-homeless-number-hits-a-high-advocates-press-de-blasio-on-policies.html?_r=0.

⁸³ Michael Powell & Janet Roberts, *Minorities Affected Most as New York Foreclosures Rise*, N.Y. TIMES (May 15, 2009), http://www.nytimes.com/2009/05/16/nyregion/16foreclose.html?pagewanted=1&_r=2&ref=us.

⁸⁴ Alina Tugend, *What You Need to Know to Get a Mortgage*, N.Y. TIMES (June 1, 2008), <http://www.nytimes.com/2008/06/01/realestate/01cov.html?pagewanted=all>.

⁸⁵ Lynnley Browning, *The Subprime Loan Machine*, N.Y. TIMES (Mar. 23, 2007), <http://www.nytimes.com/2007/03/23/business/23speed.html>.

⁸⁶ *Id.*

⁸⁷ FATEN SABRY & THOMAS SCHOPFLOCHER, THE SUBPRIME MELTDOWN: A PRIMER 1 (2007), available at http://www.nera.com/extImage/PUB_SubPrimer_1108.pdf.

crisis, leading to hundreds of thousands of foreclosures.⁸⁸ According to the U.S. Department of Housing and Urban Development, predatory lending occurs when a lender “provides misinformation, manipulates the borrower through aggressive sales tactics, and/or takes unfair advantage of the borrower’s lack of information about the loan terms and their consequences.”⁸⁹ “The results are loans with onerous terms and conditions that the borrower often cannot repay, leading to foreclosure or bankruptcy.”⁹⁰ The tactics led to significant payment increases two or three years into the loan term, virtually guaranteeing monthly payments beyond a family’s ability to pay.⁹¹

Black, Latino, and older homeowners were particularly hit hard in the foreclosure crisis.⁹² One reason is that these groups were heavily targeted by predatory lending scams.⁹³ A report by the National Community Reinvestment Coalition showed that Black and Latino consumers, regardless of income level, were most at risk of receiving high-cost home mortgage loans.⁹⁴ Further, African-American and Latino borrowers were almost twice as likely to have been impacted by the crisis.⁹⁵ Approximately one quarter of all Latino and African-American borrowers have lost their home to foreclosure or are seriously delinquent, compared to just under twelve percent for white borrowers.⁹⁶

⁸⁸ Andy Kroll, *Can Anyone Stop the Predatory Lenders*, MOTHER JONES, Jan./Feb. 2010, available at <http://www.motherjones.com/politics/2010/01/mortgage-sharks-foreclosing>.

⁸⁹ U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF TREASURY, JOINT REPORT ON RECOMMENDATIONS TO CURB PREDATORY HOME MORTGAGE LENDING 17 (2000) [hereinafter HUD & TREASURY JOINT REPORT], available at <http://archives.hud.gov/reports/treasrpt.pdf>.

⁹⁰ *Id.*

⁹¹ Klein & Kavanagh, *supra* note 75, at 138.

⁹² Powell & Roberts, *supra* note 83. LORI A. TRAWINSKI, AARP PUBLIC POLICY INSTITUTE, NIGHTMARE ON MAIN STREET: OLDER AMERICAN AND THE MORTGAGE MARKET CRISIS 1 (2012).

⁹³ See HUD & TREASURY JOINT REPORT, *supra* note 89, at 71–73.

⁹⁴ NAT’L CMTY. REINVESTMENT COAL., INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING II: A COMPARISON OF HIGH-COST LENDING IN AMERICA’S METROPOLITAN AND RURAL AREAS 3 (2008).

⁹⁵ DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 3 (2011), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf>.

⁹⁶ *Id.* at 4.

VI. LEGAL EFFORTS TO RESCUE THOSE AT RISK FOR LOSING THEIR HOMES

In 2006, for the first time in its 130-year history, the American Bar Association (ABA) urged federal and state governments to “provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”⁹⁷ In 2010, the ABA published “Basic Principles for a Right to Counsel in Civil Legal Proceedings”⁹⁸ to aid in state implementation of the resolution and produced a Model Access Act, for state legislatures to use in drafting legislation.

By 2010, over thirty State Bar Associations and other legal committees adopted the ABA’s resolution, including the New York State Bar Association (NYSBA) and the New York County Lawyers Association. In its report, NYSBA recognized that “[e]xpanding the right to counsel in civil cases is an essential way to ensure that low-income people are able to access the justice system in truly important cases.”⁹⁹ NYSBA called on the New York State Legislature to expand the civil right to counsel in areas regarding housing shelter.¹⁰⁰

New York State Attorney General Eric Schneiderman was at the forefront of protracted negotiations between states attorneys general and the country’s five largest banks.¹⁰¹ The deal, reached in February 2012, amounted to a \$26 billion settlement to provide relief to nearly “two million current and former homeowners harmed by the bursting of the housing bubble.”¹⁰² New York State received \$136 million, the fourth highest amount in the country.¹⁰³ In June 2012, Attorney General Schneiderman announced that al-

⁹⁷ AM. BAR ASS’N, ABA REPORT & RESOLUTION TO THE HOUSE OF DELEGATES 2 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

⁹⁸ AM. BAR ASS’N, ABA TOOLKIT FOR A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_toolkit_for_crtc.authcheckdam.pdf.

⁹⁹ Laura Abel, *Towards a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association*, 25 TOURO L. REV. 31, 34 (2010).

¹⁰⁰ *Id.* at 39–41.

¹⁰¹ Nelson D. Schwartz & Shaila Dewan, *States Negotiate \$26 Billion Agreement for Homeowners*, N.Y. TIMES (Feb. 8, 2012), <http://www.nytimes.com/2012/02/09/business/states-negotiate-25-billion-deal-for-homeowners.html?pagewanted=all>.

¹⁰² *Id.*

¹⁰³ Press Release, N.Y. State Office of the Att’y Gen., Schneiderman Secures Major Settlement that Allows Sweeping Mortgage Investigations to Proceed (Feb. 9, 2012),

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most half the settlement proceeds—or \$60 million—would fund housing counseling and legal services for struggling New Yorkers over three years.¹⁰⁴ Further, in a separate action, Attorney General Schneiderman sued the five largest banks in the country alleging that their reliance on the Mortgage Electronic Registry System, or MERS, resulted in a wide range of deceptive and fraudulent foreclosure filings.¹⁰⁵ As a result, the Attorney General settled with the nation’s five largest banks for a sum of \$25 million in March 2012.¹⁰⁶

VII. LEGISLATIVE EFFORTS TO HELP STRUGGLING HOMEOWNERS & ATTEMPTS TO STOP FRAUDULENT FORECLOSURES

The New York State Assembly¹⁰⁷ and the NYS Senate¹⁰⁸ drafted legislation which provides for legal representation in certain mortgage foreclosure actions where the homeowner is financially unable to obtain counsel.¹⁰⁹ The draft bill noted that current New York State law already provides court-appointed counsel in certain civil litigation, such as family and surrogate court, but not to those individuals threatened with the loss of their home.¹¹⁰ The legislature in both houses found no fiscal implication in providing counsel to homeowners who risk foreclosure.¹¹¹

available at <http://www.ag.ny.gov/press-release/schneiderman-secures-major-settlement-allows-sweeping-mortgage-investigations-proceed>.

¹⁰⁴ Press Release, N.Y. State Office of the Att’y Gen., A.G. Schneiderman Announces \$60 Million Commitment to Fund Housing Counseling and Legal Services for Struggling Homeowners (June 18, 2012), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-60-million-commitment-fund-housing-counseling-and-legal>.

¹⁰⁵ *NY’s Schneiderman Sues Banks in Foreclosure Effort*, WALL ST. J. (Feb. 3, 2012), <http://online.wsj.com/article/AP49a5ae2893f744cf99dc2f4fe9a52137.html>.

¹⁰⁶ Ruth Simon & Nick Timiraos, *New York to Settle Some Mortgage Claims With 5 Banks*, WALL ST. J. (March 13, 2012), available at <http://online.wsj.com/news/articles/SB10001424052702303717304577279953721486914>.

¹⁰⁷ Assembly Bill 4193 (N.Y. 2013), available at <http://assembly.state.ny.us/leg/?bn=A04193&term=2013>.

¹⁰⁸ S. Bill 1723 (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S1723-2013>.

¹⁰⁹ See *id.* (“The overwhelming majority of homeowners in foreclosure proceeding have no legal representation. As the subprime lending crisis sweeps across New York State, it is estimated that tens of thousands of state residents may face foreclosure in the near future. This bill will confront the crisis and prevent dramatic declines in home ownership by providing a right to legal representation for those who cannot afford it.”).

¹¹⁰ *Id.* (noting that “[p]resent law provides a right to court-appointed counsel in limited civil litigation matters, including certain family or surrogate court cases”).

¹¹¹ *Id.*

VIII. TAX A BANK, SAVE A HOME

In 2012, U.S. banks made \$141.3 billion net income, the second highest on record year in history according to the Federal Deposit Insurance Corporation (FDIC).¹¹² The top five banks in the country alone pulled in \$19.5 billion in profit.¹¹³ These same five banks received a combined \$100 billion in U.S. government bailout funds in 2008, according to the Treasury Department.¹¹⁴ What is more, as of June 2010, three of the five largest banks (J.P. Morgan, Bank of America, Wells Fargo) held the most one-to-four family home loans in foreclosure proceedings, with Citigroup holding the fifth most one-to-four family homes in foreclosure proceedings.¹¹⁵

President Franklin D. Roosevelt declared that the American people wanted “some safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours.”¹¹⁶ A few short years later, in 1939, Congress passed the Federal Unemployment Tax Act, which taxes employers to pay for unemployment compensation to workers who have lost their jobs.¹¹⁷ Today, most employers pay state and federal unemployment taxes.

Seventy-five years since the passage of the Unemployment Tax Act, unemployment insurance is universally recognized as a necessary and positive contribution on the part of employers to help struggling workers.¹¹⁸ In the same vein, New York State legislators should pass a law to tax banks that hold large numbers of foreclosure mortgages to help struggling homeowners. Taxed proportion-

¹¹² Jesse Hamilton, *U.S. Banks Had Second-Best Earnings Ever in 2012*, FDIC Says, BLOOMBERG (Feb. 26, 2013, 12:22 PM), <http://www.bloomberg.com/news/2013-02-26/u-s-banks-report-second-best-earnings-ever-in-2012-fdic-says.html>.

¹¹³ Danielle Douglas, *Big Banks Cutting Billions from Reserve Funds*, WASH. POST (Apr. 26, 2013), http://articles.washingtonpost.com/2013-04-26/business/38843156_1_reserves-timothy-sloan-snl-financial.

¹¹⁴ *Bailed Out Banks*, CNN MONEY, <http://money.cnn.com/news/specials/storysupplement/bankbailout/> (last visited May 20, 2014).

¹¹⁵ Stephen Grocer, *America's Top 25 Foreclosure Banks*, WALL ST. J., (Oct. 21, 2010, 2:52PM), <http://blogs.wsj.com/deals/2010/10/21/americas-top-25-foreclosure-banks/>.

¹¹⁶ *FDR's Statements on Social Security*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/fdrstmts.html> (last visited May 21, 2014) (collecting quotes and statement by President Franklin D. Roosevelt on welfare and social security).

¹¹⁷ Pub. L. 76-379 (1939). See also *Unemployment Compensation*, ALMANAC OF POL'Y ISSUES, http://www.policyalmanac.org/social_welfare/archive/unemployment_compensation.shtml (last visited Sept. 15, 2014) (overview of legislation geared toward unemployment safeguards).

¹¹⁸ COUNCIL OF ECON. ADVISERS & U.S. DEPT. OF LABOR, *THE ECONOMIC BENEFITS OF EXTENDING UNEMPLOYMENT INSURANCE* (2013), available at <http://www.whitehouse.gov/sites/default/files/docs/uireport-2013-12-4.pdf>.

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ately to their holdings, the banks would pay into a fund to pay for the cost of legal representation for homeowners who risk losing their homes to foreclosure. The tax would represent a small cost to these large banks yet have a life-changing effect on the lives of New Yorkers. The tax may also act as an incentive for banks to work with homeowners to refinance loans and settle matters quickly instead of fighting through protracted litigation to remove a family from their home.

CONCLUSION

Currently, more than 75,000 metro-area New York homeowners are on the brink of losing their home.¹¹⁹ Along with that home, they stand to lose the security, financial stability, and peace of mind that comes with that home.¹²⁰ At least half of these homeowners will face the extraordinarily complex foreclosure proceedings without the assistance of an attorney.¹²¹

This Note calls on the New York State Legislature to protect struggling homeowners and pass A4193-2013 and S1723-2013 to give homeowners the assistance of counsel when they risk losing their home. The current foreclosure prevention pilot program should be expanded to create a sustainable, statewide program so no homeowner will miss out on critical defenses, substantive rights, and procedural protections that only attorneys have the knowledge and experience to access. This life-saving program should be paid for with a small tax levy on banks. This miniscule tax will mean little to the banks, but will mean the difference between an individual remaining in their home or losing the roof over their head.

The stakes are too high for individuals to lose their homes while subjected to unfair fraudulent practices by banks, private modification scams, and other insidious behavior by mortgage lending companies. The need is real and the means in this State exist. New York should not waste another minute by putting homeowners in jeopardy of losing their homes without giving them a fighting chance. All individuals in foreclosure proceedings deserve the right to an attorney. Tax a bank. Save a home.

¹¹⁹ Catherine Curan, *Many New Yorkers Living in Foreclosure Limbo*, N.Y. POST (Mar. 1, 2014), <http://nypost.com/2014/03/01/many-nyers-living-sans-mortgage-bill/>.

¹²⁰ THOMAS P. FITZGIBBON III, *THE SOCIO-ECONOMIC BENEFIT OF HOME OWNERSHIP IN LOW AND MODERATE INCOME COMMUNITIES* 50–51 (2010).

¹²¹ PAL, *supra* note 35.

