CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

City University of New York School of Law
2 Court Square
Long Island City, New York 11101

Volume Seventeen | Summer 2014 | Number Two

CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

Volume Seventeen Summer 2014 Number Two

CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

CONTENTS

Direct communication about advertising, sponsorships, reprints, or back orders can be sent via email. Manuscripts should be double-spaced and use footnotes, not endnotes. We prefer electronic submissions, which can be sent to us either through the Berkeley Electronic Press's expresso service <http://law.bepress.com/expresso> or our email address, CUNYLR@mail.law.cuny.edu.

Volume Seventeen Summer 2014 Number Two

MOVING TOWARD A MORE PERFECT WORLD: ACHIEVING EQUAL ACCESS TO JUSTICE THROUGH A NEW DEFINITION OF JUDICIAL ACTIVISM

Fern Fisher†

Contents

Introduction

The controversial term *judicial activism*[1] is defined in many varying ways, but is consistently used to refer to a judge's approach when deciding cases. In his comment, Keenan Kmiec surveys the use of the term *judicial activism* from when it first appeared in public print to modern times.[2] While not advocating a particular definition of the term, Kmiec sets forth five definitions as they have appeared in Supreme Court cases and scholarly literature.[3] These

† Justice Fern Fisher serves as Deputy Chief Administrative Judge for New York City Courts and is also charged with state-wide responsibility for access to justice issues. Justice Fisher's career started in the Civil Court as a legal services attorney practicing in Manhattan Housing Court. Justice Fisher served as Deputy Director of Harlem Legal Services, Inc., and as an Assistant Attorney General of the New York State Department of Law. For four years, she provided pro bono legal services to Harlem-based community organizations as a project director of the National Conference of Black Lawyers. In 1989, she was appointed Judge of the Housing Part of the Civil Court, and later, in 1990, was elected to the Civil Court where she served as Deputy Supervising Judge. Justice Fisher was elected in 1993 to the Supreme Court of the State of New York, where she was assigned to the city and matrimonial parts. In December 1996, she was appointed Administrative Judge of the Civil Court of the City of New York, where she served until March 2009, when she was appointed to her current position.

1 Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 Cal. L. Rev. 1441, 1476 (2004) (referring to Ninth Circuit Judge Diarmuid O'Scannlain's definition of *judicial activism*).

2 *Id.* at 1441.

3 *Id.* at 1444.

five definitions of judicial activism, broadly stated, are: striking down of arguably constitutional actions of other branches (striking down clearly unconstitutional actions is merely judicial review);[4] ignoring controlling-vertical precedent or ignoring controlling-horizontal precedent in certain instances;[5] judicial legislating;[6] departing from accepted canons of interpretation when rendering decisions;[7] and engaging in result-oriented judging, meaning that the judge has an ulterior motive for making the ruling and the decision departs from the baseline of correctness.[8]

The term *judicial activism* once enjoyed a "positive connotation, much more akin to 'civil rights activist' than a 'judge misusing authority.'"[9] "The label of 'judicial activist' . . . reflect[ed] a belief that one ought to aggressively employ judicial review to safeguard the rights upon which democracy is predicated."[10] Arthur Schlesinger Jr., who introduced the term in early 1947,[11] characterized judicial activism as stating firmly that it could not "rely on an increasingly conservative electorate to protect the underdog or to safeguard human rights."[12] Courts had to intervene.[13] Over the years, debates on the goods and evils of judicial activism have continued.[14]

Notably absent from the debate on judicial activism is discussion of the judge's role off the bench. Decision-making is the largest part of judges' contributions to the justice system. However, the judges' roles also include stewardship over the improvement of laws, the legal system, and the administration of justice.[15] These

---

4 *Id.* at 1463–66.

5 *Id.* at 1466–71.

6 *Id.* at 1471 ("Judges are labeled judicial activists when they legislate from the bench.") (quotation omitted); *id.* at 1471–73. Judicial legislation refers to court rulings that go beyond interpreting, declaring, or enforcing the law into the realm of creating or correcting "supposed errors, omissions or defects in legislation." *See* N.Y. STAT. § 73 cmt. (2014).

7 Kmiec, *supra* note 1, at 1473–75.

8 *Id.* at 1475–76.

9 *Id.* at 1451.

10 *Id.*

11 *Id.* at 1446.

12 Kmiec, *supra* note 1, at 1448–49.

13 *Id.* Kmiec, *supra* note 1, at 1449.

14 Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709 (2009) (advocating the position that instead of focusing on the courts' results by debating the term "judicial activism," attention should be placed on whether the courts are adhering to "judicial responsibilities").

15 *See Code of Conduct for United States Judges*, ADMIN. OFFICE OF U.S. COURTS, http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx (last visited Feb. 25, 2014) (noting that the Code of Conduct encourages judges to "engage in activities to

aspects of the judicial role have become more important in the current economic climate. The recent economic crisis has flooded state courts with family, consumer, foreclosure, and housing cases.[16] Significantly, more individuals appear in these types of cases without an attorney. Millions of individuals with life-affecting cases handle their cases without any knowledge of substantive or procedural law.[17] The number of self-represented litigants has been described as the biggest challenge facing state court systems.[18] From this challenge, a new form of judicial activism has grown. Judges have stepped forward to ensure that their courts are responsive to unrepresented litigants' needs. This Article discusses the various ways judges have redefined what they can do to improve laws, the legal system, and the administration of justice. This discussion further urges the judiciary to embrace this new definition of judicial activism in order to ensure a more perfect world of equal justice for all.

I. Access to Justice Commissions

Twenty-nine states and the District of Columbia have access to

improve the law, the legal system, and the administration of justice"); N.Y. Jud. Law app. Code of Jud. Conduct pmbl. (2012) (preamble for the *Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts*, providing the purpose of the New York Code of Conduct for judges); *Code of Judicial Conduct*, N.J. Judiciary, http://www.judiciary.state.nj.us/rules/appendices/app1_jud.htm (last visited Feb. 25, 2014) (listing the canons of the New Jersey Code of Judicial Conduct).

16 *See* Michael D. Greenberg & Geoffrey McGovern, An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes? 13–14 (2012), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2012/RAND_OP353.pdf (stating that despite the limits posed on current data, available data suggests "for state civil litigation generally, and for federal bankruptcy and state foreclosure cases in particular, courts across the nation are seeking marked increases in the volume of claims and their workload").

17 Office of the Deputy Chief Admin. Judge for Justice Initiatives, Self-Represented Litigants in the New York City Family Court and New York City Housing Court 1 (2005), *available at* www.nycourts.gov/reports/AJJI_SelfRep06.pdf (noting data from informal surveys of court managers revealing that most litigants appear without a lawyer for critical types of cases—as high as 75% and 90% of litigants in family court and housing court, respectively); Memorandum from Madelynn Herman on Self-Representation Pro Se Statistics to the Nat'l Ctr. for State Courts (Sept. 25, 2006), http://web.archive.org/web/20120504035215/http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm (last modified May 8, 2009) (providing statistics on the number of pro se litigants in various states).

18 Chief Justice John T. Broderick, Jr., Remarks to the National Association of Court Management: The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management 4 (Mar. 10, 2009), *available at* http://www.courts.state.nh.us/press/2009/CJ-Brodericks-March-10-2009-speech-to-NACM.pdf (addressing the challenges that must be faced in order to ensure "accessible, affordable and understandable justice in state courts across the country").

justice commissions as defined by the American Bar Association (ABA).[19] These commissions have the core responsibility of expanding civil justice to low-income populations.[20] Significantly, the body must be charged by or recognized by a state's highest court to be accepted as a commission.[21] Judges head or co-head sixteen of these commissions.[22] The ABA has determined that the most successful commissions have the active participation of the highest court in the state.[23] These commissions have produced reports establishing the need for more civil justice.[24] Judges increasingly see serving on these commissions as a new fundamental responsibility of their public office and necessary to ensure justice.[25] Commis-

---

19 *Resource Center for Access to Justice Initiatives*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html (last visited Feb. 5, 2014) (as of February 2014 the twenty-nine states include, Alabama, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

20 AM. BAR ASS'N, ABA RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, DEFINITION OF ACCESS TO JUSTICE COMMISSION (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf (noting moderate-income populations can be considered for access to civil justice, but low-income populations must be included in the Commission's mission).

21 *Id.*

22 *See* AM. BAR ASS'N, ABA RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, STATE ACCESS TO JUSTICE COMMISSIONS: CREATION, COMPOSITION, AND FURTHER DETAILS (Chart) (last updated Mar. 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_commissions_table.authcheckdam.pdf (listing a table of all state access to justice commissions with data such as when the commissions were created, the number of members in each commission, the names of chairpersons, and how often the commissions release reports).

23 DEFINITION OF ACCESS TO JUSTICE COMMISSION, *supra* note 20.

24 *See, e.g.*, THE ALA. ACCESS TO JUSTICE COMM'N, THE LEGAL NEEDS OF LOW INCOME ALABAMIANS: A NEEDS ASSESSMENT & ANALYSIS (n.d.), *available at* http://alabamaatj.org/wp-content/uploads/2013/08/Access-to-Justice-Needs-Final.pdf; COLO. ACCESS TO JUSTICE COMM'N, THE JUSTICE CRISIS IN COLORADO: A REPORT ON THE CIVIL LEGAL NEEDS OF THE INDIGENT IN COLORADO (2008), *available at* http://www.cobar.org/repository/Access%20to%20Justice/08ATJReport.pdf; THE D.C. ACCESS TO JUSTICE COMM'N & THE D.C. CONSORTIUM OF LEGAL SERV. PROVIDERS, RATIONING JUSTICE: THE EFFECT OF THE RECESSION ON ACCESS TO JUSTICE IN THE DISTRICT OF COLUMBIA (2009), *available at* http://www.dcaccesstojustice.org/files/Rationing_Justice_Report_final_PDF_.pdf; HAW. ACCESS TO JUSTICE COMM'N, ANNUAL REPORT FOR 2012 (2012), *available at* http://25shu2g61cw30sjn46t4k87by.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/ATJC-Annual-Report-for-2012-5-8-13.pdf.

25 *See* Jess Dickinson, Presiding Justice of the Mississippi Supreme Court, Opening Keynote Address at the Arkansas Access to Justice Commission Conference (May 29, 2012), *available at* http://ualr.edu/socialchange/2012/06/15/supreme-court-of-mississippi-justice-jess-dickinsons-opening-keynote-address-to-the-arkansas-access-to-justice-commission-2/ (highlighting the issue of a lack of equal justice in U.S. courts

sions, some of which are driven by judges, have proposed various reforms to the justice system.[26] Many of the commissions' proposals, however, have run counter to the traditions that have been the bedrock of the legal profession.[27]

For example, a number of commissions have proposed the use of unbundled legal services[28] as a means to increase access to justice.[29] On the other hand, the New York State Bar Association has resisted the use of unbundled legal services, recommending that lawyers provide clients with full representation.[30] Commissions have also urged the use of non-lawyers to bridge the justice gap.[31]

---

for indigent people and how judges have a lot more work to do in addressing this issue).

26 *See* TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 8–9 (Nov. 29, 2013) [hereinafter TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES 2013 REPORT], *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf (listing a number of the Task Force's recommendations to help bridge the justice gap in New York including proposing a revision to the Code of Judicial Conduct regarding judges' roles when faced with unrepresented litigants, implementing a process to develop more easily understandable uniform forms for statewide use in various matters—such as in landlord-tenant, consumer debt, foreclosure, and child support cases—and enhancing training for town and village court justices when deciding summary proceedings).

27 For example, even though courts have long recognized the importance of legal assistance, they "have largely failed to extend guarantees of legal assistance to civil contexts, even where crucial interests are at issue." Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 375 (2004). However, some commissions are considering whether to implement a civil right to counsel at public expense. *See, e.g.*, S.B. 262, 433rd Gen. Assemb. (Md. 2013) (creating a Task Force to study implementing a civil right to counsel in Maryland).

28 *Unbundled legal services* is where a "lawyer and client agree that the lawyer will provide some, but not all, of the work involved in traditional full service representation. Simply put, the lawyers perform only the agreed upon tasks, rather than the whole 'bundle,' and the clients perform the remaining tasks on their own." *Definitions*, N.Y. STATE UNIFIED COURT SYST., http://www.nycourts.gov/courts/nyc/civil/definitions.shtml#u (last visited Feb. 12, 2014).

29 *See, e.g.*, MELANIE B. ABBOTT ET AL., REPORT TO THE CONNECTICUT JUDICIAL BRANCH ACCESS TO JUSTICE COMMISSION 11 (2013), *available at* http://ncforaj.files.wordpress.com/2013/03/report-2-15-13-to-the-access-to-justice-commission-2-15-13.pdf (reporting the use of limited-scope representation or unbundled legal services to serve unmet civil legal service needs as a method to address the challenges created by the increase in self-represented litigants); HAW. ACCESS TO JUSTICE COMM'N, *supra* note 24, at 8 (recommending unbundled legal services to meet currently unmet legal needs).

30 N.Y. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS ON "UNBUNDLED" LEGAL SERVICES (2002), *available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id=26674 (recommending that limited representation should not, as a general matter, be permitted).

31 *See, e.g.*, HAW. ACCESS TO JUSTICE COMM'N, *supra* note 24, at 5 (describing the goals of the Hawaii Commission's Committee on Initiatives to Enhance Civil Justice to "make recommendations concerning ways in which paralegals and other non-lawyers

In New York State, the Access to Justice Task Force,[32] which has judicial members, proposed the use of non-lawyers.[33] The Chief Judge of New York, Jonathan Lippman, formed a committee to study the issue in response to the proposal.[34] On February 11, 2014, Judge Lippman announced in his State of the Judiciary address the use of trained non-lawyers—which he called court "Navigators"—to assist unrepresented litigants in court.[35] These Navigators are empowered to assist in a number of ways, but their most significant role is to accompany litigants in the courtroom and answer factual questions posed by the judge.[36]

Judges on commissions have also been influential in addressing social problems facing courts. Judge Jon Levy of the Maine Supreme Court, who co-chaired the Maine commission called the Justice Action Group, was pivotal in addressing the issue of cultural competency in Maine.[37] Maine's expanding new immigrant popu-

---

may assist in meeting specified unmet civil legal needs"); N.H. ACCESS TO JUSTICE COMM'N, THE JUSTICE GAP: A STUDY OF THE LEGAL NEEDS OF NEW HAMPSHIRE'S LOW-INCOME RESIDENTS 40–41 (2013), *available at* http://www.courts.state.nh.us/access/2013_report/LEGAL_NEEDS_STUDY.pdf (finding that educating workers at Community Action Programs on the availability of legal services would "help ease a potential barrier to those with legal needs"); MASS. ACCESS TO JUSTICE COMM'N SPECIAL PLANNING COMMITTEE, SECOND INTERIM REPORT OF THE SPECIAL PLANNING COMMITTEE 24 (2011), *available at* http://www.massaccesstojustice.org/reports-of-the-commission.php (follow hyperlink "The Second Interim Report is the revised version and can be downloaded here") (recommending development of programs for the utilization of lay advocates).

32 *See generally Task Force to Expand Access to Civil Legal Services in NY*, N.Y. STATE UNIFIED COURT SYST., http://www.nycourts.gov/ip/access-civil-legal-services/index.shtml (last visited Feb. 12, 2014) (listing the two main aspects of the Task Force's mission).

33 TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 12 (2012), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf (recommending the use of non-lawyers to "bridge the access-to-justice gap").

34 Press Release, N.Y. State Unified Court Sys., Chief Judge Names Members of Committee Charged with Examining How Non-Lawyer Advocates Can Help Narrow New York's Justice Gap (May 28, 2013), *available at* http://www.nycourts.gov/press/PDFs/PR13_07.pdf (announcing non-lawyer initiative for to meet needs for civil legal services, including training and qualification of non-lawyer advocates).

35 Jonathan Lippman, Chief Judge of the State of New York, The State of the Judiciary 2014: Vision and Action in Our Modern Courts 8 (Feb. 11, 2014) [hereinafter Lippman, The State of Judiciary 2014], *available at* http://www.nycourts.gov/whatsnew/pdf/2014-SOJ.pdf (declaring that the committee examining the use of non-lawyers to bridge the access to justice gap has developed incubator projects by having the trained and supervised non-lawyers provide pro bono assistance in various New York courts to test this approach).

36 *Id.*

37 Telephone Interview with Caroline Wilshusen, Executive Coordinator, Maine Justice Action Group (Feb. 3, 2014) (on file with author).

lation has presented numerous issues in ensuring access to justice in its courts.[38] As a result, in 2012, a seminar was devoted to the issue.[39]

Judicial participation and leadership on access to justice commissions has been an indirect way of asserting judicial activism via influencing action through the collective voice of a body representative of the entire legal community. Access to justice commissions have been influential in recommending and achieving change.[40] The gravitas of judicial participation has been part of the power in achieving change. Despite the achievements of these commissions and a resolution[41] from the Conference of Chief Justices,[42]—a body of all the chief judges of state courts—calling for all states to

---

38 *See* JUSTICE ACTION GROUP SUBCOMM. ON ACCESS TO THE COURTS, A REPORT TO THE JUSTICE ACTION GROUP ON ACCESS TO MAINE COURTS FOR INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY ii (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/melepfinalreport1_6_05.authcheckdam.pdf (reporting that Maine's immigrant population has presented the court system with issues in language access and due process); *see also* Rachel Reyes, *The Hard Work of Ensuring Access to Justice for Immigrants*, CTR. FOR MIGRATION STUDIES (Jan. 26, 2012), http://cmsny.org/the-hard-work-of-ensuring-access-to-justice-for-immigrants/ (reporting that Maine's immigrant population is one of two of Maine's largest growing populations and highlighting the problems with access to legal representation in the U.S. for low-income immigrants given the shortage of affordable civil legal service attorneys).

39 Judy Harrison, *Cultural Differences as Important as Language When Serving Immigrants in Court, Lawyers Told*, BANGOR DAILY NEWS (Jan. 26, 2012), http://bangordailynews.com/2012/01/26/news/court/cultural-differences-as-important-as-language-when-serving-immigrants-in-court-lawyers-told/ (discussing the cultural competency difficulties that are faced by immigrants who utilize Maine's court system).

40 Karla M. Gray & Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions*, JUDGES' J., Vol. 47, No. 3, at 33 (2008) (general information on the increasing number of access to justice commissions initiated by the states' highest judiciaries and the positive impacts that result for pro se litigants who seek civil legal services); *see also* Meredith McBurney, *ATJ Commissions and Resource Development*, *in* MGMT. INFO. EXCHANGE (2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/resource_development_mie_2008.pdf (describing the work of various Access to Justice Commissions throughout the country in increasing resources for indigent clients with civil legal service matters).

41 Conference of Chief Justices, Conference of State Court Administrators, Resolution 13: Reaffirming Commitment to Access to Justice Leadership and Expressing Appreciation for Access to Justice Progress and Collaboration (July 31, 2013), *available at* http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/07312013-Reaffirming-Commitment-Justice-Leadership-Expressing-ATJ-Collaboration-CCJ-COSCA (committing to "tak[ing] steps to ensure that no citizen is denied access to the justice system by reason of lack of resources, or any other such barrier").

42 *See generally* CONFERENCE OF CHIEF JUSTICES, http://ccj.ncsc.org/ (last visited Feb. 25, 2014) (online hub for states' highest judicial officers to discuss and propose improvements or recommendations for issues relating to state courts and the judicial system).

form an access to justice commission, twenty-one states do not have commissions.[43]

II. Judge-Headed Access to Justice Programs

Both Massachusetts and New York, in addition to commissions, also have judge-led programs that handle access to justice issues.[44] Judge Dina E. Fein in Massachusetts has recently accomplished the following initiatives: finalized a language access plan; translated small-claims forms into seven languages; produced self-help videos for small claims litigants, dubbed into seven languages; created a new court-system wide website with robust self-help content; piloted two court service centers; and developed court-wide training materials for Limited Assistance Representation (LAR) lawyers.[45] The New York State Access to Justice Program, which I head, has had many achievements, including: the development of twenty-four Do It Yourself (DIY) interactive computer programs for unrepresented litigants and advocates to use to fill out court forms and obtain legal information; the establishment and supervision of unbundled volunteer attorney programs, programs assisting senior citizens, physically or mentally disabled litigants, and persons at risk of homelessness; and the creation of an extensive community outreach program to underserved communities.[46] The power of judicial activism is reflected in the initiatives and results that the judge-led programs in Massachusetts and New York have

---

43 *See Resource Center for Access to Justice Initiatives*, *supra* note 19 (listing existing state access to justice commissions).

44 *See* Press Release, Mass. Court Sys., Special Advisor for Access to Justice Initiatives Appointed (June 8, 2009), http://www.mass.gov/courts/press/pr060809.html (stating Judge Dina Fein was appointed as the first Special Advisor for Access to Justice Initiatives by the Chief Judge in 2009); Juanita Bing Newton, First Annual Report of the Deputy Chief Administrative Judge for Justice Initiatives (2000), *available at* http://www.nlada.org/DMS/Documents/1001012090.19/DCAJJI2000Rep.pdf (findings by the head of the state's new access to justice program, created in 1999); Press Release, N.Y. State Unified Court Syst., Chief Judge Lippman Announces Restructuring of Judicial Administrative Leadership in New York State Courts (Mar. 11, 2009), http://www.nlada.org/DMS/Documents/1241037636.27/NY%20State%20Court%20Reorganization.pdf (announcing Judge Fern Fisher's new role as the head of the New York State Access to Justice Program).

45 Email from Judge Dina E. Fein, Special Advisor for Access to Justice Initiatives to Judge Fern A. Fisher, Dir. of N.Y. State Access to Justice Program (Jan. 29, 2014, 1:36 CST) (on file with author).

46 N.Y. State Courts Access to Justice Program, Report to the Chief Judge and the Chief Administrative Judge of the State of New York 3–5, 19–21, 35–43 (2013), *available at* https://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2013report.pdf (outlining the Access to Justice Program's various efforts to deliver legal services to unrepresented litigants and communities).

achieved.[47]

III. Rallying Resources for Access to Justice

Ethical rules permit judges to engage in advocating for resources for civil legal services and recruiting pro bono lawyers.[48] Judges across the country have defined judicial responsibility as including a commitment to finding ways to close the justice gap.[49] One of the civil legal services movement's top priorities is to increase funding. In 2012, the Conference of Chief Justices added its weighty voice to the issue by adopting a resolution to restore funding to the Legal Services Corporation.[50]

Chief Judge Jonathan Lippman has set the bar high on judicial activism with his successful advocacy for the inclusion of funding for civil legal services in the New York courts budget. In the year 2011, the New York State Legislature gave $27.5 million to the New York courts for civil legal services for the first time.[51] Chief

---

47 Task Force to Expand Access to Civil Legal Services 2013 Report, *supra* note 26, at 6 ("The number of low-income New Yorkers served through the Judiciary Civil Legal Services program across New York State increased from 125,169 in 2011–2012 to 267,965 in 2012–2013."); *see generally* Mass. Access to Justice Comm'n, Report on 2012: Objectives and Accomplishments 1–2 (2012), *available at* http://www.massaccesstojustice.org/ (follow hyperlink "Report on Activities in 2012") (setting forth several accomplishments of the commission in 2012, including collecting "[m]ore than $1.1 million in Access to Justice Fees . . . during annual attorney registration and turn[ing it] over to the IOLTA [Interest on Lawyers' Trust Accounts] Committee for support of civil legal services to the poor" and creating "an Access to Justice Fellows program, with senior lawyers providing pro bono services on major projects in collaboration with public interest organizations)".

48 *See, e.g.*, Md. Judicial Ethics Comm., Published Op. 2010–14 (2010), *available at* http://www.courts.state.md.us/ethics/pdfs/2010-14.pdf (noting that "judges are permitted to approach law firms and propose that the firms underwrite the compensation of a full-time pro bono attorney to provide advocacy to victims of domestic violence").

49 *See, e.g.*, Annette J. Scieszinski, *A Matter of Trust: A Judge's Fiduciary Responsibility*, Judges' J., Vol. 49, No. 4, at 19–20 (2010) ("Access to justice is a judicial responsibility. Reasonable and impartial accommodations in a courtroom, such as language interpretation—while often delegated to the lawyers or court staff to arrange—are ultimately the duty of the judicial officer in charge.").

50 Conference of Chief Justices, Conference of State Court Administrators, Resolution 1: In Support of Continued Federal Funding for the Legal Services Corporation (July 25, 2012), *available at* http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/07252012-In-Support-of-Continued-Federal-Funding-for-the-Legal-Services-Corporation (reaffirming the importance of legal services by resolving to restore $404 million in funding for the Legal Services Corporation in Fiscal Year 2013); *see generally Fact Sheet on the Legal Services Corporation*, Legal Services Corp., http://www.lsc.gov/about/what-is-lsc (last visited Apr. 26, 2014) (stating the Legal Services Corporation is the "largest funder of civil legal aid for low-income Americans in the nation").

51 *See* Jonathan Lippman, *Accessing Justice in a Time of Reduced Court Resources*, *in*

Judge Jonathan Lippman's one-man campaign for the increase in funding emanated from his view that there is a moral imperative for society to ensure equal access to justice.[52]

In Massachusetts, Chief Justice Roderick L. Ireland of the Supreme Judicial Court joined "hundreds of private attorneys from more than 50 law firms at the Massachusetts State House on Jan[unary] 30[, 2014] . . . [to] ask for increased state funding for programs that provide civil legal aid to low-income Massachusetts residents."[53] In 2009, Chief Justice Wallace B. Jefferson of the Supreme Court of Texas lobbied for and secured $20 million for IOLTA funding.[54] In 2011, the Chief Justice reported in an interview that the "[Texas] Legislature appropriated almost $18 million for basic civil legal services in the last legislative session."[55]

The second most coveted resource by the civil legal services community is more pro bono lawyers. Many state court systems encourage judges to recruit pro bono attorneys through literature or rules.[56] Federal courts have similarly made efforts to increase the

---

ARTHUR LIMAN PROGRAM: 15TH ANNIVERSARY ISSUE 8 (2012), *available at* http://www.law.yale.edu/documents/pdf/Liman/Liman_NL_2012_final.pdf (explaining that the approved funding was "just the tip of the iceberg given the need, but yet the most state funding for civil legal services in the country"). The $27.5 million consisted of $12.5 million for civil legal services and $15 million for the Interest on Lawyer Trust Account (IOLTA). *Id.* The IOLTA account is a "mainstay in funding civil legal services for the poor." Terry Carter, *No Longer Flush: IOLTA Programs Find New Funding to Support Legal Services*, A.B.A. J., March 2013, at 61 (explaining that when the Federal Reserve lowered the interest rate to "virtually zero," this major source of legal services funding was lost).

52 Jonathan Lippman, Symposium, *New York's Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL'Y REV. 13, 19 (2013) ("Access to justice is not a luxury, affordable only in good times. To the contrary, it is a bedrock value of a society based on the rule of law. For the judiciary and for the legal profession, equal justice for all is our very reason for being.").

53 Press Release, Chief Justice Ireland, Bar Association Leaders to Speak at 15th Annual Walk to the Hill (Jan. 22, 2014), *available at* http://www.prweb.com/releases/2014/01/prweb11508611.htm.

54 Carter, *supra* note 51 at 61.

55 *Texas Judiciary Meets Dynamic State Challenges*, METROP. CORP. COUNSEL (Sept. 1, 2011), *available at* http://www.metrocorpcounsel.com/articles/15323/texas-judiciary-meets-dynamic-state-challenges (interview with the chief justice where he recounts efforts for "emergency relief to provide funding for legal aid").

56 *See Recruiting Volunteer Attorneys*, MO. JUDICIARY, http://www.courts.mo.gov/page.jsp?id=40234 (last visited Feb. 19, 2014) (providing examples as to how Missouri judges can recruit pro bono attorneys); COMM. ON THE ROLE OF JUDGES IN PRO BONO ACTIVITY, REPORT OF THE COMMITTEE ON THE ROLE OF JUDGES IN PRO BONO ACTIVITY (1994), *available at* http://www2.mnbar.org/committees/lad/role-judges.pdf (recommending each judicial district "adopt a comprehensive policy that encourages judges to be involved in recruiting and training pro bono attorneys, and educating attorneys and the public regarding the need for pro bono services"); MD. JUDICIAL COMM'N ON PRO BONO, THE MARYLAND JUDICIAL COMMISSION ON PRO BONO REPORT AND RECOM-

number of pro bono attorneys.[57] Frontline judges have passionately engaged in recruiting pro bono lawyers. United States District Judge Jay C. Zainey from New Orleans "has spent his professional and personal life aspiring to the ideal 'We are responsible to each other,'"[58] and in 2004 founded the H.E.L.P. Program (Homeless

---

MENDATIONS 27–28 (2000), *available at* http://www.courts.state.md.us/probono/pdfs/probono.pdf (reporting that the Maryland Judicial Ethics Committee not only found it ethical to solicit attorneys for "pro bono assistance to indigent parties in child custody cases," but also further opined that circuit court judges may advertise in local bar newspapers and appear at group meetings of the bar to solicit pro bono volunteer lawyers); *A Few Key Things that Judicial Officers Can Do to Encourage Attorneys to Provide Pro Bono Services*, JUDICIAL BRANCH OF CAL., http://www.courts.ca.gov/partners/56.htm#california (follow hyperlink "A Few Key Things Judges Can Do to Encourage Pro Bono" under the "Pro Bono Toolkit" tab) (providing tips to judicial officers on ways to encourage attorneys to engage in pro bono work); Ind. Pro Bono Comm'n, *Judicial Appointee Resource Guide*, Exhibit A, *available at* http://www.nlada.org/DMS/Documents/1316110339.0/judicial%20appointee%20resource%20guide.docx (stating the purpose of Rule 6.6 of the Rules of Professional Conduct, which is to "promote equal access to justice for all Indiana residents, regardless of economic status, by creating and promoting opportunities for attorneys to provide pro bono civil legal services to persons of limited means"); *Pro Bono/Legal Assistance*, ELEVENTH JUDICIAL CIRCUIT OF FLA., http://www.jud11.flcourts.org/SCSingle.aspx?pid=212 (last visited Mar. 12, 2014) (stating that the Put Something Back Pro Bono Project has recruited over 7,000 attorneys to provide free legal assistance and is also the "largest and most comprehensive pro bono project in Florida").

57 *See* Memorandum from David L. Neal, Chief Immigration Judge, to All Immigration Judges et al. 2 (Mar. 10, 2008), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm08/08-01.pdf (demonstrating that immigration courts encourage the recruitment of pro bono attorneys); *Federal Pro Bono Project*, U.S. DIST. COURT N. DIST. OF CAL., http://www.cand.uscourts.gov/probono (last visited Feb. 26, 2014) (stating that the Northern District of California U.S. District Court will reimburse costs of participating attorneys in the Federal Pro Bono Project for up to $15,000 and "[p]ro bono counsel may recover attorney's fees awarded to the plaintiff as the prevailing party or as part of a negotiated settlement of the case"). In some states, hours spent representing indigent clients in federal court counts toward state incentive programs. *See, e.g.*, *Pro Bono Service Opportunities*, U.S. DIST. COURT DIST. OF OR., http://www.ord.uscourts.gov/index.php/attorneys/pro-bono-panel (last visited Feb. 26, 2014) ("Hours spent representing individuals in Federal Court in Oregon now count toward Pro Bono Challenge, Honor Roll, and other [Oregon State Bar (OSB)] OSB-sponsored programs."); *Pro Bono CLE*, U.S. DIST. COURT S. DIST. OF N.Y., http://www.nysd.uscourts.gov/pro_bono_cle.php (last visited Feb. 26, 2014) (attorneys may receive Continuing Legal Education (CLE) credit from the New York State CLE Board for hours spent providing pro bono services); *see also U.S. District Judge Jay C. Zainey*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/publications/young_lawyer/jayzainey.authcheckdam.pdf (last visited Apr. 2, 2014) (stating Judge Zainey is the cofounder of SOLACE, a Louisiana State Bar Association Program, which has about 7,500 volunteer attorneys who participate in the program to provide services to the bar association and the entire legal community).

58 *See* States News Service, *American Bar Association Honors Jay Zainey with 2011 Pro Bono Publico Award for Outstanding Service* (June 27, 2011), *available at* http://go.galegroup.com/ps/i.do?id=GALE%7CA259996197&v=2.1&u=cuny_lawschool&it=r&p=AONE&sw=w&asid=51fc99010f60ae45c21b5229e6aa5a1f; *see also* Jamie Hochman-Herz, *2011 ABA Pro Bono Publico Award Recipients*, DIALOGUE, Vol. 15, No. 2 (2011),

Experience Legal Protection Program).[59] Through "a local shelter, H.E.L.P. establishes a regularly scheduled clinic to offer free legal services to homeless individuals, provided by volunteer attorneys from [around New Orleans]."[60] With Judge Zainey's personal involvement and literal footwork—traveling to other cities to promote the program and recruiting volunteers—H.E.L.P. has expanded to nineteen additional cities, and "over 450 attorneys" have participated in the program across the country.[61] Judge Robert Katzman, the Chief Judge of the U.S. Court of Appeals for the Second Circuit, took the initiative to address another area of great need—"the shortage of competent legal representation for immigrants, particularly those of modest means facing deportation."[62] "[D]eeply concerned about the quality and availability of representation for immigrants, he sounded a clarion call and started a study group . . . [which found that m]ost detained immigrants in the New York region did not have counsel at the time that their cases were completed."[63] Chief Judge Katzman's efforts "spawned an initiative, the New York Immigrant Family Unity Project, which seeks to provide legal representation for every poor immigrant facing deportation."[64] Determined to make greater strides and reach more numbers of immigrants, Chief Judge Katzman continued his advocacy and stayed the challenging course for many years, inspiring the founding of another group, the Immigrant Justice Corps (IJC).[65]

First of its kind, the IJC "recruits [as fellows] talented lawyers and college graduates . . . and partners them with New York City's

---

available at http://www.americanbar.org/content/newsletter/publications/dialogue_home/dialogue_archive/ls_dial_fa11_probono3.html (highlighting how each of the 2011 ABA Pro Bono Publico Award recipients became involved in pro bono work and the contributions each recipient made to serve low-income populations throughout his or her career).

59 *See generally Home*, PROJECT H.E.L.P., http://homelesslegalprotection.com/ (last visited Apr. 2, 2014) (program composed of local attorneys, law students, and law firm secretaries and paralegal in a number of cities providing pro bono legal assistance to homeless individuals at local shelters and other social service organizations).

60 Hochman-Herz, *supra* note 58.

61 *Id.*

62 Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. TIMES (Jan. 28, 2014), http://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html?_r=0 (discussing the new program designed to address the shortage of competent legal representation for immigrants by recruiting twenty-five recent law graduates each year to work in various community-based organizations).

63 *Id.*

64 *Id.*

65 *See id.*

leading non-profit legal service providers and community-based organizations to offer a broad range of immigration assistance."[66] In 2014, the IJC plans to award forty fellowships to high achievers, who will assist immigrants and their families with "a broad range of immigration assistance including naturalization [and] deportation defense."[67] The fellows will also help with "affirmative applications for asylum seekers, juveniles, and victims of crime, domestic violence or human trafficking."[68]

Judge Ann Lazurus of the Superior Court of Pennsylvania has also been publicly active in endorsing volunteer programs for lawyers to help communities in need and has advocated for more judge involvement. Judge Lazurus recognizes that it is "incumbent upon the judiciary to continually strive . . . towards achieving the promise of 'equal justice under the law.'"[69] She urges courts to, among other things, encourage judges to recruit attorneys to perform pro bono services, increase resources for self-represented litigants, and loosen restrictions on attorneys to allow for unbundled legal services.[70]

Over the past five years in New York State, my staff and I have recruited 3,000 volunteer lawyers to serve in court-based volunteer lawyers.[71]

IV. Delivering Legal Services

The concept of a court providing legal services to court users is novel. Despite the imprimatur of the Conference of Chief Justices, few judges have involved themselves directly with the delivery of legal services. New York State has operated court-based and court-operated volunteer attorney programs since 1997 and has the most robust involvement in delivering legal services to court users in the country. I started the first program when I was unable to get any bar association in New York City to start a pro bono program in housing court. Without any other alternative to address the needs

66 *See id.*; *see also Our Story*, Immigrant Justice Corps, http://justicecorps.org/our-story/ (last visited Apr. 15, 2014).

67 *See* Immigrant Justice Corps, *supra* note 66.

68 *Id.*

69 Ann Lazarus, *Pro Bono: A Case for Judicial Intervention, Or How the Judiciary Can Bridge the Justice Gap in America*, 80 Penn B. Ass'n. Q. 47, 58 (2009), http://apps.americanbar.org/legalservices/probono/judicial/downloads/probono_a_case.pdf (arguing for an increased judicial role in the recruitment of pro bono attorneys).

70 *Id.* at 50–51, 54–56.

71 New York State Courts Access to Justice Program statistics from 2009 to 2014 (on file with the author). It should be noted that the volunteer programs commenced in 1997. Many more were trained from 1997 to 2009.

of the flood of unrepresented litigants in the courthouse, the New York court system filled the void by developing volunteer programs. All of the programs are unbundled programs and provide either divorce form preparation, advice in the Help Centers, or limited-scope representation in courtrooms.[72] The court recruits, trains, and supervises volunteer attorneys.[73] From 2009 to the present, the New York State Access to Justice Program has trained 3,000 attorneys[74] and thousands of litigants have received assistance.[75] In 2005, the court launched the Consumer Debt Volunteer Lawyer for the Day Program,[76] which provides limited-scope representation in settlements of consumer debt cases. As of 2012, the program had represented over 10,000 defendants in consumer debt cases.[77]

One of the key attributes of the New York State volunteer programs is that the lawyers who volunteer receive indemnification defense should there be a claim of malpractice by a litigant.[78] New York State Attorney General Opinion, No. 2000-F1, dated February 3, 2000, clarified that the indemnification defense under the New York Public Officer's Law § 17 is available for any volunteer whom the court trains and supervises.[79] Generally, participants in state-sponsored volunteer programs are considered "state employees" where the state provides them training and supervision during their volunteer service.[80]

The advice-only programs[81] and the Uncontested Divorce Pro-

---

72 N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 3.

73 *Id.* at 1.

74 *See supra* note 71.

75 N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 4–5, 10, 12, 16, 24, 49.

76 *Id.* at 10 ("Begun as a pilot program in 2009, the [Volunteer Lawyer for the Day] VLFD – Consumer Debt Program has expanded to include almost all daily programs in New York, Kings, Queens and Bronx counties that help thousands of . . . New York City residents who have been sued in debt collection cases . . . and face major substantive and procedural obstacles to the fair adjudication of their cases.").

77 *Id.* at 11.

78 *Id.* at 3.

79 Eligibility of Volunteer Lawyers to Receive Defense and Indemnification by the State, Op. Att'y Gen. No. 2000-F1 (2000), *available at* http://www.ag.ny.gov/sites/default/files/opinion/2000-F1%20pw.pdf.

80 *Id.*

81 N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 4–5 ("The Access to Justice Program oversees several unbundled volunteer lawyer programs that provide legal assistance to unrepresented litigants in the New York City Civil, Family and Housing Courts. The access to Justice Program recruits, trains and placed admitted attorneys, law graduates, and law student volunteers in Court Help Centers where they assist unrepresented litigants with pending court cases.").

gram[82] provide services to any unrepresented person who needs assistance.[83] The issue of an attorney's conflict of interest with a client while volunteering in limited pro bono legal services programs is addressed by Rule 6.5 of the New York State Rules of Professional Conduct.[84] When a litigant goes into a courtroom unrepresented, a judge will often need to be more engaged than he or she would typically be if both parties were represented by counsel; for example, by asking additional questions or more fully explaining the law, thereby creating the appearance that the court is not neutral.[85] Even though this perception is flawed,[86] the courtroom representation model nevertheless addresses these concerns by taking the pressure off of the court to be more engaged with unrepresented litigants.[87] The Volunteer Lawyer for the Day Program[88] operates in consumer debt and housing cases only.[89] In

---

82 *Id.* at 12 ("The Access to Justice Program's Uncontested Divorce Program helps unrepresented litigants with the preparation of uncontested divorce forms at clinics in the Supreme Courts of New York, Queens, Kings, Bronx and Westchester Counties. . . . The Program helps ensure that the divorce process is simply explained and the documents that litigants submit are complete and accurately prepared. The Program recruits, trains and supervises volunteer attorneys to assist unrepresented litigants.").

83 *Id.* at 3–5, 12–13 (Access to Justice volunteer-based programs, such as the advice-only programs and the Uncontested Divorce Program, do not income screen; the only requirement is that the unrepresented litigant has a case in the New York State Courts.).

84 N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 Rule 6.5 (2013) (attorney representing a client pro bono shall comply with conflict of interest rules if the attorney actually knows of a conflict at the commencement of representation).

85 *See* Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. L. LEGAL ETHICS 423, 427–28 (2004) (The public perception of a judge is "characterized by a responsive and reactive attitude, in which the judge does no more or less than acts as an umpire, responding only when asked to do so by counsel." (footnote omitted)).

86 *Id.* at 428–29 (a judge can be neutral and engaged simultaneously).

87 *See* N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 8 (A volunteer lawyer's presence in the courtroom contributes to fairer outcomes for litigants by "breaking down the legalese," "addressing language difficulties" and "alleviat[ing] the litigant's nervousness" and by "deftly arguing points of law and fact before the judge," while also freeing up the courtroom employees' time by answering litigants' questions or explaining procedure.).

88 *Id.* at 7–8 ("The Access to Justice Program offers unbundled representation in the courtroom through its Volunteer Lawyer for the Day (VLFD) Program. . . . The VLFD Program recruits, trains, and supervises volunteer lawyers in the New York City Housing and Civil Courts. Unlike the advice only programs, the volunteer attorneys, law graduates, and law students who participate in the VLFD programs meet their clients for the first time on the morning of the court appearance. The representation begins and ends the same day. If a particular case is not resolved in a single appearance, the Program provides representation on adjourned dates by the same volunteer or by a different volunteer depending on availability.").

consumer debt cases, the plaintiff-corporation must always be represented by an attorney and only defendants require assistance.[90] Therefore, the court is not faced with one side receiving assistance, and not the other. In fact, the court fosters neutrality by ensuring that both sides have attorneys. In the housing program, it is very challenging for the court to maintain fairness to both sides. In housing cases, 99% of tenants do not have attorneys and 85% of homeowners have representation.[91] In cases where the homeowner is not represented, the court's program does not provide assistance to the tenant. The court then refers the tenant to other programs.

After observing problems that unrepresented litigants were having in their courtrooms, frontline judges took action and developed programs to address the issues they saw. In Oregon, Judge Maureen McKnight of the Multnomah County Family Court saw individuals who would have fared better in her courtroom if a lawyer had represented them.[92] Judge McKnight helped to develop a clinic using volunteer lawyers.[93] Similarly, Judge Stephanie Joannides of Anchorage, Alaska, developed a program in family court with the Family Law Self-Help Center[94] and the Alaskan Pro Bono Program called the Early Resolution Project (ERP).[95] The Alaska Legal Services Corporation (ALSC)[96] succeeded the Alaskan Pro Bono Program and began working with the Alaskan Court System on the ERP.[97] The ALSC handles the volunteer attorney coordina-

---

89 *See id.* at 7–11.

90 N.Y. C.P.L.R. § 321(a) (McKinney 2014) (stating "a corporation . . . shall appear by attorney").

91 N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 32.

92 Janine Robben, *Here Come the Judges: Concern for Unrepresented Litigants Lures Judges to Pro Bono*, OR. ST. B. BULL. (Dec. 2006), *available at* http://www.osbar.org/publications/bulletin/06dec/judges.html#top (last visited Mar. 28 2014) (providing a description of Judge Maureen McKnight's and other Oregon judges' efforts to create programs that offer pro bono legal services to unrepresented litigants who cannot afford representation).

93 *Id.*

94 *See generally About the Family Law Self-Help Center*, ALASKA COURT SYST., http://courts.alaska.gov/selfhelp.htm (last updated Jan. 6, 2014) (stating general information about The Family Law Self-Help Center and how trained neutral people provide legal information and educational materials to litigants in family court in Alaska).

95 Chief Justice Walter L. Carpeneti, State of the Judiciary: 2012 (Feb. 29, 2012), http://courts.alaska.gov/state12.htm (providing a brief description of the Early Resolution Project); Chief Justice Dana Fabe, State of the Judiciary: 2013 (Feb. 13, 2013), http://courts.alaska.gov/state13.htm.

96 *Alaska Legal Services Corporation (ALSC)*, ALASKA LEGAL SERVICES CORP., http://new.aklawselfhelp.org/background-and-history/ (last visited Mar. 12, 2014) (providing general information on the history and services offered by the Alaska Legal Services Corporation).

97 Chief Justice Dana Fabe, *supra* note 95.

tion and recruitment and co-trains new volunteers with the Family Law Self-Help Center.[98] Volunteer attorneys receive the ALSC's malpractice insurance when they are volunteering.[99]

Additionally, President Judge Darnell Jones and Judge Annette Rizzo of the Philadelphia Court of Common Pleas saw the rise in foreclosure cases first hand.[100] In response, the judges set up the Residential Mortgage Foreclosure Diversion Pilot Program in 2008.[101] The program is overseen by Judge Rizzo.[102] All foreclosures are diverted into a settlement program,[103] and participation is required of both sides.[104] The volunteer attorneys represent homeowners in negotiations with banks to resolve the foreclosure.[105]

V. Judicial Activists Shaking Up the System

Judges are perceived as the architects and defenders of the justice system,[106] and the crisis in civil justice has led some judges to believe the justice system needs an overhaul.[107] These activist

98 Richard Zorza, *Alaska Early Resolution Project Using Pro Bono*, Richard Zorza's Access to Justice Blog (Mar. 9, 2013), http://accesstojustice.net/2013/03/09/alaska-early-resolution-project-using-pro-bono/ (providing a description of the Early Resolution Project).

99 *Pro Bono Legal Service Providers*, Alaska Bar Ass'n, https://www.alaskabar.org/servlet/content/pro_bono_resources.html (last visited Mar. 19, 2014).

100 Unemployment Info. Ctr., Philadelphia Residential Mortgage Foreclosure Diversion Pilot Program: Survey of Outcomes for Homeowners Facing Foreclosure who Entered the Diversion Program between June 2008 and February 2009 (2009), *available at* http://www.philaup.org/pdf/PhiladelphiaRMFDPP.pdf (reporting that the Mortgage Foreclosure Diversion Prevention Program has a positive impact on helping homeowners remain in their homes).

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*; *see also* Peter S. Goodman, *Philadelphia Gives Homeowners a Way to Stay Put*, N.Y. Times (Nov. 17, 2009), http://www.nytimes.com/2009/11/18/business/18philly.html?pagewanted=all&_r=1& (reporting that Philadelphia's volunteer lawyer program helps homeowners in foreclosure proceedings to stay in their homes).

106 *See* Kim Lane Scheppele, *Judges as Architects*, 24 Yale J.L. & Human. 345, 347–49 (2013) (highlighting the similarities between the roles of judges and architects).

107 *See, e.g.*, Rebecca Love Kourlis, *5 Steps for Fixing the Civil Justice System*, The Atlantic (June 11, 2012, 11:50 AM), http://www.theatlantic.com/national/archive/2012/06/5-steps-for-fixing-the-civil-justice-system/258295/ (discussing how the legal system has become too expensive and inefficient for ordinary citizens to resolve personal conflicts). Kourlis is a former judge of the Colorado Supreme Court. *Rebecca Love Kourlis*, Atlantic, http://www.theatlantic.com/rebecca-love-kourlis/ (last visited Apr. 19, 2014); Margaret H. Marshall, Chief Justice of the Supreme Judicial Court Mass., Remarks on the Access to Justice Commission (Apr. 4, 2007), *available at* http://www.nlada.org/DMS/Index/000000/000053/00005313/document_browse#topics (follow hyperlink "Speech by Chief Justice Marshall") (quoting Reginald Herber

judges came from a variety of backgrounds before they ascended to the bench. Some had Legal Aid backgrounds and were already familiar with the problems confronting unrepresented litigants.[108] Other judges became exposed to access to justice issues facing unrepresented litigants after they became judges. For example, Judge Annette Rizzo worked at the Philadelphia City Solicitor's Office,[109] and then with a law firm, which does civil litigation defense.[110] Just prior to ascending to bench, Judge Rizzo served as Senior Counsel at CIGNA Companies, a global health insurance company.[111] Judge Stephanie Joannides, who recently retired from the bench, was a prosecutor and government attorney before her election to the bench.[112] Judge Mark Juhas was also not exposed to unrepresented litigants prior to becoming a Los Angeles Superior Court Judge[113]—he handled personal injury, insurance defense, and product liability cases.[114] Judge Juhas' introduction to the civil justice crisis started when he ascended to the bench, where he now handles family court cases.[115] His observations in his courtroom led

---

Smith and continuing to address that there is much that remains to be done to reach the goal of equal justice).

108 I am a former Legal Services attorney. Judge Dina E. Fein, a housing court judge in Massachusetts, is a former Legal Aid attorney. E-mail from Judge Dina E. Fein, Special Advisor for Access to Justice Initiatives, to Judge Fern A. Fisher, Dir. of N.Y. State Access to Justice Program (Mar. 31, 2014, 6:59 PM CST) (on file with author). Judge Maureen McKnight, a Multnomah County, Oregon Circuit Court Judge, was a Legal Aid attorney and involved in family law issues prior to being appointed to the bench. *Biography*, OR. JUDICIAL DEP'T, *available at* http://courts.oregon.gov/Multnomah/General_Info/Judges/McKnight/pages/Judge_McKnight_Biography.aspx (last visited Apr. 9, 2014).

109 "The City Solicitor is a member of the Mayor's Cabinet, and manages the [Philadelphia] Law Department." *Welcome to the Law Department*, CITY OF PHILA. LAW DEP'T, http://www.phila.gov/law/index.html (last visited Apr. 19, 2014).

110 *Honorable Annette M. Rizzo*, FEARLESSWOMENNETWORK.ORG, http://www.fearlesswomennetwork.org/Bios/Rizzo.php (last visited Apr. 15, 2014); *Success Endures*, RAWLE & HENDERSON, http://www.rawle.com/ (last visited Apr. 19, 2014).

111 FEARLESSWOMENNETWORK.ORG, *supra* note 110.

112 Rhonda McBride, *Judge Stephanie Joannides Steps Down from Superior Court Bench*, KTUU-TV (Jan. 31, 2011), http://articles.ktuu.com/2011-01-31/superior-court-bench_27095172; *District Court Judge: Stephanie E. Joannides, Third Judicial District*, ALASKA DIV. OF ELECTIONS, http://www.elections.alaska.gov/doc/oep/1996/joannide.htm (last visited Apr. 4, 2014).

113 Telephone interview with Judge Mark Juhas (Mar. 13, 2014) (on file with author).

114 *See* Robert Greene, *Governor Davis Names Four to Los Angeles Superior Court*, METRO. NEWS-ENTER. (Aug. 26, 2002), http://www.metnews.com/articles/appt082602.htm ("Judge Juhas' practice has been exclusively in civil litigation" with some Superior Court experience as a judge *pro tempore* presiding over traffic and small claims cases); telephone interview with Judge Mark Juhas, *supra* note 113.

115 Telephone interview with Judge Mark Juhas, *supra* note 113.

him to become a judicial activist.[116] Judge Juhas advocates non-adversarial solutions to family court cases.[117] He believes "the default process for resolving family law matters must be changed from litigation to consensual dispute resolution."[118] My years of sitting on the bench handling housing and matrimonial cases has led me to share the same beliefs as Judge Juhas on the U.S. justice system. We must re-think our adversarial system. I challenge lawyers and judges to consider that an adversarial system is inherently unfair to unrepresented litigants.[119]

New York is fortunate to have a chief judge who is a leader in access to justice issues. The title of Chief Judge Jonathan Lippman's recent speech at New York University School of Law on March 11, 2014, "The Judiciary as the Leader of the Access to Justice Revolution," says it all—in New York State, judicial activism goes to the top.[120] In his speech, Judge Lippman stated:

> With all of these changes that I've talked about tonight, we are shifting the landscape for access to justice in New York and around the country. The cumulative effect truly amounts to a revolution, and the Judiciary is and should be at its vanguard—as we incrementally move closer to a civil *Gideon*, where we as a society demand that people be represented when the basic necessities of life are at stake. This is what we're supposed to be doing, making equal justice a reality for every single individual, regardless of his or her status in life. We are experiencing that revolution in the way we think about the need for legal services,

---

116 *See* Jessica Logan, *New Program to Help Lighten Legal Paperwork*, FREEREPUBLIC.COM (Oct. 2, 2004, 6:10 PM), http://www.freerepublic.com/focus/f-chat/1233596/posts (reporting various efforts made by Judge Mark Juhas and Commissioner Michael Convey to make the court "very user-friendly" in order to help self-represented litigants); *see also* Press Release, Cal. Ass'n of Legal Document Assistants, LA Superior Court Judge Mark Juhas as the Keynote Speaker at the California Association of Legal Document Assistants' 24th Annual Conference (Sept. 19, 2011), http://www.pr.com/press-release/354351 (announcing the topics of discussion Judge Mark Juhas will address in his speech at the conference, including the importance of having a continuum of access to legal services for self-represented litigants and access to justice).

117 Mark Baer, *Is the Adversary Model Appropriate or Suitable for Family Law Matters?*, HUFFINGTON POST (June 9, 2013, 3:35 PM), http://www.huffingtonpost.com/mark-baer/is-the-adversary-model-ap_b_3412351.html (noting the significant negative impact divorces can have on children and the problems that arise through family law).

118 *Id.*

119 Fern Fisher, Deputy Chief Admin. Judge of N.Y.C. Courts, Dir. of N.Y. State Access to Justice Program, Commencement Speech at California Western Law School (Dec. 16, 2013) (speech on file with author).

120 *See* Jonathan Lippman, Address at the Twentieth Annual Justice William J. Brennan Lecture on State Courts and Social Justice: The Judiciary as the Leader of the Access to Justice Revolution (Mar. 11, 2014), *available at* http://ncforaj.org/wp-content/uploads/2014/03/CJ-Lippman-Brennan-3-11-14.pdf.

> about society's obligation to the poor, and the ways in which we can fulfill that obligation. State judiciaries are uniquely positioned by our constitutional and societal role to advocate for access to justice and to meet the challenges ahead. We cannot be limited or narrow in defining our role, nor underestimate the impact we can have. By using the Judiciary's authority to regulate the courts and the profession and shape legal education, by developing a record, adopting rules, and focusing on the noble values of our profession, as we promote innovation and change, we can have a dramatic impact on the equal justice paradigm. We, in the Judiciary, are duty bound to change the public dialogue as it relates to legal services for the most needy among us, so that access to justice will no longer be an afterthought, but rather recognized throughout the country as the fundamental right of every individual in a civilized society.[121]

Judge Lippman's 2012 Law Day announcement of a fifty-hour pro bono requirement of law graduates seeking admission to the bar shook up the bar and law schools.[122] The proposed rule was met with some skepticism.[123] However, the civil legal services community was generally warm to this ground-breaking requirement.[124] New York's pro bono requirement was the first of its kind in the country,[125] and the chief architect of the rule is a member of the judiciary. Three other states—California, Connecticut, and New Jersey—are considering a similar fifty-hour pro bono rule, although the catalyst for the movement is not from the judiciary in Connecticut and California.[126]

---

121 *Id.* at 19–20.

122 Chief Judge Jonathan Lippman, Remarks on Law Day 2012 4 (2012), *available at* http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf; N.Y. Ct. Rules § 520.16 (2013).

123 *See* Joel Stashenko, *While Pro Bono Goal Applauded, Questions About Details Abound*, 247 N.Y. L.J. 87 (highlighting both the unmet legal need to be served by the pro bono requirement and the concerns about the pro bono requirement's implementation and impact on existing law student pro-bono efforts); Ben Trachtenberg, Op-Ed., *Rethinking Pro Bono*, N.Y. Times (May 13, 2012), http://www.nytimes.com/2012/05/14/opinion/a-better-pro-bono-plan.html (explaining why Chief Judge Lippman's proposal, mandating law students perform fifty pro bono hours to join the state bar, is an ineffective approach for addressing the needs of pro bono legal services and suggesting other alternatives).

124 *See* Am. Bar Ass'n Standing Comm. on Pro Bono and Pub. Serv., New York's 50-Hour Preadmission Pro Bono Rule: Weighing the Pros and Cons (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_preadmission_pro_bono_requirement_white_paper.authcheckdam.pdf (commenting on Chief Judge Jonathan Lippman's fifty-hour pro bono requirement for New York's bar applicants and analyzing the potential benefits and drawbacks of the new rule).

125 *Id.* at 1.

126 N.J. Courts, Report of the Working Group on the Proposed Preadmission

Judge Lippmann again shook the legal community when he announced the Pro Bono Scholars Program[127] during his 2014 State of the Judiciary address.[128] The program will allow law students in their last year of law school to provide 500 hours of pro bono services in lieu of traditional classes.[129] Additionally, these students will be able to take the bar before they graduate and have their admission paperwork expedited as soon as their service is completed.[130] Judge Lippman stated "this new option of coupling early bar admission, practical experience, and service to the poor [is] part of what must be a partnership of the academy, the Judiciary, and the profession to help close the justice gap and ensure the nobility and relevance of the legal profession in the challenging years ahead."[131]

In Washington State, the Supreme Court adopted APR 28, which allows for non-lawyers to practice law.[132] In adopting APR 28, the Limited Practice Rule for Limited License Legal Technicians,[133] a six-justice majority of the Supreme Court of Washington

---

PRO BONO REQUIREMENT (2013), *available at* http://ncforaj.files.wordpress.com/2013/05/nj-report-on-50-hr-rule.pdf (reporting on the Working Group's evaluation, pursuant to the Chief Justice of the New Jersey Supreme Court's request, of whether New Jersey should establish a preadmission pro bono requirement, and the extent of such program for New Jersey bar applicants); Joyce E. Cutler, *California Proposal Would Mandate Pro Bono, Practical Skills Requirements for Admission*, BLOOMBERG BUREAU OF NAT'L AFFAIRS (Feb. 27, 2013), http://www.bna.com/california-proposal-mandate-n17179872597/ (discussing the California State Bar's investigation on whether the bar should develop a requirement to perform fifty hours of voluntary legal service for California bar applicants); MELANIE B. ABBOTT ET AL., *supra* note 29, at 19–20 (recommending that the Connecticut judiciary implement a fifty-hour pro bono requirement).

127 *See* Steve Grumm, *New York's New "Pro Bono Scholars Program": What We Know, What We Don't*, AM. BAR ASS'N ACCESS TO JUSTICE BLOG (Feb. 12, 2014), http://abaatj.wordpress.com/2014/02/12/new-yorks-new-pro-bono-scholars-program-what-we-know-what-we-dont/ (outlining the Scholars Program and raising practical questions about how it will work).

128 *See* Lippman, The State of Judiciary 2014, *supra* note 35, at 3–6.

129 *Id.* at 4.

130 *Id.*

131 *Id.* at 6.

132 Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75, 77 (2013), *available at* http://mississippilawjournal.org/wp-content/uploads/2013/02/3_Holland_Final.pdf (discussing the innovative move of utilizing trained non-lawyers to engage in the limited practice of law).

133 *See* In the Matter of the Adoption of New APR 28—Limited Practice Rules for Limited License Legal Technicians, No. 25700-A-1005, slip op. at 2 (Wash. June 15, 2012), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf. The rule allows Limited License Legal Technicians, individuals who are not lawyers, to engage in very discrete, limited-scope and limited-function activities. Many individuals will need far more help than the limited-scope of

sought to protect unrepresented litigants from an unregulated marketplace of legal and law-related services.[134] Recognizing that a "range of strategies" have been implemented to help assist unrepresented litigants, the majority detailed "significant limitations in [the resulting] services and large gaps in the type of services for pro se litigants."[135] According to the majority, these shortcoming force many unrepresented litigants to seek help from non-attorney "practitioners."[136] The majority concluded that the courts "have a duty to ensure that the public can access affordable legal and law related services [in a regulated marketplace], and that they are not left to fall prey to the perils of the unregulated market place."[137] The three dissenting judges' only objection to the rule was the source of funding to implement the rule.[138]

Judges are calling for change of the role of judges in the courtroom.[139] Justice Laurie Zelon of the California Court of Appeals, for example, advocates for judges to be neutral and engaged with self-represented litigants and recently offered a webinar on the subject with Judge Karen Adam of the Arizona Superior Court in Pima Country.[140]

---

law related activities that a limited license legal technician will be able to offer. These people must still seek help from an attorney. But there are people who need only limited levels of assistance that can be provided by non-lawyers trained and overseen within the framework of the regulatory system developed by the Practice of Law Board.

134 *Id.*

135 *Id.* at 4–5.

136 *Id.* at 5.

137 *Id.* at 5–6.

138 *See* In the Matter of the Adoption of New APR 28—Limited Practice Rules for Limited License Legal Technicians, Dissent to Order, No. 25700-A-1005 (Wash. June 14, 2012) (Owens, J., dissenting), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf.

139 *See* Rebecca A. Albrect et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES' J., VOL. 42, No. 1, at 16, 43 (2003) (reviewing recent case law and finding a large number of instances in which appellate courts reversed trial courts that did not "lean over backward . . . to identify meritorious issues hidden in the presentations of an unrepresented litigant"); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 373 (2008) (describing the "growing consensus that is essential for courts to provide meaningful access [to the courts] to unrepresented litigants").

140 Karen Adam & Laurie Zelon, *Self-Represented Litigation Curriculum* (Jan. 16, 2014, 2:00 PM), http://www.ncsc.org/microsites/access-to-justice/home/Webinars.aspx (follow hyperlink "Self-Represented Litigation Curriculum, January 16, 2014 at 2:00 PM EST") (explaining how judges can utilize their role in dealing with self-represented litigants, and explaining various modules to assist judges on how to make their courtroom and the legal process more accessible for self-represented litigants).

Conclusion

The public is losing confidence in the civil justice system.[141] Confidence in the system will continue to erode as more individuals are faced with life-affecting civil cases and are forced to do so without an attorney in an adversarial judicial system that is lawyer-centric. The real debate on judicial activism is not the lofty sparring on how to interpret the U.S. Constitution, but is actually what judges can and should do to ensure access to justice. Individuals who are faced with the loss of their homes, income, benefits, and children are foremost concerned with how the civil justice system will respond to them. Judges are recruiting pro bono lawyers, insisting on the provision of more funds for civil legal services, developing and operating delivery systems for such services, and challenging the judicial system to change to be more inclusive of the needs of the public, especially those without lawyers. Judicial activists throughout the country have shown that judges can change the conversation about judicial activism from the narrow focus on interpreting the Constitution to every day legal problems faced by millions in the country. Former Chief Judge John T. Broderick, Jr. of New Hampshire stated the charge perfectly:

> I believe that courts need to speak with a louder voice and that judges, in particular, need to be heard. If those who preside in our courtrooms do not take a laboring oar on the issue of meaningful access to justice, then we cannot complain when others don't. If as judges we do not press the bar to step up, the courts to change, and the legislative and executive leaders in this country to join us, we will surely fail. Silence is not our friend, nor is it mandated by any ethical code that governs our conduct. We are all free to speak and write on issues affecting the administration of justice and more importantly, it is, in my judgment, our fiduciary obligation to do so. It goes to the very essence of what drew us to public service in the first place.[142]

Judges must be activists and lead the way to a more perfect world where there is equal access to justice for all.

---

141 Ron Faucheux, *By the Numbers: Americans Lack Confidence in the Legal System*, Atlantic (July 6, 2012, 7:24 AM), http://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/ (discussing the statistics of a recent poll that highlight Americans' lack of trust in the American legal system).

142 John T. Broderick, Jr., Chief Justice of the New Hampshire Supreme Court, Remarks at the National Access to Justice Conference: A Roadmap Toward Justice (May 9, 2008), *reprinted in* Dialogue 30 (Summer 2008), *available at* http://www.nlada.org/DMS/Documents/1219779973.18/Broderick%20speech%206-08%20Dialogue.pdf.

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

Erica Braudy†

CONTENTS

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,"

† Staff Attorney at the New York Legal Assistance Group, Housing Project/Mobile Legal Help Center, J.D. CUNY School of Law (2013). My deepest thanks to Professor Stephen Loffredo, Sir Andrew Adams, Clarissa Gomez, the people whose stories made this article come to life: Lisa and John, and Ignacio and Julieta, Professor Alan White, and the *CUNY Law Review* Editorial Board.

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 PFAU, 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-

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 fraudulant 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 John[12] 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).

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 midday 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," Julieta[14] 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

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.

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_forclosures.pdf.

73 *Id.* at 2.

74 *Id.*

75 Gary Klein & Shennan Kavanagh, *Causes of the Subprime Foreclosure Crisis and the Availability of Class Action Reponses*, 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 Colloquim 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),

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 Assembly[107] and the NYS Senate[108] 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.

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.

THE CHICAGO POLICE TORTURE SCANDAL: A LEGAL AND POLITICAL HISTORY

G. Flint Taylor†

CONTENTS

† Founding partner, People's Law Office (PLO). Taylor has represented survivors of police torture in Chicago for more than twenty-five years. These survivors include Andrew Wilson, Darrell Cannon, Gregory Banks, David Bates, Marcus Wiggins, Leroy Orange, Michael Tillman, Ronald Kitchen, Victor Safforld (Cortez Brown), Aaron Patterson, Anthony Holmes, Alonzo Smith, Oscar Walden, and Shawn Whirl. Other PLO attorneys who have worked on the torture cases over the years include Jeffrey Haas, John Stainthorp, Joey Mogul, Tim Lohraff, Ben Elson, Sarah Gelsomino, Michael Deutsch, Jan Susler, Erica Thompson, and Shubra Ohri. Ms. Mogul is a 1994 graduate of CUNY School of Law.

Introduction

In 1969, a military police sergeant named Jon Burge returned from his tour of duty at a prisoner of war camp in South Vietnam and soon thereafter became a Chicago police officer. Assigned to a Southside District, he soon began working with several other Vietnam veterans who would later form the backbone of a crew of almost exclusively white Chicago police detectives who would torture at least 118 African American criminal suspects.[1]

In the spring of 1972, Burge was promoted to detective, and assigned to the midnight shift at Area 2 police headquarters. Months later, in a highly sensational case where a young white boy was brutally beaten by several Black burglars, Burge and several of his fellow detectives beat several suspects, taking one seventeen-year-old to a deserted area to beat him.[2] The coordinated brutality yielded confessions, the four suspects pled guilty, and their claims of abuse were never fully litigated.

The next May, Burge and his midnight crew escalated their brutality, employing torture tactics that Burge had most likely learned from his fellow soldiers in Vietnam.[3] After executing an early-morning raid, Burge and fellow detective John Yucaitis transported arrestee Anthony Holmes back to Area 2, administered repeated electrical shocks from a device housed in a box, and nearly suffocated Holmes by placing a bag over his head.[4] Holmes was overcome with pain so intense that he thought he was dying; he passed out, and he subsequently gave a detailed stationhouse confession to an assistant Cook County Felony Review prosecutor implicating himself in a murder that he later insisted he did not commit.[5]

Holmes told his aunt about his torture when she visited him at Area 2 later that morning, and subsequently told the assistant public defenders who were assigned to represent him on the murder case.[6] The lawyers, no doubt skeptical about such a draconian

---

1 *118 Known Burge Area 2 and 3 Torture Victims 1972-1991* (Chart), People's Law Office, *available at* http://peopleslawoffice.com/wp-content/uploads/2014/01/1.6.14.-Documented-TortureSurvivorsunderBurge.pdf.

2 Sworn Statement of Rodney Mastin at 13, Patterson v. Burge, No. 03C4433 (N.D. Ill. July 24, 2004).

3 *See* John Conroy, *Tools of Torture*, Chi. Reader (Feb. 3, 2005), http://www.chicagoreader.com/chicago/tools-of-torture/Content?oid=917876.

4 People's Law Office, *Chicago Police Commander Jon Burge and his Victims*, YouTube (July 2007), http://www.youtube.com/watch?v=Tjo2ZAUQai8.

5 *Id.*

6 Unsworn Statement of Anthony Holmes at 9, Patterson v. Burge, No. 03C4433 (N.D. Ill. Apr. 19, 2004).

story, chose not to pursue a motion to suppress the confession but instead tried the case before a veteran Cook County judge who, like so many of his judicial colleagues, was formerly a Cook County prosecutor.[7] The judge rejected Holmes's defense—that there was no corroboration for the confession—and convicted him of murder. Thirty years later, Holmes was released on parole.[8]

Burge and the Area 2 midnight crew of white robbery detectives continued to torture selected African American suspects throughout the 1970s, and their elevated success rate in clearing serious felony cases and obtaining confessions earned Burge a promotion to sergeant in 1977 and to lieutenant in 1980.[9] Burge's electric shock device, which he referred to as the "nigger[10] box," was sometimes on display on a table in the Robbery office, and continued to be a signature of their interrogations in high profile cases.[11] On one occasion, a Black Area 2 detective named Bill Parker walked in on a Burge torture scene, but when he reported it to a supervisor, he was reprimanded and transferred out of Area 2.[12]

I. The Wilson Criminal Case

In the early 1980s, the Chicago Police Department reorganized its detective division, and Burge was put in charge of Area 2's newly created Violent Crimes Unit. At about the same time, Rich-

---

7 One of Holmes's attorneys, Lawrence Suffredin, who later went on to become a well-known Cook County commissioner, testified as a government witness about these events at Burge's criminal prosecution in 2010. *See* Transcript of Proceedings on May 27, 2010 – Trial Vol. 2A, United States v. Burge, No. 08 CR 846 (N.D. Ill.) (direct examination of Lawrence Suffredin).

8 The Illinois Appellate Court, following previous Illinois precedent, reversed Holmes's conviction, holding that corroboration was required, but the Illinois Supreme Court reversed and reinstated Holmes' conviction. People v. Holmes, 347 N.E.2d 407 (Ill. App. Ct. 1976), *rev'd*, 67 Ill. 2d 236 (Ill. 1977).

9 Testimony of Jon Burge, United States v. Burge, No. 08 CR 846 (N.D. Ill. June 17, 2010).

10 [*Editor-in-chief's note*: To accurately reflect the racist roots upon which, among other things, the horrors of the Chicago police torture scandal were founded, this Article contains some verbatim quotes with derogatory references to Black people. Out of respect for, and in solidarity with, the numerous victims of police torture detailed here—both recognized and unrecognized—*CUNY Law Review* believes that it is of utmost importance to not obscure this reality and thus has chosen to leave the quotes as is.]

11 Affidavit of Melvin Duncan, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433); Sworn Statement of Tony Thompson at 20–26, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433).

12 Sworn statement of William Parker at 7–12, 16–17, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433).

ard M. Daley, the son of Chicago's legendary mayor, was elected the State's Attorney of Cook County. In February of 1982, after two white Chicago gang unit officers were shot and killed on the South Side, Police Superintendent Richard Brzeczek and Mayor Jane Byrne launched the largest manhunt in the history of the City, and Burge was placed in charge of the operation.

Police kicked down doors and terrorized scores of African Americans in what Jesse Jackson of Operation PUSH and Renault Robinson of the Afro American Police League condemned as "martial law" that "smack[ed] of Nazi Germany."[13] Suspected witnesses were smothered with bags and threatened with bolt cutters, and Burge and his detectives took several young men—whom they wrongly suspected to be the killers—to police headquarters, where they tortured them.[14]

After five days of wanton brutality, two brothers, Andrew and Jackie Wilson, were arrested for the crime. Andrew, who was identified as the shooter, was arrested by Burge and his Area 2 associates, and brought back to the Area, where he was initially bagged, beaten, and burned with a cigarette lighter.[15] Burge and Yucaitis then took over the torture, handcuffing Wilson across a ribbed steam radiator and repeatedly shocking him on the nose, ears, lips, and genitals with Burge's shock box. The shocks, which were transmitted from a hand crank generator through wires and alligator clips, jolted Wilson against the radiator and seriously burned his face, chest, and leg.[16] The torture was repeated throughout the day, and when Wilson at first refused to give a formal confession and instead told the Felony Review prosecutor that he was being tortured, the prosecutor sent Wilson back to Burge for more abuse.[17]

Wilson and his brother Jackie, who was also tortured, both ultimately confessed, but Andrew's injuries were so pronounced that the police lockup keeper refused to accept him into lockup. Medical personnel documented his injuries and the public defender who was appointed to represent him took graphic pictures.[18] The

---

13 *See Cops Accused of Brutality*, CHI. TRIB., Feb. 18, 1982, at 3; Chinta Strausberg, *Police, Bar Group Ask 'Manhunt' Probe*, CHI. DEFENDER, Feb. 18, 1982, at 3.

14 Deposition of Donald G. White at 2653, Wilson v. City of Chicago, 900 F. Supp. 1015 (N.D. Ill. 1995) (No. 86 C 2360); Affidavit of Anthony Williams, Logan v. Burge, No. 09 C 5471 (N.D. Ill. Mar. 7, 2011).

15 John Conroy, *House of Screams*, CHI. READER (Jan. 25, 1990), http://www.chicagoreader.com/chicago/house-of-screams/Content?oid=875107.

16 *Id.*

17 *Id.*

18 *Id.*

director of medical services at the Cook County Jail, Dr. John Raba, examined Wilson, heard him describe his torture, and wrote a letter to Police Superintendent Brzeczek describing Wilson's injuries and demanding a full investigation.[19] Brzeczek—who would later admit that he upbraided several of his high level deputies for being present at Area 2 and permitting Wilson to be tortured—delivered Dr. Raba's letter directly to State's Attorney Daley, accompanied with a cover letter confiding that he would not investigate Wilson's alleged torture unless Daley directed him to do so.[20] After consulting with his first assistant, Richard Devine, and another top level assistant, William Kunkle, Daley decided not to investigate; instead, he and Brzeczek both publicly commended Burge,[21] and Kunkle proceeded to prosecute Andrew Wilson and his brother Jackie. The Wilson brothers moved to suppress their confessions, and an extensive hearing was held at which Burge and his men all denied that they abused the Wilsons. The trial judge denied the motions, both Wilsons were convicted, and Andrew was sentenced to death, while Jackie received a life sentence. Andrew's case was directly appealed as of right to the Illinois Supreme Court, which reversed his conviction.[22] The court recounted Wilson's testimony of how he was repeatedly electric-shocked and burned, and detailed "some 15 separate injuries that were apparent on the defendant's head, chest, and right leg":

> Two cuts on the defendant's forehead and one on the back of his head required stitches; the defendant's right eye had been blackened, and there was bleeding on the surface of that eye. Dr. Korn also observed bruises on the defendant's chest and several linear abrasions or burns on the defendant's chest, shoulder, and chin area. Finally, Dr. Korn saw on the defendant's right thigh an abrasion from a second-degree burn; it was six inches long and 1 1/2 to 2 inches wide.[23]

The Court then held:

> [T]he defendant's injuries in this case cannot be disputed, and only several facial injuries were explained by the State. Because

---

19 Letter from Dr. John Raba, Med. Dir., Cook Cnty. Jail, to Richard Brzeczek, Superintendent, Chi. Police Dep't (Feb. 17, 1982) (on file with author).

20 Letter from Richard Brzeczek, Superintendent, Chi. Police Dep't, to Richard Daley, State's Attorney of Cook Cnty. (Feb. 25, 1982) (on file with author); Statement of Richard Brzeczek to the Special Prosecutor (Mar. 9, 2005) (on file with author).

21 Personnel Order No. 82-369, Chicago Department of Police Unit Meritorious Performance Award (Sept. 1, 1982) (on file with author); *Daley Hails 11 in Crime War*, CHI. TRIB., May 20, 1983.

22 People v. Wilson, 506 N.E.2d 571 (Ill. 1987).

23 *Id. at* 573.

> the State failed to show by clear and convincing evidence that the confession was not the product of coercion . . . the defendant's statement should have been suppressed as having been involuntarily given. The use of a defendant's coerced confession as substantive evidence of his guilt is never harmless error, and the cause must therefore be remanded for a new trial.[24]

After remand, Wilson was re-tried without his confession and was again convicted. When one juror refused to vote for the death penalty, Wilson was sentenced to two natural life sentences.[25]

II. The Andrew Wilson Civil Case

In 1986, while Andrew Wilson was sitting on death row, he filed a *pro se* 42 U.S.C. § 1983 complaint in the U.S. District Court for the Northern District of Illinois, alleging that he was tortured by Burge and several of his detectives. After a series of appointed lawyers withdrew, lawyers from the People's Law Office took on Wilson's representation in 1987 and filed an amended complaint, which added a *Monell*[26] policy-and-practice claim against the City of Chicago and former Police Superintendent Brzeczek. Burge and the then-current Superintendent of Police, Leroy Martin, convinced the Chicago City Council's Finance Committee to retain William Kunkle, who was formerly a high-level State's Attorney under Daley, to represent Burge and his fellow officers at the taxpayers' expense. Kunkle had personally prosecuted Wilson and had subsequently gone into private practice at a law firm where Richard Devine, Daley's former first assistant, was a partner.

The case survived the City and Brzeczek's motion to dismiss,[27] and later, on summary judgment, District Court Judge Brian Barnett Duff found there to be enough evidence in support of Wilson's claims against those same defendants to require a trial on the merits.[28] The key *Monell* allegation upheld by the court was that

---

24 *Id.* at 576.

25 Jackie Wilson's case was originally reversed by the Illinois Appellate Court on the basis that a constitutionally mandated *voir dire* question was not asked. *See* People v. Wilson, 487 N.E.2d 1015 (Ill. App. Ct, 1985). The Illinois Supreme Court reversed and remanded to the Appellate Court, People v. Wilson, 513 N.E.2d 844 (Ill. 1986), which then reversed Jackie Wilson's conviction on the separate basis that his case should have been severed from Andrew's. People v. Wilson, 515 N.E.2d 812 (Ill. App. Ct. 1987). Jackie Wilson was re-tried separately, was re-convicted of one of the two murders and sentenced to natural life.

26 Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978).

27 Wilson v. City of Chicago, 684 F. Supp. 982 (N.D. Ill. 1989) (denying motion to dismiss).

28 Wilson v. City of Chicago, 707 F. Supp. 379, 384 (N.D. Ill. 1989).

> [t]here existed in February 1982 in the City of Chicago a de facto policy, practice and/or custom of Chicago Police Officers exacting unconstitutional revenge and punishment against persons who they alleged had injured or killed a fellow officer. This revenge and punishment included beating, kicking, torturing, shooting, and/or executing such a person, both for the purpose of inflicting pain, injury and punishment on that person, and also for the purpose of forcing that person to make an inculpatory statement.[29]

Wilson's civil-rights case went to trial in February 1989.[30] While torture at Area 2 had long been an "open secret" there,[31] both Wilson's lawyers and the public at large were ignorant of the depth and breadth of the decades-long pattern and practice of torture under Burge.

III. The Anonymous Letters from "Deep Badge"

During the trial, Wilson's lawyers received several anonymous letters from a police source who was close to Burge. The source asserted that the torture was deeply racist and systemic. The source, who was dubbed "Deep Badge" by the lawyers, named numerous of Burge's "asskickers," implicated State's Attorney Daley and Mayor Jane Byrne in the scandal, and specifically identified another torture victim, Melvin Jones, who, he asserted, was tortured by Burge with electric shock only days before Wilson.[32]

The lawyers located Jones in the Cook County Jail, confirmed his story, and obtained a transcript of his testimony at his 1982 motion to suppress hearing where he first detailed his torture.[33] Nonetheless, Judge Duff would not permit Jones to testify at the trial, holding that although the evidence was "explosive," the "surprise and prejudice of the testimony to the defendants was manifest."[34]

In contrast, Judge Duff permitted Burge's City-financed law-

---

29 *Id.*

30 *See* Mary Ann Williams, *Torture in Chicago*, Chi. Lawyer, Mar. 1989, at 1, 13–15.

31 Nov. 9, 2004 Sworn Statement of Doris Byrd at 11, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433).

32 *See* Letters from "Ty," Anonymous, to Flint Taylor (Wilson's counsel) (postmarked Feb. 2, 1989, Mar. 6, 1989, Mar. 15, 1989, and June 16, 1989) (on file with author). *See also* Transcript of Testimony of Melvin Jones before the Chicago Police Board at 844, *In re* Charges Filed Against Burge, Nos. 1856–1858 (Jan. 22, 1992).

33 The trial judge had granted the motion, but not on the grounds of physical coercion.

34 Wilson v. City of Chicago, No. 86 C 2360, 1989 WL 65189, at *5. (N.D. Ill. June 5, 1989). The Jones breakthrough would open the door to the discovery and documentation, over the next two decades, of nearly 120 victims of torture by Burge and his men. *See 118 Known Burge Area 2 and 3 Torture Victims 1972-1991* (Chart), People's

yers to present weeks of highly prejudicial and irrelevant evidence about the police murders for which Wilson stood convicted. After eight weeks of trial, the racially mixed jury hung, and a mistrial was declared. The Jones evidence had led Wilson's lawyers to a number of additional victims of Area 2 torture, and they presented them to Judge Duff in an unsuccessful attempt to have this evidence presented at the retrial under Federal Rule of Evidence 404(b), as well as to further establish the City's pattern and practice. Frustrated by his refusal to permit the admission of the newly discovered evidence, and his extreme bias in favor of Burge and his fellow defendants, Wilson's lawyers moved to recuse Duff, pursuant to 28 U.S.C. §§ 144 and 455, but he unceremoniously denied the motion after a rancorous hearing.[35]

At the retrial, which commenced in the summer of 1989, Judge Duff permitted Burge's lawyers to again present weeks of evidence about the police murders for which Wilson stood convicted. He repeatedly cited Wilson's lawyers for contempt when they attempted to introduce the newly discovered evidence of torture and protested the unremitting admission of the plethora of police murder evidence.[36] Remarkably, the all-white jury, which was selected after the Judge gave the defendants twice as many peremptory challenges as the plaintiff, nonetheless returned a split verdict, absolving Burge from violating Wilson's constitutional rights, but finding that the police department had a policy of abusing persons accused of killing police officers, and awarding zero damages.[37]

On appeal, the Seventh Circuit reversed Judge Duff and ordered a new trial. It found that Duff had erroneously admitted a "massive amount of highly inflammatory evidence" concerning the police murders and that the theories upon which the judge admitted the evidence were not "remotely plausible."[38] The court went on to find that the barring of the Jones evidence was also error:

> While the judge was far too generous in allowing the defendants to present evidence, he was far too chary in allowing the plaintiff to present evidence. He kept out on grounds of relevance the plainly relevant testimony of Melvin Jones, who claimed to have been subjected to electroshock by Burge and other officers nine

---

LAW OFFICE, *available at* http://peopleslawoffice.com/wp-content/uploads/2014/01/1.6.14.-Documented-TortureSurvivorsunderBurge.pdf.

35 Wilson v. City of Chicago, 710 F. Supp. 1168 (N.D. Ill. 1989).

36 13 JOHN STAINTHORP & G. FLINT TAYLOR, LITIGATING POLICE TORTURE IN CHI., CIVIL RIGHTS LITIG. & ATTORNEY FEES ANNUAL HANDBOOK (1997).

37 *Id.*

38 Wilson v. City of Chicago, 6 F.3d 1233, 1237 (7th Cir. 1993).

> days before the interrogation of Wilson. If Burge had used an electroshock device on another suspect only a few days previously, this made it more likely (the operational meaning of "relevant") that he had used it on Wilson. Another excluded defense witness, Donald White, would have testified that he was arrested as a suspect in the murder of the two police officers shortly before Wilson's arrest and was taken to a police station where he was beaten for several hours by Burge and other defendant officers. Although evidence of prior bad acts is inadmissible to prove a propensity to commit such acts, it is admissible for other purposes, including intent, opportunity, preparation, and plan. . . . Jones's evidence would have served all four of these purposes, White's all but the third (preparation); and, since Burge had denied under cross-examination that he had ever had or used an electroshock instrument, Jones's evidence could also have been used to impeach that denial.[39]

The court then held that Judge Duff's errors were not harmless but rather required a new trial:

> The plaintiff's case was strong, as evidenced by the decisions of the Supreme Court of Illinois and the Police Board of Chicago. The torrent of inflammatory evidence and argument that the judge allowed the jury to consider may well have been decisive. Evidence that the jury was in fact confused is found in its verdict, which declared that Wilson's rights had been violated but not by any of the individual defendants or even by the city's policy (as the jury found it to be) of authorizing the abuse of suspected cop killers. By whom then?[40]

The court then turned to Wilson's policy-and-practice claim. After reluctantly accepting the City's concession that Superintendent Brzeczek was the final policymaker for the City, the Court asked whether he had "formulated, announced, approved, encouraged, acquiesced in, or otherwise adopted a policy of physical abuse of suspected cop killers."[41] Answering its own question, the court first found that

> Brzeczek had received many complaints from members of the [B]lack community that officers in "Area 2 Violent Crimes," the police unit in which Wilson was tortured, were abusing suspects; such abuse was in fact common in Area 2. Brzeczek had referred the complaints to the office in the police department that is responsible for investigating complaints of police misconduct, but the office had done nothing except lose a lot of the complaints.

---

39 *Id.* at 1238.
40 *Id.*
41 *Id.* at 1240.

> Brzeczek had written the state's attorney that he would do nothing further unless the state's attorney assured him that doing something would not interfere with the prosecution of Wilson; the letter was not answered, so true to his word Brzeczek did nothing further. Brzeczek had downplayed the gravity of the problem in Area 2 in discussions with [B]lack police officers. He had even signed a commendation for Burge, though it had been prepared by others for his signature and he may not have noticed Burge's name.[42]

While the court further found that "a rational jury could have inferred from the frequency of the abuse, the number of officers involved in the torture of Wilson, and the number of complaints from the [B]lack community, that Brzeczek knew that officers in Area 2 were prone to beat up suspected cop killers," it nonetheless absolved the City because his steps to eliminate the practice, no matter how ineffectual, established that he was not deliberately indifferent:

> He referred the complaints to the unit within the police department that is responsible for investigating police abuses. It was the plaintiff's responsibility to show that in doing this Brzeczek was not acting in good faith to extirpate the practice. That was not shown. At worst, the evidence suggests that Brzeczek did not respond quickly or effectively, as he should have done; that he was careless, maybe even grossly so given the volume of complaints. More was needed to show that he approved the practice. Failing to eliminate a practice cannot be equated to approving it. Otherwise every inept police chief in the country would be deemed to approve, and therefore become answerable in damages to all the victims of the misconduct of the officers under his command. . . .[43]

IV. Office of Professional Standards Reports

While the trial judge would not permit the other acts of torture by Burge to be introduced as evidence, it was instrumental in compelling the CPD's Office of Professional Standards to reopen its disciplinary investigation in the Wilson case and also to open a parallel investigation into the alleged pattern and practice of torture at Area 2. In the fall of 1990 the OPS, in a detailed report authored by investigator Francine Sanders, recommended that Burge, Yucaitis and a third detective, Patrick O'Hara, be fired for

---

42 *Id.*

43 Wilson v City of Chicago, 6 F.3d 1233, 1240 (7th Cir. 1993).

their torture of Andrew Wilson.[44] The Superintendent concurred, and they were suspended from the force pending a termination hearing before the Chicago Police Board.[45]

The parallel OPS investigation into the systemic nature of Area 2 torture was conducted by OPS investigator Michael Goldston, and its damning findings were approved by the OPS Chief Administrator.[46] Goldston's report found that suspects held in custody at Area 2 had been subjected to "systematic" and "methodical" "abuse," that the abuse included "planned torture," and that Area 2 command personnel were "aware of the systematic abuse" and encouraged it by "actively participating" or failing to take action to stop it.[47]

CPD Superintendent Martin, who had previously been Burge's commander at Area 2, suppressed the report[48] until lawyers from the People's Law Office obtained it under a protective order. In February 1992, U.S. District Judge Milton Shadur ordered that the report could be publicly released, and the report's findings received widespread local, national, and international coverage. In response, Martin and Mayor Richard M. Daley, who had been elected in 1989, publicly condemned the findings, calling them "only allegations . . . rumors, stories, things like that."[49]

V. The Firing of Jon Burge

Burge, Yucaitis, and O'Hara were put on trial before the Chicago Police Board for the torture of Andrew Wilson only days after the Goldston Report was made public.[50] In pleadings filed by the City in the Police Board case, its lawyers admitted for the first time that there was "an astounding pattern or plan on the part of [Burge and Yucaitis] to torture certain suspects . . . into confessing

---

44 Francine Sanders, Office of Prof'l Standards, Chi. Police Dep't, Analysis of *Wilson* Case 63–66 (Sept. 26, 1990).

45 Office of Prof'l Standards, Chi. Police Dep't, Recommendation for Separation 1–2 (Oct. 11, 1991).

46 Michael Goldston, Chi. Police Dep't Office of Prof'l Standards, History of Allegations of Misconduct by Area Two Personnel (Nov. 2, 1990).

47 *Id.* at 3.

48 *See* Expert Opinion of Anthony Bouza, Orange v. Burge, No. 04 C 168, 2005 WL 742641 (N.D. Ill. March 30, 2005); Declaration of G. Flint Taylor filed March 22, 2011, Cannon v. Burge, No. 05 C 2192, 2011 WL 4361529 (N.D. Ill. Sept. 19, 2011).

49 David Jackson, *13 Years of Cop Torture Alleged, Daley, Martin, Rip Internal Police Reports*, Chi. Trib. (Feb. 8, 1992), http://articles.chicagotribune.com/1992-02-08/news/9201120603_1_jon-burge-torture-chicago-police-board.

50 The hearing began on Feb. 10, 1992, and was completed on March 20, 1992. *See generally* Transcript of Proceedings Before the Chicago Police Board, *In re* Charges Filed Against Burge, Nos. 1856–1858 (Jan. 22, 1992).

to crimes."[51] Wilson, Melvin Jones, and a third Burge torture victim, Shadeed Mu'min, all testified for the City during the six-week hearing.[52] William Kunkle, who had made approximately $1 million defending Burge, Yucaitis, and O'Hara in the civil case, was retained by the Fraternal Order of Police to represent the charged officers before the Police Board.

A year later, in February 1993, the Police Board released its written decision, finding that Burge physically abused Wilson, and that Burge, Yucaitis, and O'Hara all failed to stop the abuse and provide medical care. The Board then ordered that Burge be fired and Yucaitis and O'Hara suspended for 15 months.[53] The lengthy decision did not brand the officers' conduct as torture nor specifically find that Wilson was electric-shocked, burned, or bagged, but it was nonetheless considered to be a significant victory by the anti-torture movement.[54]

VI. Wilson Civil Suit on Remand

When the *Wilson* case came back to the District Court from the Seventh Circuit, it was reassigned to Judge Robert Gettleman, a judge with a background in civil-rights law who took a decidedly different approach to the case than Judge Duff.[55] Wilson's lawyers amended the complaint to rejoin the City, alleging that it was directly liable for defendants Burge, Yucaitis, and O'Hara's actions under chapter 745, section 9-102 of the Illinois Compiled Statutes, while the defendant officers filed a third-party complaint against

---

51 City's Memorandum in Opposition to Motion to Bar Testimony Concerning Other Alleged Victims of Police Misconduct at 1, *In re* Charges Filed against Burge, Nos. 1856–58 (Jan. 22, 1992).

52 Transcript of Testimony by Andrew Wilson at 104, *In re* Charges Filed against Burge, Nos. 1856-1858 (1992); Transcript of Testimony of Melvin Jones at 844, *In re* Charges Filed Against Burge, Nos. 1856-1858 (1992); Transcript of Testimony of Shadeed Mu'min at 1055, *In re* Charges Filed Against Burge, Nos. 1856-1858 (1992).

53 *In re* Charges Filed Against Jon Burge Nos. 91-1856-1858, at 35–39 (Chi. Police Bd. Feb. 11, 1993) (ruling). The decision was affirmed in 1994 by Cook County Judge Thomas O'Brien, and in December 1995 by the Illinois Appellate Court. *See* Order at 20–28, Burge v. Chi. Police Bd., Nos. 1-94-0999, 1-94-2462, 1-94-2475 (consolidated) (Ill. App. Ct. Dec. 15, 1995).

54 One of Wilson's lawyers was quoted as saying that "justice had finally been done," that "the person in charge of the systematic torture had been fired," but that the department should "clean house," and "implement" the Goldston Report. Charles Nicodemus, *Cop Loses Job Over Torture*, Chi. Sun-Times, Feb. 11, 1993, at 5.

55 Duff subsequently resigned from active service, reportedly after the U.S. Department of Justice filed a disciplinary complaint connected to his continuing erratic behavior in other cases. *See* Maurice Possley & Matt O'Connor, *Controversial U.S. Judge Steps Down from U.S. Bench*, Chi. Trib. (Oct. 11, 1996), http://articles.chicagotribune.com/1996-10-11/news/9610110249_1_7th-circuit-complaint-removing.

the City alleging their right to indemnification.[56] The City, while still paying for their officers' defense, moved to dismiss, claiming for the first time that their officers' actions in abusing Wilson were outside the scope of their employment and thereby did not come within the statute.[57] After finding that the court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367, and that the parties had standing to assert these claims, Judge Gettleman denied the motion to dismiss, holding that whether the officers' actions were within the scope of their employment was a question of fact:

> [W]hether the City will be obligated to indemnify the Officers (or will be directly liable to plaintiff) depends on the Officers' actions when arresting and interrogating plaintiff. If those actions go beyond the scope of their duty as police officers, or could be classified as willful, then perhaps the City will not be found liable. That factual question, however, is obviously intertwined with the factual question in the underlying federal action.[58]

Wilson also moved for partial summary judgment, arguing that pursuant to principles of collateral estoppel, the administrative findings of the Police Board, made after a six-week evidentiary hearing, established the officers' liability for "excessive use of force" by Burge, failure to prevent abuse by all the officers, and failure to provide prompt medical attention.[59] The court first set forth the legal standard established by the United States Supreme Court in *University of Tennessee v. Elliott*.[60] In *Elliot*, the Supreme Court stated:

> When a State agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts.[61]

Judge Gettleman found that the Police Board's determination met the *Elliot* standard:

> The Officers assert, however, that the Board's decision is too vague to determine exactly what factual issues were actually decided, whether the issues decided were essential to its decision,

---

56 745 ILL. COMP. STAT. ANN. 10/9-102 (West 2002).

57 The City had previously admitted in its answer to the original complaint that Burge and Yucaitis were acting within the scope of their employment.

58 Wilson v. City of Chicago, 1995 U.S. Dist. LEXIS 205, at *10-11 (N.D. Ill. Jan. 5, 1995).

59 Wilson v. City of Chicago, 900 F. Supp. 1015, 1024–25 (N.D. Ill. 1995).

60 478 U.S. 788, 799 (1986).

61 *Id.*

> and whether those issues are identical to the issues in the instant case. They argue that because the Board's decision contains such language as "and/or," there is a question as to what specific conduct the Officers were found to have engaged in. The court disagrees. The findings of the Board provide that Burge did: (1) "strike and/or kick and/or otherwise physically abuse or maltreat [plaintiff] . . . and/or cause or aggravate physical or injuries to the person of [plaintiff]"; (2) "after having knowledge or reasonable basis to believe that other police officers . . . were physically abusing or maltreating [plaintiff] . . . improperly failed to take any action to stop such physical abuse or maltreatment . . . ." The findings are equally specific as to Yucaitis and O'Hara with respect to their knowledge of and failure to prevent such abuse or provide for or secure medical care for plaintiff. The court concludes that such findings are sufficiently specific for purposes of collateral estoppel.[62]

Given the fact that the Police Board decision was then on appeal to the Illinois Appellate Court, Judge Gettleman entered a stayed summary judgment against Burge and his Area 2 co-defendants pending final appellate resolution of the Police Board case. Wilson then agreed to settle his claims against Burge and O'Hara for a total of $1 million in damages and attorneys' fees. The City refused to pay the settlement, the judge entered judgment, and the City appealed to the Seventh Circuit.[63]

On appeal, the Seventh Circuit affirmed. It rejected the City's argument that the District Court did not have jurisdiction, finding that the principle of ancillary jurisdiction permitted Wilson's rejoinder of the City after the *Monell* claim was lost.[64] The court defined the controlling issue to be "whether Burge was acting within the scope of his employment by the City when he tortured Wilson,"[65] and held that he was:

> Burge . . . was not pursuing a frolic of his own. He was enforcing the criminal law of Illinois overzealously by extracting confessions from criminal suspects by improper means. He was, as it were, too loyal an employee. He was acting squarely within the scope of his employment.[66]

---

62 *Wilson*, 900 F. Supp. at 1026.

63 Wilson requested dismissal for the case against Yucaitis, who had died, and liability for the settlement was then divided equally between Burge and O'Hara. The appeal was taken on the portion of the settlement against Burge only, with the City agreeing to pay O'Hara's portion. The total amount ultimately collected by Wilson and his lawyers, after appeal, amounted to $1.1 million.

64 *See* Wilson v. City of Chicago, 120 F.3d 681 (7th Cir. 1997).

65 *Id.* at 684.

66 *Id.* at 685.

VII. Area 2 Torture by Burge's Midnight Crew

In 1982, after State's Attorney Daley refused to investigate and prosecute Burge and his confederates for the torture of Andrew Wilson, Burge installed his boyhood friend, John Byrne, as the sergeant in charge of the midnight shift at Area 2 Violent Crimes. This crew of white Burge loyalists soon became known internally as Burge's Asskickers,[67] and proceeded to continue the practice of torturing selected African American suspects who were arrested for particularly violent crimes. Among the scores of documented cases of torture and abuse by the midnight crew that followed Daley's inaction over the next six years were those of co-defendants Gregory Banks and David Bates, Darrell Cannon, co-defendants Stanley Wrice and Lee Holmes, co-defendants Michael Tillman and Steven Bell, and Eric Caine. All these men were convicted on the basis of confessions tortured from them, as were ten other men, including Leroy Orange, Stanley Howard, Aaron Patterson, and Madison Hobley, all of whom were sentenced to death.

VIII. The Banks and Bates Cases

Gregory Banks and David Bates were arrested in late October 1983 for the murder of a drug dealer and brought to Area 2 Violent Crimes for interrogation. The midnight crew, led by Byrne and his trusted associates, detectives Peter Dignan and Charles Grunhard, took over the questioning, and obtained confessions to the crime from both men. Banks later alleged that he confessed after Byrne put a revolver in his mouth and Dignan took out a plastic bag, said that they had "something for niggers," and proceeded to place the bag over his head.[68] The tactic, known as "dry submarino,"[69] simulates suffocation, and Byrne and Dignan exacerbated the torture by kicking and punching Banks while he could not breathe and thought he was about to die.[70] Bates independently described a similar experience, including repeated baggings, at the hands of Byrne and Grunhard. While Banks suffered physical injuries, Bates did not.[71]

---

67 *See* Letter from "Ty," Anonymous, to Flint Taylor (postmarked Mar. 6, 1989) (on file with author).

68 People v. Banks, 549 N.E.2d 766, 768 (Ill. App. Ct. 1989).

69 *See generally* Masha Lisitsyna, *The "Dry Submarino": Police Torture in Kazakhstan*, Open Soc'y Found. (Apr. 27, 2010), http://www.opensocietyfoundations.org/voices/dry-submarino-police-torture-kazakhstan.

70 *Banks*, 549 N.E.2d at 768.

71 *Id.* at 769; Testimony of Gregory Banks, United States v. Burge, No. 08 CR 846 (N.D. Ill. June 10, 2010).

Banks and Bates moved to suppress their confessions and sought to call Lee Holmes, who alleged that he was "bagged" by Byrne and Dignan thirteen months before Banks and Bates were tortured, but the Judge denied both this request and the motions to suppress. Both men appealed, and in December 1989, the Illinois Appellate Court, in the wake of the *Wilson* civil trials, reversed Banks' conviction. Citing *Miranda v. Arizona*[72] and *Brewer v. Williams*,[73] the Court first admonished that

> [T]he trial judge must keep in mind that ours is an adversary criminal justice system, and there must not be any naiveté that it is otherwise. The stark realities of our adversary criminal justice system are such that what occurs within the confines of a police station during custodial interrogation when there is no attorney present is not always what the unsophisticated would expect.[74]

Following the decision in *People v. Andrew Wilson*,[75] the court found that the State had not established "by clear and convincing evidence that defendant's injuries were not inflicted as a means of producing the confession."[76] Noting that "in our system of government, the use of a defendant's coerced confession as substantive evidence of his guilt cannot be considered harmless error,"[77] the court remanded the case for a new trial while making a powerful condemnation of police torture in support:

> We believe that this case is another reminder of the grave responsibility that trial judges have and must be willing to exercise when ruling on motions to suppress based on charges of police brutality and racial intimidation. If our constitutional rights and guarantees are to be in fact enjoyed equally by all our citizens, trial judges must ensure that those suspected of crimes do not relinquish their constitutional rights and guarantees solely because they become matched up against an uncaring or overzealous law enforcement officer who may be bent on obtaining a confession without regard to the suspect's constitutional rights and guarantees. In this regard, trial judges must bear in mind that while we no longer see cases involving the use of the rack and thumbscrew to obtain confessions, we are seeing cases, like the present case, involving punching, kicking and placing a plastic bag over a suspect's head to obtain confessions . . . . When trial judges do not courageously and forthrightly exercise

---

72 384 U.S. 436, 448–58 (1966).
73 430 U.S. 387, 399 (1977).
74 *Banks*, 549 N.E.2d at 766, 770.
75 People v. Wilson, 506 N.E.2d 571 (Ill. 1987).
76 People v. Banks, 549 N.E.2d 766, 770 (Ill. App. Ct. 1989).
77 *Id.*

> their responsibility to suppress confessions obtained by such means, they pervert our criminal justice system as much as the few misguided law enforcement officers who obtain confessions in utter disregard of the rights guaranteed to every citizen—including criminal suspects—by our constitution. Moreover, trial judges must be most circumspect when it appears that a right guaranteed to every citizen by our constitution may have been violated by police brutality or racial discrimination, for those affected are invariably the poorest, the weakest and the least educated, who are not sophisticated enough or do not have the resources to see and ensure that they are not denied the protections afforded by the rights and guarantees of our constitution.[78]

On remand, the state dismissed the charges rather than retry Banks, and he was released after serving seven years in prison. He later filed a civil suit and received a $96,000 settlement.[79] Bates also appealed, claiming that his confession was a product of an illegal arrest and physical coercion. The court distinguished Bates's case from Banks's on the basis that Bates had no physical injury, and affirmed the trial court's determination that Bates's confession was not physically coerced.[80] The court did find that Bates's arrest was without probable cause and remanded the case on the question of whether his confession was a product of his illegal arrest.[81] On remand, the trial judge refused to consider the Goldston and Sanders OPS Reports, and found that the confession was sufficiently attenuated from the arrest to make it admissible.[82] Bates again appealed, and the appellate court reversed, holding that the reports were relevant to "the purpose and flagrancy of police misconduct," a standard which the U.S. Supreme Court had established in *Brown v. Illinois*[83] as part of the attenuation test.[84] The State proceeded to retry Bates, but could present no competent evidence, and the judge dismissed Bates's case in December 1995. Having spent eleven years in jail, Bates then brought a civil suit that he settled for approximately $66,000.[85]

---

78 *Id.* at 771. The court also found that Holmes' testimony that he was bagged and beaten thirteen months prior to Banks was clearly relevant and not too remote in time. *Id.* at 771–72.

79 Banks v. Burge, No. 91-C-6470 (N.D. Ill. Aug. 18, 1993).

80 People v. Bates (*Bates I*), 578 N.E.2d 240 (Ill. App. Ct. 1991).

81 *Id.*

82 People v. Bates (*Bates II*), 642 N.E.2d 774, 776 (Ill. App. Ct. 1994).

83 422 U.S. 590, 604 (1975).

84 *Bates II*, 642 N.E.2d at 774.

85 *See* Bates v. Byrne, No. 96-C-7061 (N.D. Ill. May 5, 1997).

IX. The Cannon Criminal Case

Darrell Cannon was arrested for murder only days after Banks and Bates by a contingent of Area 2 officers who placed him in a detective car where Dignan told him that they had a "scientific way of questioning niggers."[86] When Cannon refused to talk, Byrne, Dignan, and Grunhard took him to a remote site on the far southeast side of Chicago, where Dignan forced the barrel of a shotgun into Cannon's mouth and pulled the trigger.[87] He repeated this mock execution twice more, after which he and Byrne pulled down Cannon's pants and repeatedly shocked him on the genitals with a cattle prod. After a subsequent round of electric shocking, Cannon gave a statement implicating himself as accountable in the murder.[88]

Cannon's motion to suppress was denied by a judge who would later go to federal prison for taking bribes.[89] Cannon eventually appealed; his conviction was reversed, and he was retried in 1994 after a successor judge denied him the right to re-litigate his motion to suppress.[90] He again appealed, armed with a record that included numerous other cases where Byrne and Dignan were accused of torturing and abusing other African American suspects.[91] The appellate court remanded the case to the trial court for a new motion to suppress hearing. The court, following *People v. Banks* and *Wilson v. City of Chicago*, held that the other torture allegations were relevant to show motive, plan, intent, and course of conduct, and to impeach Dignan and Byrne. In so doing, the court also held that the newly discovered evidence defeated principles of collateral estoppel and *res judicata*, and reiterated that the admission of a coerced confession can never be harmless error:

> No citation of authority is required for the proposition that in a civilized society torture by police officers is an unacceptable means of obtaining confessions from suspects. The use of a defendant's coerced confession as substantive evidence of his guilt

---

86 Transcript of Darrell Cannon's Testimony at Motion to Suppress Hearing at 17, People v. Cannon, No. 83-11830 (Cir. Ct. Cook County Mar. 27, 1984) [hereinafter Cannon Testimony]; *see also* KosWorks, *Police Torture Chicago Style: Darrell Cannon, Anthony Holmes and Flint Taylor Speak Out*, YouTube (Jan. 10, 2012), http://www.youtube.com/watch?v=AGCZ-qcjFto.

87 Cannon Testimony, *supra* note 86, at 37–38, People v. Cannon, No. 83-11830 (Cir. Ct. Cook County March 27, 1984); *see also* KosWorks, *supra* note 86.

88 Cannon Testimony, *supra* note 86, at 43-48. *See also* KosWorks, *supra* note 86 (Cannon recounting his torture).

89 *See* Bracy v. Gramley, 520 U.S. 899 (1997).

90 People v. Cannon, 688 N.E.2d 693, 696 (Ill. App. Ct. 1997).

91 *Id.* at 695.

never is harmless error.[92]

In finding the other allegations of torture relevant, the court powerfully rejected the State's argument that the torture employed in the other cases was too dissimilar to Cannon's to be admissible:

> To say, as the State does, that there is a qualitative distinction between shocking one suspect's genitals with a cattle prod and beating another with a flashlight, or inserting a shotgun in a suspect's mouth as opposed to a handgun, is to trivialize established principles for decent law enforcement. Under that view, accepted standards descend to banality. Minor differences in technique do not alter the nature of the torturer's work.[93]

On remand, Cannon's lawyers presented evidence of other acts of torture by Byrne and Dignan, and documentation of the pattern and practice of torture that included the Goldston Report and its findings that Byrne and Dignan were "players" in Burge's pattern and practice.[94] Cannon's lawyers also offered a long-suppressed 1994 OPS report that specifically found that Cannon had been tortured by Byrne, Dignan, and Grunhard,[95] as well as expert psychological evidence that further corroborated Cannon's claims of torture. In 2004, the State dismissed Cannon's case without presenting Byrne and Dignan as witnesses in the still pending motion to suppress hearing, but the Illinois Parole Board refused to release him because of a parole hold that was premised on the dismissed case. Finally, in 2007, after two parole hearings and an order from a Cook County judge, Cannon was released from prison after serving twenty-four years.[96]

X. The Death Row Cases

In the early 1990s, the legal and political struggle began to focus on the torture victims who had been sent to death row. These prisoners joined together and formed the Death Row Ten.[97] Pri-

---

92 *Id.* at 696.

93 *Id.* at 697.

94 *See* Michael Goldston, Chi. Police Dep't, Office of Prof'l Standards, History of Allegations of Misconduct by Area Two Personnel (Nov. 2, 1990); Chi. Police Dep't, Office of Prof'l Standards, Supplemental Report (April 30, 1991).

95 Declaration of G. Flint Taylor filed March 22, 2011, Cannon v. Burge, No. 05 C 2192, 2011 WL 4361529 (N.D. Ill. Sept. 19, 2011); Veronica Tillman, Chi. Police Dep't Office of Prof'l Standards, Supplementary Summary Report, Complaint Register No. 134723 (Jan. 1994); report also filed in *Cannon*, 2011 WL 4361529.

96 Cannon v. Ill. Prisoner Review Bd., No. 04-CH-16620, slip op. at 13, 15, 19 (Cir. Ct. Cook County Nov. 22, 2006).

97 *See* Flint Taylor, *Police Torture and the Death Penalty in Illinois: Ten Years Later*,

mary among them were Aaron Patterson,[98] Madison Hobley,[99] Leroy Orange,[100] and Stanley Howard.[101] Orange had been repeatedly electric-shocked by Burge, while the others had been bagged and beaten by his midnight crew. All four of them lost on direct appeal,[102] and Hobley and Orange also lost their post-conviction torture claims in the Illinois Supreme Court,[103] in part because they could not show physical injuries that the Illinois Supreme Court, in a perverse application of *People v. Wilson*, had articulated as a requirement in their cases.

In 1994, Patterson, represented by lawyers from the People's Law Office, filed a post-conviction claim in which he marshaled all the newly discovered torture evidence that had come to light since his 1988 motion to suppress hearing and trial. He also included his subsequent identification of Jon Burge as the red-haired officer who participated in his torture and offered photographs of etchings he had made in the interrogation room bench the night of his torture which stated that he was suffocated with plastic. The trial judge dismissed the petition, and Patterson, who had no documented physical injuries, appealed directly to the Illinois Supreme Court. Confronted with the *Wilson* physical injury standard, Patterson's lawyers placed Chicago police torture in the context of the history of torture, international law, and its definition by the United Nations Committee Against Torture (CAT) in order to argue that a major component of torture was to inflict serious pain during interrogations without leaving marks or visible injury.[104]

The case was argued and decided together with two other Chicago police torture cases,[105] and in August 2000 the Supreme Court issued a landmark decision in the *Patterson* case. After re-

---

NATION (Jan. 11, 2013), http://www.thenation.com/article/172152/police-torture-and-death-penalty-illinois-ten-years-later.

98 People v. Patterson, 610 N.E.2d 16 (Ill. 1992).

99 People v. Hobley, 637 N.E.2d 992 (Ill. 1994).

100 People v. Orange, 521 N.E.2d 69 (Ill. 1988).

101 People v. Howard, 588 N.E.2d 1044 (Ill. 1991).

102 *Patterson*, 610 N.E.2d at 16; *Hobley*, 637 N.E.2d at 992; *Howard*, 588 N.E.2d at 1044; *Orange*, 521 N.E.2d at 69.

103 People v. Orange, 659 N.E.2d 935 (Ill. 1995); People v. Hobley, 696 N.E.2d 313 (Ill. 1998). The Illinois Supreme Court granted Hobley a post-conviction hearing on other grounds.

104 *See* Reply Brief and Argument for Defendant-Appellant at 3–7; People v. Patterson, 610 N.E.2d 16 (Ill. 1992) (No. 82711).

105 People v. King, 735 N.E.2d 569 (Ill. 2000); People v. Kitchen, 727 N.E.2d 189 (Ill. 2000). The Supreme Court, following its decision in *Patterson*, reversed the trial court's denial of an evidentiary hearing in *King*, and reversed the trial court's denial of leave to file an amended post-conviction petition in *Kitchen*.

jecting several ineffective assistance of counsel arguments, the court, in an opinion written by Justice Rathje, found that fundamental fairness defeated the *res judicata* effect of its prior *Patterson* decision,[106] and held that Patterson was entitled to an evidentiary hearing on the question of newly discovered torture evidence.[107] Rejecting the State's reliance on a number of the court's prior decisions, including *People v. Wilson*, *People v. Hobley*, and *People v. Orange*, the court modified the physical injury rule:

> [T]he fact that the defendant has suffered a physical injury is only one of many factors to consider when determining whether evidence of prior allegations of police brutality are admissible. The question of relevancy is a determination to be made by the trial court after a consideration of, *inter alia*, the defendant's allegations of torture and their similarity to the prior allegations.[108]

The court detailed the newly discovered evidence, including sixty incidents of torture that implicated Burge and the detectives who tortured Patterson, the OPS Goldston and Sanders Reports, and several judicial and administrative decisions, and evaluated their relevance in light of the decisions in *People v. Cannon*, *People v. Banks*, *Wilson v. Burge*, and *People v. Hobley*. The court found that the sixty incidents, some of which were contained in a proffer offered in the *Wilson* civil case, were not unduly remote:

> Many of the claims detailed in the plaintiff's proffer are remote in time from defendant's claims. The amount of time separating the incidents is a relevant consideration when determining admissibility. . . . Even incidents that are remote in time can become relevant, however, if the party presenting the evidence can present evidence of other incidents that occurred in the interim. Thus, a single incident years removed has little relevance. However, a series of incidents spanning several years can be relevant to establishing a claim of a pattern and practice of torture. Consequently, we believe that the claims detailed in the proffer should be considered new evidence, but only if defendant can establish the later discovery of other torture allegations linking defendant's claims to those contained in the proffer.[109]

In conclusion, the court found that all of this evidence was relevant and should be considered by the trial court:

> After reviewing the new evidence relied upon by defendant, we

106 *Patterson*, 610 N.E.2d at 16.
107 *Patterson*, 735 N.E.2d 616 (Ill. 2000).
108 *Id.* at 645.
109 *Id.* at 642–43.

> believe that it is material and that, as pleaded, would likely change the result upon retrial. In particular, we note that defendant has consistently claimed that he was tortured. In fact, he made this claim during his first court appearance. Moreover, defendant's claims are now and have always been strikingly similar to other claims involving the use of a typewriter cover to simulate suffocation. Additionally, defendant describes the use of a gun as a threat and beatings that do not leave physical evidence. Further, the officers that defendant alleges were involved in his case are officers that are identified in other allegations of torture. Finally, defendant's allegations are consistent with the OPS findings that torture, as alleged by defendant, was systemic and methodical at Area 2 under the command of Burge.[110]

XI. Area 3 Detective Headquarters

In August 1986, Burge was promoted to commander and put in charge of the Bomb and Arson Unit. He stayed there until January 1988, when he was transferred, at his request, to Area 3 Detective Headquarters, on Chicago's predominantly African-American West Side. Commander Burge brought Byrne and several trusted Area 2 detectives with him to Area 3. In August of 1988, Burge and his detectives "solved" a quintuple murder by arresting Ronald Kitchen and Marvin Reeves for the crimes. Burge personally participated in Kitchen's interrogation, and after he collaborated with several detectives under his command to repeatedly beat Kitchen with a telephone book and a phone receiver, Kitchen gave a false confession.[111] Kitchen and Reeves were both convicted, and Kitchen was sentenced to death, while Reeves received a life sentence.[112]

A steady stream of police torture allegations began to emanate from Area 3, culminating in September of 1991 with a case where eleven young men, most of whom were juveniles, were rounded up for questioning about a murder. They were brought to Area 3 where, they alleged, they were tortured and abused. The youngest of the boys was Marcus Wiggins, a diminutive thirteen-year-old who was mentally delayed. Wiggins claimed that he was electric-shocked by one of Burge's transplanted detectives into giving a false confes-

---

110 *Id.* at 645.

111 KosWorks, *Ronald Kitchen: Tortured, Framed, and Sentenced to Death*, YouTube (Nov. 19, 2011), http://www.youtube.com/watch?v=A0sJXxPkZLg (Kitchen recounting his torture).

112 *See* G. Flint Taylor, *Three Torture Victims Exonerated, Another Granted a New Trial*, 9 Police Misconduct & Civil Rights Law Reporter, No. 14, Mar.–Apr. 2010, at 4.

sion, and several of the other juveniles also alleged shockings and beatings.[113] Eight of the young men, including the only non-juvenile, Jesse Clemon, were charged with the murder. They moved to suppress their confessions, and, ultimately, all of the cases were dismissed. In Clemon's case, Earl Strayhorn, a well-respected African-American judge, became the first Cook County trial judge to hold, albeit indirectly, that Burge or his underlings coerced a statement from a suspect. Finding that a witness who corroborated Wiggins' assertions that he was electric-shocked to be "very credible," Judge Strayhorn suppressed Clemon's confession:

> Given the atmosphere that existed in that District with eleven people under suspicion in custody in the same location, the atmosphere must have been horrendously oppressive and I am going to suppress the statements.[114]

The Illinois Appellate Court affirmed the trial judge, and Clemon was set free.[115]

In January of 1993, Wiggins brought a 42 U.S.C. § 1983 lawsuit that alleged that his torture and wrongful arrest were caused by a pattern and practice of torture.[116] During discovery, Wiggins' counsel compelled the City to produce several suppressed OPS disciplinary files which contained findings that Byrne, Dignan, and several other Burge detectives tortured and abused several suspects.[117] After Wiggins settled his case, his counsel sought to publicly release the files; the City opposed their motion, and the trial judge ordered them released:

> In essence, this Court concludes that the allegations of police misconduct in the disputed documents before the Court must receive public exposure in order to insure that the significant public interest is served. As Martin Luther King, Jr. stated in his now famous letter from the Birmingham County Jail in April of 1963: Like a boil that can never be cured as long as it is covered up but must be opened with all its pus-flowing ugliness to the natural medicines of air and light, injustice must likewise be exposed, with all of the tension its exposing creates, to the light of human conscience and the air of national opinion before it can be cured." Similarly, this Court concludes that the allegations of

---

113 People v. Clemon, 630 N.E.2d 1120 (Ill. App. Ct. 1994); June 4, 1996 Deposition of Marcus Wiggins at 303:1–308:7, Wiggins v. Burge, 173 F.R.D. 226 (N.D. Ill. 1997) (No. 93 C 199).

114 *Clemon*, 630 N.E.2d at 1123.

115 *Id.*

116 *See* Deposition of Marcus Wiggins, *supra* note 113, at 303:1–308:7.

117 Declaration of G. Flint Taylor at 13–17, Cannon v. Burge, No. 05 C 2192, 2011 WL 4351529 (N.D. Ill. Sept. 19, 2011).

> police misconduct contained in the disputed files must be exposed to the light of human conscience and the air of natural opinion.[118]

Two years later, in 1999, Federal Judge Milton Shadur, who had previously ordered the Goldston Report released, made the first unequivocal judicial determination that there was a pattern and practice of torture and abuse under Burge at Area 2:

> It is now common knowledge that in the early to mid-1980s Chicago Police Commander Jon Burge and many officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions. Both internal police accounts and numerous lawsuits and appeals brought by suspects alleging such abuse substantiate that those beatings and other means of torture occurred as an established practice, not just on an isolated basis.[119]

XII. Gubernatorial Pardons

In 2000, in response to the heightened focus on the death penalty and its relationship to police torture, Illinois Governor George Ryan ordered a moratorium on the death penalty. Three years later, after a long and highly publicized battle between proponents and opponents of the death penalty, Ryan, as he left office, commuted all 163 Illinois death sentences to life without parole, and granted innocence pardons to Leroy Orange, Madison Hobley, Aaron Patterson, and Stanley Howard.[120] The basis for these pardons was that all four men had been tortured into giving false confessions by Burge and his men. In an impassioned statement, Ryan described his rationale:

> The category of horrors was hard to believe. If I hadn't reviewed the cases myself, I wouldn't believe it . . . . [W]e have evidence from four men, who did not know each other, all getting beaten and tortured and convicted on the basis of the confessions they allegedly provided. They are perfect examples of what is so terribly broken about our system.[121]

---

118 *Wiggins*, 173 F.R.D. at 230.

119 United States *ex rel.* Maxwell v. Gilmore, 37 F. Supp. 2d 1078, 1094 (N.D. Ill. 1999). Judge Shadur made this determination in support of his granting an evidentiary hearing to Area 2 torture victim Andrew Maxwell on his federal habeas corpus petition.

120 *See* G. Flint Taylor, *A Historic Moment for the Human Rights Movement: Illinois Governor Ryan Grants Pardons and Mass Clemency*, 7 Police Misconduct & Civil Rights Law Reporter, No. 7, Jan.–Feb. 2003, at 75.

121 *Id.* at 75, 77.

Hobley, Orange, and Patterson were immediately released, while Howard remained imprisoned on another conviction.

XIII. Appointment of the Cook County Special Prosecutors

Since the early 1990s, lawyers for the torture victims had periodically made the demand for a special prosecutor to investigate the serious crimes that were alleged in the ever-increasing number of documented torture cases. These demands went unrealized until 2001, when the lawyers, together with community activists, mounted a campaign that resulted in the filing of a petition before Cook County Criminal Division Chief Judge Paul Biebel that sought the appointment of a special prosecutor. The basis for the petition was Cook County State's Attorney Richard Devine's alleged conflict of interest that arose from his and his law firm's prior representation of Burge in the *Wilson* civil litigation. In April of 2002, Judge Biebel granted the petition, finding, pursuant to chapter 55, section 3-9008 of the Illinois Compiled Statutes and relevant Illinois precedent,[122] that Devine's prior representation of Burge created both an "appearance of impropriety" and a *per se* conflict of interest which was imputed to the entire Cook County State's Attorney's Office.[123] In what would later prove to be a very controversial decision, Judge Biebel appointed as Special Prosecutors two former Assistant Cook County State's Attorneys, Edward Egan and Robert Boyle, who had played key supervisory roles in the 1960s during the reign of Mayor Richard J. Daley.[124]

Later in 2002, lawyers for the Death Row Ten moved to remove Devine's office from defending the State in all Burge related post-conviction cases and for the entire Cook County Bench to be disqualified from hearing the cases.[125] The disqualification of the State's Attorney's Office was premised on Devine's conflict, the appearance of impropriety, and Judge Biebel's prior ruling, while the judicial disqualification request was based on the fact that a large percentage of Cook County judges were former Assistant State's

---

122 55 Ill. Comp. Stat. Ann. 5/3-9008 (West 2001); People v. Coslet, 364 N.E.2d 67, 70 (Ill. 1977); People v. Gerold, 107 N.E. 165 (Ill. 1914); People v. Courtney, 687 N.E.2d 521, 526 (Ill. App. Ct. 1977).

123 *In re* Appointment of Special Prosecutor, No. 90 CR 11985, 2002 WL 34491483 (Cir. Ct. Cook County April. 24, 2002).

124 *See, e.g.*, Abdon M. Pallasch & Frank Main, *Did Leaders of Burge Inquiry Favor City Hall?: E-mails Show Top Daley Lawyer Pleased With Their Selection*, Chi. Sun-Times, July 31, 2006, at 10.

125 *See* Memorandum Opinion and Order of Apr. 9, 2003 at 3, *In re* Appointment of Special Prosecutor, No. 2001 Misc. 4, (Apr. 24, 2002).

Attorneys, with a substantial number having been directly involved either in taking confessions from men who alleged torture, or had been involved in the prosecution of cases where a tortured confession was at issue.[126] Judge Biebel found that Devine did not have a *per se* conflict, but disqualified the State's Attorney's Office nonetheless because of a potential conflict that arose from the possibility that Burge might be a potential witness in one or more of the cases.[127] Over the objection of the torture victims' lawyers, the judge appointed the Illinois Attorney General to represent the State in the cases. Judge Biebel also rejected the argument that the appearance of impropriety required the disqualification of the Cook County bench, finding that:

> This Court agrees that public confidence in the judiciary is of substantial importance. However, the Court disagrees that removing the cases from the Cook County Judiciary is the best way to foster such confidence. The best remedy for any perceived lack of faith is to allow the judges of this jurisdiction to preside over these matters with diligence and impartiality, as they have been sworn to do. The removal of Petitioners' cases from Cook County would, in essence, be an acknowledgement that the judges therein are incapable of fulfilling their duty. This Court declines to draw such a conclusion.[128]

XIV. Civil Suits by the Pardoned Prisoners

In late 2003 and early 2004, the four pardoned torture survivors each brought 42 U.S.C. § 1983 suits alleging that they were tortured into giving false confessions that led to their wrongful convictions and imprisonment.[129] They further alleged that their torture and wrongful convictions were caused, in part, by a widespread racially based pattern and practice of torture, and that their wrongful convictions were continued as a result of a broad-based conspiracy by high-level police officials, acting together with Burge, his associates, and State's Attorney Richard Devine, to cover up the pattern and practice of Burge-related torture.[130]

---

126 *See* John Conroy, *Deaf to the Screams*, Chi. Reader, (July 31, 2003), http://www.chicagoreader.com/chicago/deaf-to-the-screams/Content?oid=912813.

127 Memorandum Opinion and Order of April 9, 2003, at 12–13, *In re* Appointment of Special Prosecutor, No. 2001 Misc. 4 (April 24, 2002).

128 *Id.* at 25–26.

129 *See* Orange v. Burge, No. 04 C 0168, 2005 WL 74264 (N.D. Ill. Mar. 30, 2005); Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004); Hobley v. Burge, No. 03 C 3678, 2004 WL 856439 (N.D. Ill. June 2, 2004); Howard v. City of Chicago, No. 03 C 8481, 2004 WL 2397281 (N.D. Ill. Oct. 22, 2004).

130 See G. Flint Taylor, *Pardoned Illinois Prisoners Bring Torture and Wrongful Convic-*

The defendants' motions to dismiss were denied in almost all respects,[131] and discovery proceeded in the cases. People's Law Office lawyers, who represented Orange and Patterson, embarked on an investigation that yielded numerous statements that they obtained from recently discovered torture victims and five African-American detectives who had retired from the force. The former detectives, no longer living in fear of the police code of silence and official retaliation,[132] for the first time revealed a wealth of evidence that corroborated that the pattern and practice of torture under Burge was an "open secret at Area 2."[133] These former detectives revealed that they had seen what appeared to be Burge's torture box,[134] had walked in on torture scenes,[135] had overheard discussions concerning the use of plastic bags, telephone books, and the "Vietnamese treatment" to obtain statements,[136] and had heard screams coming from the interrogation room.[137] They further asserted "the [B]lack box . . . was running rampantly through the little unit up there,"[138] that Burge enforced the "code of silence" with threats of violence,[139] and that Burge was an avowed racist[140] who was rumored to be a Ku Klux Klan member.[141]

During discovery, the torture victims' lawyers took scores of depositions and posited hundreds of interrogatories, and on al-

---

tion Claims, 7 POLICE MISCONDUCT & CIVIL RIGHTS LAW REPORTER, No. 13, Jan.–Feb. 2014.

131 *Id.*

132 *See, e.g.*, November 9, 2004 Sworn Statement of Doris Byrd at 41–43, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433).

133 *Id.* at 11.

134 Affidavit of Melvin Duncan on May 20, 2004, at ¶¶ 5–10, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433); Statement of Walter Young on November 2, 2004 at 6–7, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433).

135 *See* November 9, 2004 Sworn Statement of Doris Byrd, *supra* note 132, at 13–14; Statement of William Parker on Oct. 12, 2004 at 7–16, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433); Statement of Walter Young, *supra* note 134, at 9–10.

136 Sworn Statement of Doris Byrd, *supra* note 132, at 10–12; Affidavit of Melvin Duncan, *supra* note 134, at ¶¶ 1, 4, 5–10; Statement of Walter Young, *supra* note 134, at 8–9, 27–28.

137 Sworn Statement of Doris Byrd at 9, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433).

138 *Id.* at 10–11.

139 *Id.* at 6–7.

140 *Id.* at 26–27; Statement of Walter Young on November 2, 2004, at 30–31, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433); Statement of Sammy Lacey on October 12, 2004, at 20–21, 28, Patterson v. Burge, 328 F. Supp. 2d 878 (N.D. Ill. 2004) (No. 03 C 4433).

141 Statement of Walter Young, *supra* note 134, at 31–32; Sworn Statement of Doris Byrd, *supra* note 132, at 27.

most all occasions, Burge and his fellow officers, citing the ongoing investigation by the special prosecutors, invoked the Fifth Amendment to all torture-related questions. However, at the very inception of discovery, Burge made what would later prove to be a critical mistake—he denied under oath in interrogatory answers that he had participated in or witnessed any acts of torture and abuse.

None of the four plaintiffs had joined Richard M. Daley as a defendant in his case, but they all sought his deposition as a material witness as State's Attorney and Mayor on their *Monell* and conspiracy claims. In February 2007, Magistrate Judge Geraldine Soat Brown ordered that Daley sit for his deposition on Madison Hobley's *Monell* claims.[142] However, in what would become a recurring theme, the City subsequently agreed to settle the four cases for a total of $19.8 million, and the Chicago City Council approved the settlement in January of 2008.[143] Daley consequently avoided testifying.

XV. The International Campaign

From the beginning of the public struggle against police torture in the late 1980s, People's Law Office lawyers and anti-torture activists had consistently identified the racially motivated abuse perpetrated by Burge and his confederates as torture rather than police brutality, as the media preferred to call it. At their behest, the Chicago City Council held a widely publicized hearing on the torture cases on Christmas Eve 1990 at which one of Andrew Wilson's lawyers, international torture expert Dr. Robert Kirschner, and County Commissioner Danny Davis presented evidence.[144] Shortly thereafter, Amnesty International took up the cause, calling for an investigation by the Illinois Attorney General's Office.[145] In the *Patterson* case, PLO lawyers, for first time in a police torture-related court proceeding, argued the relevance of the international history of torture to the Burge cases, and their arguments

142 Hobley v. Burge, No. 03 C 3678, 2007 WL 551569, at *8 (N.D. Ill. Feb. 22, 2007).

143 Fran Spielman, *This Tragic Chapter . . . Is Closed*, Chi. Sun-Times, Jan. 10, 2008, at 8. The City had agreed to settle with three of the four men for $14.8 million more than a year earlier, but the City refused to execute the agreement. *See* Rudolph Bush, *Burge Claimants Allege City Backed Out of $14.8 Million Settlement*, Chi. Trib., Feb. 20, 2007. Judge Soat Brown released her Daley decision two days after the City's attempt to back out of the settlement became public.

144 *See* Transcript of Hearing before Chicago City Council Subcomm. on Finance (Dec. 24, 1990) (on file with author).

145 *See* Ray Long, *Police Torture Probe Sought Here*, Chi. Sun-Times, Jan. 28, 1991, at 1.

led to a landmark change in the law.[146]

In 2005, the anti-torture movement, frustrated by the pace and tenor of the ongoing investigation by the Special Prosecutors' Office, petitioned for and obtained a hearing before the Inter American Commission for Human Rights (IACHR) of the Organization of American States.[147] At this hearing, held in Washington, D.C. in October 2005, a Burge torture survivor, lawyers from the People's Law Office, and several activists testified and presented evidence to the Commission.[148]

The movement next turned to the United Nations Committee Against Torture (CAT). The Midwest Committee for Human Rights and lawyers from the People's Law Office, together with numerous national human rights organizations, presented the issue of Chicago police torture to CAT as part of a broader picture of systemic U.S. human rights violations that also included torture at Guantanamo Bay and Abu Ghraib.[149] A lawyer from the People's Law Office appeared before CAT in Geneva, Switzerland to argue the case for U.S. prosecutions of Burge and his men.[150] In May 2006, the CAT, in its "principal subjects of concern and recommendations concerning the United States" section of its report found:

> The Committee is concerned with allegations of impunity of some of the State party's [U.S's] law enforcement personnel in respect of acts of torture or cruel, inhuman or degrading treatment or punishment. The Committee notes the limited investigation and lack of prosecution in respect of the allegations of torture perpetrated in areas 2 and 3 of the Chicago Police Department. (article 12) The State party should promptly, thoroughly and impartially investigate all allegations of acts of torture or cruel, inhuman or degrading treatment or punish-

146 *See* Reply Brief and Argument for Defendant-Appellant at 3–7, People v. Patterson, 610 N.E.2d 16 (Ill. 1992) (No. 82711).

147 Approximately fifty organizations and individuals, including the Midwest Committee for Human Rights (MCHR), the National Lawyers Guild, the National Conference of Black Lawyers, the NAACP, the ACLU, and the Christian Council on Urban Affairs signed the petition. *See* Letters from Locke E. Bowman et. al, McArthur Justice Ctr. at the Univ. of Chi. Law Sch., to the Exec. Secretariat, Inter-Am. Comm'n on Human Rights (postmarked Aug. 26, 2005 and Sept. 6, 2005) (on file with author) (alleging that the pattern and practice of torture violated the American Declaration of the Rights and Duties of Man and requesting a general interest hearing).

148 Dennis Conrad, *Panel Hears Claims of Anti-Black Cop Brutality Here*, CHI. SUN-TIMES, Oct. 15, 2005.

149 *See cf.* Memorandum from Midwest Comm. for Human Rights (MCHR) to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Sept. 30, 2005).

150 *See* Diantha Parker, *U.N. Investigates Alleged Torture*, WBEZ Chicago Public Radio broadcast, May 5, 2006 (transcript on file with author).

> ment by law enforcement personnel and bring perpetrators to justice, in order to fulfill its obligations under article 12 of the Convention. The State party should also provide the Committee with information on the ongoing investigations and prosecution relating to the above-mentioned case.[151]

XVI. The Special Prosecutors' Report

In July 2006, after a four-year investigation that cost Cook County taxpayers $7 million, Special Prosecutors Egan and Boyle returned no indictments, but rather issued a report that absolved Richard M. Daley, Richard Devine, and all but one of the numerous high-level Chicago Police officials who had been implicated in the decades-long scandal.[152] In the report, the Special Prosecutors did make a number of findings that would prove to be of significance in subsequent legal proceedings:

- The evidence established beyond a reasonable doubt that Burge committed aggravated battery, obstruction of justice, and perjury when he abused Andrew Wilson and later testified falsely about it.[153]
- The evidence established beyond a reasonable doubt that Area 2 Midnight detectives Ronald Boffo and James Lotito physically abused Philip Adkins and committed aggravated battery against him.[154]
- The evidence established beyond a reasonable doubt that Area 2 detectives Anthony Maslanka and Michael McDermott physically abused Alphonso Pinex and committed aggravated battery, perjury, and obstruction of justice.[155]
- There were "many other cases" in which the Special Prosecutors believed that the persons, including Melvin Jones, Shadeed Mu'min, and Michael Johnson, were abused but "proof beyond

---

151 U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, 36th Sess., May 1–19, 2006, at 7, CAT/C/USA/CO/2 (May 18, 2006). In May 2008, similar evidence was presented to the U.N. Rapporteur on Racism at a hearing conducted in Chicago. *See* MidwestHumanRights, *Joey Mogul's Testimony to UN Special Rapporteur on Racism*, YouTube (May 29, 2008), http://www.youtube.com/watch?v=90dH2WOL34w.

152 *See* Report of the Cook County Special State's Attorney, *In re* Appointment of Special Prosecutor, No. 2001 Misc. 4 (July 19, 2006) [hereinafter Special Prosecutors' Report].

153 *Id.* at 16, 63.

154 *Id.* at 16. The evidence established that Adkins was brutally beaten about his head and body with a flashlight, causing him to defecate on himself, and that racial epithets were directed at him. *Id.* at 266–75.

155 *Id.* at 16.

a reasonable doubt" was absent.[156]

- Burge, the "commander of the Violent Crimes Section of Detective Areas 2 and 3," was "guilty [of] abus[ing] persons with impunity," and that it therefore "necessarily follows that a number of those serving under his command recognized that if their commander could abuse persons with impunity, so could they."[157]
- Chicago Police Superintendent Richard J. Brzeczek was guilty of a "dereliction of duty" and "did not act in good faith in the investigation of the claim of Andrew Wilson," because Brzeczek "believed that officers in the Violent Crimes unit of Detective Area 2 had tortured Andrew Wilson," and that Brzeczek "kept Burge in command at Area 2, and issued a letter of commendation to all of the detectives at Area 2."[158]
- Brzeczek "received and believed evidence that a prisoner [Andrew Wilson] had been brutalized by the Superintendent's subordinates; that the prisoner had confessed; that those subordinates had testified under oath on a motion to suppress and before a jury, and he [Brzeczek] had to believe, they [Burge and Yucaitis] testified perjuriously; *that the prisoner had been sentenced to death,* and that that Superintendent still remained silent for over twenty years."[159]
- The U.S. Court of Appeals for the Seventh Circuit, in its 1993 consideration of the City's liability in the *Wilson* civil case, was misled concerning Superintendent Brzeczek's contemporaneous knowledge that Burge and his subordinates tortured Wilson because Brzeczek concealed those views until after the case was concluded.[160]
- The Chief of Felony Review of the Cook County States Attorney's Office, Lawrence Hyman, gave "false testimony" when "he denied that Andrew Wilson told him he had been tortured by

---

156 *Id. at* 12–13. The evidence established that Burge electrically shocked Jones on his penis, thigh, and foot, struck him in the head with a stapler, threatened him with a revolver, and threatened to "blow [his] [B]lack brains out;" that Burge suffocated Mu'min with a plastic typewriter cover, threatened him with a revolver, subjected him to Russian Roulette, and repeatedly used racial epithets; and that Burge electrically shocked and beat Johnson. *See* Testimony of Melvin Jones, United States v. Burge, No. 08 CR 846 (N.D. Ill. May 27, 2010); Testimony of Shadeed Mu'min, United States v. Burge, No. 08 CR 846 (N.D. Ill. June 15, 2010); Special Prosecutors Report, *supra* note 152, at 12–13, 87.

157 Special Prosecutors' Report, *supra* note 152, at 16.

158 *Id.* at 17.

159 *Id.* at 86–87 (emphasis in original).

160 *Id.* at 87–88.

detectives under the command of Jon Burge."[161]

- No meaningful police investigation was conducted, nor any police witness questioned either in the *Wilson* case, or in the Michael Johnson electric shock case, which occurred a few months after Wilson, and had "glaring similarities" to the Wilson allegations.[162]
- "[S]omething should have been done about the 'disgrace and embarrassment' [at Area 2] 24 years ago" by the Chicago Police Superintendent.[163]
- If action had been taken against Jon Burge at the time of the Andrew Wilson case, or even shortly thereafter, the appointment of the Special Prosecutor would not have been necessary.[164]
- This action should have included, "at the very least," the Superintendent's removal of Burge from any investigative command and a "complete shake-up at detective Area 2."[165]

XVII. Response to the Special Prosecutors' Report

The lawyers for the torture victims, human rights activists, and much of the African-American community were outraged by the Special Prosecutors' failure to indict for perjury, obstruction of justice, and conspiracy, and their failure to properly assess blame. Their anger was fueled by the discovery that Special Prosecutor Egan had nine relatives who were Chicago Police officers, one of whom served under Burge at Area 2 in the 1980s and participated in the arrest of torture victim Gregory Banks.[166] As a result, lawyers from the People's Law Office, together with Northwestern Law School's Center on Wrongful Convictions, drafted a Shadow Report that was signed by more than 200 organizations and individuals from the human rights, criminal justice and racial justice movements.[167] The Shadow Report, which was released in April 2007, found that the Special Prosecutors:

- Did not bring criminal charges against members of the Chicago

---

161 *Id.* at 54.

162 *Id.* at 12–13, 87–88.

163 Special Prosecutors' Report, *supra* note 152, at 89.

164 *Id.* at 88.

165 *Id.*

166 Abdon M. Pallasch & Frank Main, *Torture Report and Family Ties: Top Investigator Had Nephew on Burge's Staff*, Chi. Sun-Times, Aug. 6, 2006, at A7.

167 Report on the Failure of Special Prosecutors Edward J. Egan and Robert D. Boyle to Fairly Investigate Systemic Police Torture in Chicago at 2 (April 24, 2007).

Police Department despite the apparent existence of numerous provable offenses within the statute of limitations.

- Ignored the failure of former Cook County State's Attorney Richard M. Daley, State's Attorney Richard A. Devine, and various other high-ranking officials to investigate and prosecute police officers who engaged in a documented pattern of torture and wrongful prosecution of torture victims.
- Did not document the systemic and racist nature of the torture and did not brand it as such in accordance with the international definition of torture.
- Unfairly evaluated the credibility of the alleged torturers and of their victims and unfairly attempted to discredit torture victims who had pending civil or criminal cases.
- Conducted an investigation that was hopelessly flawed and calculated to obfuscate the truth about the torture scandal.
- Ignored a wealth of evidence establishing that there was a widespread and continuing cover-up of the torture scandal—a conspiracy of silence—implicating high officials of the City of Chicago, the Chicago Police Department, and the Cook County State's Attorney's Office.
- Failed to document the role of judges of the Criminal Division of the Cook County Circuit Court in the torture scandal.
- Had appearances of conflict of interest and bias in favor of those whom they had been appointed to investigate.[168]

The Shadow Report provided the vehicle for obtaining public hearings, first before the Cook County Board of Commissioners, then later before the Chicago City Council. At the hearings, both of which took place in the summer of 2007, the testimony of several torture survivors, their lawyers, experts on torture, and community activists was presented; at the City Council hearing, an African-American detective who had witnessed a Burge torture scene testified, and a video of Burge repeatedly invoking the Fifth Amendment was presented.[169]

In the aftermath of the hearings, the Cook County Board passed three Resolutions, which called for the following action:

---

168 *Id.* at 2–3.

169 Cook Cnty. Bd. of Comm'rs Hearing (June 13, 2007), http://video.google.com/videoplay?docid=-7235577585903007387#. *See also* Transcript of Proceedings from Chicago City Council Committee on Police and Fire, Discussion of Special State Attorney's Findings at 118 (July 24, 2007); Chicago City Council Hearing: Burge and His Victims (July 24, 2007) (video) (on file with author); Chicago City Council Hearing: Testimony of Former Area 2 Detective William Parker (July 24, 2007) (video) (on file with author).

- The Cook County Board of Commissioners fully supports any action taken by the United States Attorneys of the Northern District of Illinois in the investigation and prosecution of any and all federal crimes allegedly committed by Burge and his men.
- The Cook County Board of Commissioners recommends that the Illinois Attorney General initiate new hearings for the twenty-six Chicago Police torture victims who were wrongfully convicted and remain incarcerated in the State of Illinois.
- The Cook County Board of Commissioners recommends to the legislature of the State of Illinois and the Congress of the United States the passage of legislation explicitly proscribing the crime of torture as defined by Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment and provide that there be no statute of limitations for this crime.[170]

During the City Council proceedings, numerous Council members, including Daley stalwarts Ed Burke, the longtime powerful Chairman of the Finance Committee, and Ike Carrothers, the chairman of the Police and Fire Committee, made strong statements condemning the pattern and practice of torture under Burge as "embarrass[ing]," [171] "heinous crimes," [172] "scurrilous," [173] "atrocities," [174] the "worst [disgrace]" in the history of the Chicago Police Department, [175] and akin to the torture at Abu Ghraib.[176] Another Daley Alderman, Tom Allen, who had previously served as a Cook County Assistant Public Defender, summed up the professed sentiment of the Council:

> This was a serial torture operation that ran out of Area 2 . . . . The pattern was there. Everybody knew what was going on . . . . Now, everybody in this room, everybody in this building, everybody in the police department, everybody in the State's Attor-

---

170 COOK CNTY BD. OF COMM'RS RES. 07-R-288-290 (July 10, 2007). The Board had requested that Special Prosecutors Egan and Boyle appear at the hearing, and when they refused to do so, it passed an additional Resolution that called for the County to discontinue any future payments to the Special Prosecutors' Office. COOK CNTY BD. OF COMM'RS RES. 07-R-342 (Sept. 6, 2007).

171 Transcript of Proceedings from Chicago City Council Committee on Police and Fire, Statement of Alderman Edward Burke (July 19, 2007).

172 Transcript of Proceedings from Chicago City Council Committee on Police and Fire, Discussion of Special State Attorney's Findings at 48–49 (July 24, 2007) (statement of Alderman Joe Moore).

173 *Id.* at 33–34 (statement of Alderman Tom Allen).

174 *Id.* at 34–35 (statement of Alderman Isaac Carothers).

175 *Id.* at 43–44 (statement of Alderman Ed Smith).

176 *Id.* at 104 (statement of Alderman Sandi Jackson).

> ney's Office, you would like to get this anvil of Jon Burge off our neck and I think that there are creative ways to do that.[177]

XVIII. The Prosecution of Jon Burge

In the wake of the hearings, several aldermen delivered a letter to the U.S. Attorney demanding that Burge be prosecuted for perjury.[178] Only days later, in response to the building public and political pressure, U.S. Attorney Patrick Fitzgerald announced that his office was investigating Burge and his men,[179] and in October 2008 Fitzgerald announced that Burge had been arrested on a three-count indictment alleging perjury and obstruction of justice.[180] The indictment was based on the allegedly false sworn statements he made nearly five years earlier in his *Hobley* interrogatory answers.

In late May 2010, Burge went on trial before a packed courtroom and a federal jury comprised of eleven whites and one African American.[181] Among the key witnesses against Burge were three of his victims—Anthony Holmes, Shadeed Mu'min, and Melvin Jones; the prior testimony of Andrew Wilson, who had died in the penitentiary in November of 2007, was read to the jury.[182] Former Area 2 detective Michael McDermott, who had been granted immunity from prosecution, was a reluctant witness for the government, and when he tried to equivocate, portions of his grand-jury testimony, in which he admitted to seeing Burge torture Mu'min by placing a piece of plastic over his face, was read to the jury as impeachment.[183] Two of the African-American detectives who had given statements in the civil cases also testified for the prosecution. Burge took the stand in his defense and denied everything, but his fellow officers all declared their intention to invoke the Fifth Amendment and were therefore not called as defense witnesses.[184]

---

177 *Id.* at 37, 40 (statements of Alderman Tom Allen).

178 Monique Garcia, *Aldermen Call for Federal Prosecution of Burge*, Chi. Trib., Sept. 20, 2007.

179 *U.S. Attorney, FBI Probing Allegations of Police Torture*, Chi. Sun-Times, Sept. 27, 2007.

180 Steve Mills & Jeff Coen, *Feds Catch Up With Burge*, Chi. Trib., Oct. 22, 2008; G. Flint Taylor, *Torture Ringleader Indicted*, 9 Police Misconduct & Civil Rights Law Reporter 7, Jan.–Feb. 2009, at 1.

181 G. Flint Taylor, *Chicago Police Commander Convicted of Lying About Torture*, 9 Police Misconduct & Civil Rights Law Reporter 17, Sept.–Oct. 2010.

182 *Id.*

183 *Id.*; Rummana Hussain, *Burge Cop's Story Changes*, Chi. Sun-Times, June 15, 2010.

184 John Conroy, *Burge Trial: Former Prosecutor and Seven Detectives to Take the Fifth*, WBEZ Chi. Pub. Radio (June 4, 2010), http://www.wbez.org/jconroy/2010/06/burge-trial-former-police-chief-wants-to-take-the-fifth/26215; John Conroy, *Burge Trial:*

The jury retired to deliberate in late June 2010, 37 years after Burge tortured Anthony Holmes. While the jury was out, Burge, still unrepentant, allegedly asked a courtroom observer whether he thought the jury would "believe that bunch of niggers?"[185] The next day the jury brought back its verdict of guilty on all three counts.

In January 2011, trial judge Joan Lefkow conducted a two-day sentencing hearing, at which Anthony Holmes spoke movingly about the meaning of the conviction and sentence to the survivors of torture, and African-American history professor Adam Green articulated their importance to Chicago's African-American community.[186] The judge then sentenced Burge to four-and-a-half years in the federal penitentiary, finding that she, like the jury, did not believe Burge when he denied torturing suspects; that certain victims of his torture were "terrified" and had to leave the City; that there was a "mountain of evidence" that supported the testimony of the torture survivor witnesses; that she inferred that coerced confessions under Burge were "widespread," and thereby "defiled" and "irreparably" "undermined" the justice system; and that Burge committed perjury to avoid "exposing [his] long history of misconduct, undermining [his] long history of denial that these events occurred."[187] The judge further found that "too many times I have seen officers sit in the witness box . . . and give implausible [testimony] to defend themselves or a fellow officer against accusations of wrongdoing;" she decried the "dismal failure of leadership in the [Chicago Police] Department" and the long time failure to act by "others, such as the United States Attorney and the State's Attorney."[188] In March 2011, Burge reported to Butner Federal Penitentiary in North Carolina to begin serving his sentence.[189]

Former Police Chief Wants to Take the Fifth, WBEZ CHI. PUB. RADIO, (June 15, 2010), http://www.wbez.org/jconroy/2010/06/burge-trial-former-police-chief-wants-to-take-the-fifth/26215.

185 G. Flint Taylor, *Racism, Torture and Impunity in Chicago*, NATION, March 11-18, 2013, at 2.

186 Transcript of Testimony of Professor Adam Green at 131–32, United States v. Burge, No. 08 CR 846, 2011 WL 13471 (N.D. Ill. July 1, 2011), *available at* http://peopleslawoffice.com/wp-content/uploads/2012/02/1.20.11.Testimony-of-Adam-Green-in-US-v.-Burge.pdf; *see also* G. Flint Taylor, *Judge Sentences Chicago Police Commander Jon Burge in Torture Case*, 10 POLICE MISCONDUCT & CIVIL RIGHTS LAW REPORTER 2, Mar.–Apr. 2011.

187 Sentencing Transcript at 4–8, 10, United States v. Burge, No. 08 CR 846, 2011 WL 13471 (N.D. Ill. Jan. 21, 2011).

188 *Id.*

189 *As Burge Heads to Prison, Torture Questions Linger*, CHI. TRIB., March 15, 2011. In February of 2014 the Department of Justice informed some of Burge's victims that he

XIX. More Exonerations and Lawsuits

Since Burge's indictment in 2008, nine more African-American men have been released from prison on the basis that inculpatory statements were tortured from them or from witnesses by Burge and his men as part of Burge's pattern and practice of torture.[190] While the State dismissed several of the cases without a hearing, in several others judges ordered new trials after conducting evidentiary hearings before the State decided to dismiss the cases. Five of the men—Michael Tillman, Ronald Kitchen, Marvin Reeves, Eric Caine, and Alton Logan—received certificates of innocence pursuant to chapter 735, section 2-702 of the Illinois Compiled Statutes from the Cook County courts after their cases were dismissed, while two of the men were released after they accepted plea deals.[191] In one case—that of Stanley Wrice—the State appealed the grant of an evidentiary hearing all the way to the Illinois Supreme Court.[192]

XX. The Stanley Wrice Case

Stanley Wrice was tortured by Burge confederates John Byrne and Peter Dignan in September 1982, and he gave what he has always maintained was a false confession to a violent rape that he did not commit. After Special Prosecutors Egan and Boyle issued their Report in 2006, Wrice pursued a successive post-conviction petition in which he alleged that the findings in the Report about Burge's midnight crew constituted newly discovered evidence. The trial judge, a former assistant state's attorney under Daley, dismissed the petition, but the Illinois Appellate Court reversed and remanded, finding that the Report and its findings of "widespread systematic torture of prisoners at Area 2" provided the basis for a new evidentiary hearing.[193] Special Prosecutor Stuart Nudelman, a former Cook County Judge who had been appointed in 2009 by

---

had been approved for release to a halfway house in Tampa, Florida, starting on October 2, 2014. Mills, Steve, *Burge to move to halfway house in fall*, Chi. Trib. Feb. 23, 2014.

190 G. Flint Taylor, *supra* note 117, at 1; Post-Conviction Orders, People v. Caine, No. 86 CR 6091 (02) (Cir. Ct. Cook County Jan. 15, 2011 & March 16, 2011); Order from Petitioner's Appeal, People v. Cortez Brown, 953 N.E.2d 81 (Ill. App. Ct. 2007) (No. 1-05-0928); Transcript of Court's Oral Order, People v. Cortez Brown, (Cir. Ct. Cook County May 22, 2009); Transcript of Court's Order, People v. Wrice, No. 82 C 8655 (03) (Cir. Ct. Cook County Dec. 10, 2013); Post-Conviction Order, People v. Andrews, Nos. 83 CR 4978 and 83 CR 4979 (Cir. Ct. Cook County Aug. 14, 2007).

191 735 Ill. Comp. Stat. Ann. 5/2-702 (West 2014).

192 *See* People v. Wrice, 940 N.E.2d 102, 108–10 (Ill. App. Ct. 2010); People v. Wrice, 962 N.E.2d 934, 952–53 (Ill. 2012).

193 People v. Wrice, 940 N.E.2d 102, 108–10 (Ill. App. Ct. 2010).

Judge Biebel to replace the Attorney General's Office in Burge related post-conviction cases,[194] appealed the case to the Illinois Supreme Court on the grounds that admission of Wrice's confession at trial, even if it were the product of torture, was harmless error. The Supreme Court, in a landmark decision, rejected this argument in no uncertain terms, finding that

> the police misconduct alleged in this case—beatings perpetrated by two police officers [Byrne and Dignan] who figured prominently in the systematic abuse and torture of prisoners at Area 2 police headquarters . . . constitutes an egregious violation of an underlying principle of our criminal justice system[.][195]

The court therefore held that the harmless-error rule did not apply to "coerced confessions . . . such as the one now before us, involving alleged police brutality and torture."[196]

On remand, the trial judge recused herself, because of her connection to unnamed witnesses in the case, witnesses who were thought to be the trial prosecutor and former State's Attorney Daley. The case was then sent to Judge Richard Walsh, who was randomly selected from a list of judges who had no connection to the State's Attorney's Office during Daley's tenure there. In December 2013, Judge Walsh vacated Wrice's conviction and ordered a new trial after an evidentiary hearing at which both Dignan and Byrne asserted their Fifth Amendment privilege against self-incrimination and refused to answer any questions concerning their torture and abuse of Wrice.[197] Concluding that Wrice's statement was coerced and that his rights under *Brady* v. *Maryland*[198] were violated, Judge Walsh found that there was "no doubt" that detectives were torturing suspects at Area 2, that it was unrebutted that Dignan and Byrne tortured Wrice, and that Byrne and Dignan committed perjury at Wrice's trial when they denied that they tortured him and witness Bobby Joe Williams.[199] On December 12, 2013, the Special Prosecutor finally gave up his vindictive crusade and dismissed the charges against Wrice.

---

194 In his order, he rejected the argument that the State's Attorney's conflict was cured by Richard Devine's retirement and his replacement by Anita Alvarez. *See* Memorandum Opinion and Order, People v. Smith, 83 C 769 (Cir. Ct. Cook County Apr. 8, 2009).

195 People v. Wrice, 962 N.E.2d 934, 952–53 (Ill. 2012)

196 *Id.* at 953.

197 Transcript of Court's Order at 2–3, People v. Wrice, No. 82 C 8655 (03) (Cir. Ct. Cook County Dec. 10, 2013).

198 373 U.S. 83 (1963).

199 Transcript of Court's Order, *supra* note 197, at 2–3.

XXI. The Cannon Civil Suit

After his criminal case was dismissed in 2004, Darrell Cannon filed a torture and wrongful conviction lawsuit under 42 U.S.C. §§ 1983 and 1985. Represented by lawyers from the People's Law Office and MacArthur Justice Center, his complaint was patterned after the policy and practice complaints those lawyers had filed in the *Orange* and *Patterson* cases. However, unlike in those cases, Cannon faced a significant obstacle—in 1986, while ensconced in the bowels of the Illinois prison system, Cannon had filed a handwritten *pro se* damages complaint alleging that he was tortured by Byrne and Dignan, and two years later, before the newly discovered evidence of torture had begun to surface, Cannon, on the advice of his court-appointed lawyer, reluctantly accepted the City of Chicago's offer of a nuisance value settlement of $3,000, of which he netted $1,247, and signed a broadly worded release that included all claims related to his torture that might arise in the future.[200]

The City and the police defendants moved to dismiss Cannon's second suit, arguing that the 1988 settlement agreement barred Cannon from pursuing further compensation against any and all City officials on all of his newly pleaded claims. In 2006, the trial judge, Amy St. Eve, rejected this argument, holding, in conformance with the Seventh Circuit Court of Appeals' landmark decision in *Bell v. Milwaukee*,[201] that the massive conspiracy to cover up the torture scandal constituted a fraud by the police defendants and the City which thereby rendered the 1988 settlement a nullity.[202]

At the 2007 Chicago City Council hearings on the Burge torture scandal, a special emphasis was placed on ending the City-financed defense of Burge in the five then-pending civil damages cases, which up to that point totaled more than $10 million. Several council members and U.S. Congressman Danny Davis publicly called on Mayor Daley and the City's legal department to settle all of the outstanding torture cases, including Cannon's.[203] Within

---

[200] Cannon v. Burge, No. 05 C 2192, 2006 WL 273544, at *10–11 (N.D. Ill. Feb. 2, 2006); G. Flint Taylor, *The Torture of Darrell Cannon: A Case that the City of Chicago Cannot Win*, Huffington Post (Aug. 10, 2012, 12:14 PM), http://www.huffingtonpost.com/g-flint-taylor/darrell-cannon-case_b_1762150.html.

[201] 746 F.2d. 1205 (7th Cir. 1984). *Bell* was an extraordinary police killing case where the court voided another unconscionably small settlement after an extensive police cover up was exposed by the partner of the police shooter twenty years after the shooting.

[202] *Cannon*, 2006 WL 273544, at *10–11.

[203] Transcript of Proceedings from Chicago City Council Committee on Police and Fire, Statement of Alderman Bob Fioretti at 95, 100–01 (July 24, 2007); *id.* at 104

months, the City settled four of the five cases for a total of $19.8 million, but refused to offer a nickel to Cannon, arguing that he was not entitled to a second bite of the apple. Instead of settling, the City poured $1.8 million in legal fees into further contesting Cannon's case. In 2011 Judge St. Eve reversed her field and granted the City's motion for summary judgment on the question of whether the 1988 settlement precluded Cannon's new suit.[204] In so doing, the judge deemed the cover-up irrelevant to the issue of fraud because Cannon knew he had been tortured and therefore, in her view, was not deceived.[205]

Cannon appealed the decision to the Seventh Circuit Court of Appeals. Relying in large part on *Bell*, the appeal presented the fundamental question of whether Burge, Byrne, and Dignan, their now notorious midnight crew, and the entire City power structure could utilize their wholesale cover-up of the worst police scandal in the history of the City of Chicago to deprive a torture victim of his fair day in court and his right to reasonable compensation.

In January of 2013, a three-judge panel of the Seventh Circuit Court of Appeals heard arguments in the case. Led by Judge Ilana Rovner, the Court repeatedly excoriated the City for its position in the case. Addressing the City's lawyer, Judge Rovner first stated:

> And before you even introduce yourself, I want to start you off because it seems to me that the City has misread *Bell*. In both *Bell* and this case the determinative fact is not what the Plaintiffs knew but what the Plaintiffs could not prove because of the cover-up. In each case the plaintiffs or the plaintiff's surviving representative knew the officers engaged in wrongful conduct and in each case the extensive cover-ups prevented them from proving it.[206]

After the City's lawyer offered a response, Judge Rovner continued her pointed inquiry:

> Look, if a defendant destroys evidence of wrongdoing and the plaintiff knows that the defendant destroyed that evidence, does that knowledge preclude the plaintiff from later claiming fraud in the inducement of a settlement? If so, does that mean that the more successfully you lie, you cheat, you commit fraud, in litigation, the greater your reward for forcing a small settle-

(statement of Alderman Sandi Jackson); *id.* at 60–61 (statement of former Alderman and Congressman Danny Davis).

204 Cannon v. Burge, 05 C 2192, 2011 WL 4361529, at *31 (N.D. Ill. Sept. 19, 2011).

205 *Id.*

206 Oral Argument at 15:44–16:24, Cannon v. Burge, 752 F.3d 1079 (7th Cir. 2014) (No. 12-1529), *available at* http://media.ca7.uscourts.gov/sound/2013/sp.12-1529.12-1529_01_22_2013.mp3.

> ment? I do not, I cannot see how this is different. I try—I cannot see how this is different.[207]

Judge Rovner then rebutted the City lawyer's assertion that the police defendants simply denied that they tortured Cannon, stating that "they didn't just deny, they lied, they cheated, they committed fraud, they committed cover-ups . . . ."[208]

Calling the City's "no fraud" argument "unavailing" . . . which she made "to be kind," Judge Rovner summarized the facts in the record:

> Here are the facts on summary judgment. These officers take a man with a prior murder conviction. Then they lie, then they torture him into making a statement that leads to a second murder conviction, then they lie about it, then they destroy evidence, then they engage in this incredibly lengthy cover-up with other city officials. You've got to help me. [On] [w]hat planet does he have a meaningful redress in the courts under those circumstances? I mean, of course he was forced to settle unfavorably because the officers and perhaps the City have made it virtually impossible for him to prove his case. You would have us enforce a settlement procured by defendants who so rigged the deck that no Plaintiff could have proven a legitimate claim and that to me seems to be the bottom line here.[209]

Judge Rovner then dismantled the City's argument that Cannon's lawyer was required to ask the defendants during his initial case if they had tortured other suspects:

> **Judge Rovner**: That astonishes me, that argument because, in other words, he is supposed to have asked in discovery, "By the way, have these officers tortured anyone else? Is the City helping these officers cover-up other criminal acts?" Was he obliged to ask them if they were committing additional criminal acts? How do you suppose they would have answered?
>
> **City's Lawyer:** Your honor, I don't know how they would have answered. . . .
>
> **Judge Rovner:** "Yes, yes we are criminals?" Of course you know.[210]

Judge Sarah Barker, sitting by designation from the Southern District of Indiana, then suggested that "where it's completely futile, because of corruption basically, you've deprived him of access to the courts, haven't you?"[211] Judge Rovner then returned to the

---

207 *Id.* at 17:33–18:08.
208 *Id.*
209 *Id.* at 18:56–20:10.
210 *Id.* at 20:34–21:05.
211 *Id.* at 21:36–21:48.

City's argument that Cannon should have further questioned the police conspirators:

> **Judge Rovner:** So why is Burge in prison right now? Why, bottom line, why do you think he is in prison right now? What was it that put him in prison right now?
> **City's Lawyer:** He was convicted of committing perjury for denying acts of torture, yes.
> **Judge Rovner:** Exactly.[212]

Judge Rovner then addressed the question of the settlement's unconscionability:

> [A]t the time he settled, there was no way for him to even begin to prove his case for torture, much less prove the cover-up. He was, you know, he's in prison for murder, based on the confession that he now alleges, and indeed alleged from the very beginning, was the result of torture, his bargaining position was absolutely non-existent in those circumstances, and it was non-existent because the Defendants obtained that condition through a confession that was given under torture and then covered up the torture, and that to me is the bottom line here.[213]

Judge Rovner, calling it "a miracle" that the truth had come out, again underscored the symmetry between Cannon's case and *Bell* decision:

> Under Bell, the Plaintiffs, it seems to me, have shown exactly what they need to show, and any other result would mean that defendants could engage in a decade-long cover-up with impunity. The plaintiffs might "know" in quotes that there's a cover-up, in the sense that they know that the police are lying, but that's a great distance from being able to prove that that's the case . . . it seems to me that if the Defendant successfully suppressed the truth in an effort to force an unfavorable settlement out of the Plaintiff, they should not be rewarded for the success of their scheme when the truth eventually comes out.[214]

As the City's argument concluded, Judge Barker returned to the paltry settlement given to Cannon in 1988:

> [G]iven all the things you know now and all the corruption that came to light, and the facts that have settled out in a different way than anybody understood or would admit at the time the settlement agreement was entered into, don't you think that it's a thin reed on which you're attempting to hang your resolution

---

212 Oral Argument at 22:10-22:25, Cannon v. Burge, 752 F.3d 1079 (7th Cir. 2014) (No. 12-1529), *available at* http://media.ca7.uscourts.gov/sound/2013/sp.12-1529.12-1529_01_22_2013.mp3.

213 *Id.* at 22:36–23:10.

214 *Id.* at 23:32–24:23, 25:09–25:21.

to say, given all of that, $3,000 is a fair settlement . . . ?[215]

Sixteen months later, in a stunning reversal from its position at oral argument, the Seventh Circuit panel, in a lengthy opinion authored by Judge Rovner, affirmed the District Court's grant of summary judgment. Judge Rovner set the tone for the panel's decision in her opening paragraph. Relegating to a footnote the fact that Burge, who was the lead defendant in the case, stood accused of torture by more than 100 African-American men, and was in the penitentiary for committing perjury and obstruction of justice, she wrote:

> This appeal casts a harsh light on some of the darkest corners of life in Chicago. The plaintiff, at the time of the events giving rise to this suit, was a general in the El Rukn street gang, out on parole for a murder conviction, when he became embroiled in a second murder. Among the defendants are several disgraced police officers, including the infamous Jon Burge, a man whose name evokes shame and disgust in the City of Chicago.[216]

The panel then proceeded to reject, one by one, all of the arguments that Judge Rovner and her fellow panel members had previously embraced. The panel held that Cannon's wrongful conviction claim, which did not arise, under *Heck v. Humphrey*,[217] until his criminal case was dismissed in 2004, was also covered by the 1988 release,[218] and refused to find that the settlement was the product of fraud,[219] despite what Judge Rovner called, at oral argument, an "extensive criminal cover-up" that made it "virtually impossible" for Cannon to prove his case.[220] Repeatedly asserting that Cannon and his lawyer did not pursue the pattern-and-practice evidence before he settled, while minimizing the cover-up and the role of high-ranking City officials in it, and reducing the decades of perjury and destruction of evidence by the named defendants to a "he said, they said controversy,"[221] the panel distinguished *Bell*, likening Cannon's case to two previously decided garden-variety po-

---

215 *Id.* at 29:08–29:34

216 Cannon v. Burge, 752 F.3d 1079 at 1081 (7th Cir. 2014).

217 512 U.S. 474, 486–90 (1994). *Heck* held that a 42 U.S.C. §1983 claim for wrongful conviction is not ripe until and unless the plaintiff is exonerated from his conviction.

218 *Cannon*, 752 F. 3d at 1083–84.

219 *Id.* at 1085.

220 Oral Argument at 24:5–25:10, Cannon v. Burge, 752 F.3d 1079 (7th Cir. 2014) (No. 12-1529), *available at* http://media.ca7.uscourts.gov/sound/2013/sp.12-1529.12-1529_01_22_2013.mp3.

221 *Cannon*, 752 F. 3d 1079 at 1086.

lice misconduct cases.[222] Emphasizing Cannon's criminal history and prior gang membership, the panel also refused to find that Cannon's $1,267 settlement was unconscionable despite Cannon's unequal bargaining position at the time, and the multimillion-dollar settlements subsequently obtained by other similarly situated torture victims after the truth about the torture scandal came to light.[223] In so doing, the panel stated that "what the officers did to Cannon was unconscionable," but the "settlement was not."[224]

In conclusion, the panel, in what Cannon's lawyers termed in their Motion for Rehearing as a "moral judgment masquerading as legal reasoning,"[225] again blamed the victim, as it did throughout the opinion, and washed their hands of the matter:

> This case casts a pall of shame over the City of Chicago: on the police officers who abused the position of power entrusted to them, on the initial trial judge who was later imprisoned for accepting bribes to fix murder cases, on City officials who turned a blind eye to (and in some instances actively concealed) the claims of scores of African–American men that they were being bizarrely and horrifically abused at Area 2, and last but not least on Cannon himself, who was a convicted murderer out on parole when, by his own admission, he drove a car for his fellow El Rukn general as a murder was committed in the back seat, and then helped dispose of the body and conceal the crime. It is difficult to conceive of a just outcome given the appalling actions by almost everyone associated with these events but the law regarding the finality of settlements governs the result.[226]

In Cannon's rehearing petition, his lawyers contrasted Cannon's situation with that of his torturers:

> It is truly ironic, in light of the Panel's broad based condemnation, that Cannon, after serving 24 years in prison, has been a model citizen since his release more than seven years ago and has devoted his life to speaking to youth about the horrors of prison and to quelling gang violence as a CEASEFire supervisor while Burge is in prison; Byrne and Dignan barely escaped federal indictment for committing perjury in Cannon's case; and that all three of them, as well as their numerous confederates, all invoke the Fifth Amendment whenever they are asked under oath if they tortured any of the 118 now known victims of tor-

---

222 *Id.* at 1085–87.

223 *Id.* at 1088.

224 Cannon v. Burge, 752 F.3d 1079 at 1104 (7th Cir. 2014).

225 Appellant Darrell Cannon's Petition for Rehearing En Banc at 12, Cannon v. Burge, No. 12-1529 (7th Cir. filed June 10, 2014).

226 Cannon v. Burge, 752 F.3d 1079, at 1104 (7th Cir. 2014).

> ture. Additionally, while Cannon is told to be satisfied with $1267 (minus appellate costs) for his trouble, Burge, Byrne and Dignan continue to collect their pensions - - - FOIA records obtained by the People's Law Office from the Police Pension Board document a total of over $2 million to date - - - and they have reaped the benefit of legal representation by private lawyers whom the City has now paid more than $1.8 million in this case alone.[227]

In conclusion, Cannon's lawyers re-emphasized the extraordinary nature of his case:

> This is, without question, an exceptional case. It is demonstrated by its facts, as well as by the panel's opinion. Additionally, it is a case of national and international importance, as it is now the subject of Amnesty International's Global Campaign Against Torture, and implicates Article 14 of the Convention Against Torture (CAT) under which the United States is obligated to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."[228]

On May 27, 2014, the full Seventh Circuit Court denied Cannon's petition without dissent.[229]

XXII. Tillman and Kitchen Civil Suits: Daley Joined as a Defendant

Six of the nine men who were released since 2007 filed torture and wrongful conviction suits in federal court, pursuant to the U.S. Supreme Court decision in *Heck v. Humphrey*.[230] Tillman and Kitchen, represented by the People's Law Office and MacArthur Justice Center lawyers, each brought wide-ranging conspiracy claims under 42 U.S.C. §§ 1983, 1985, and state law, which, for the first time, named Richard M. Daley as a conspiring defendant.[231]

---

227 Appellant Darrell Cannon's Petition for Rehearing *En Banc* at 14 n.12, Cannon v. Burge, No. 12-1529 (7th Cir. filed June 10, 2014) (footnote omitted).

228 *Id.* at 14–15, quoting Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984). The United States signed the CAT on April 18, 1988, and ratified it on October 21, 1994, subject to certain declarations, reservations, and understandings.

229 Cannon v. Burge, No. 12-1529 (7th Cir. 2014) order of May 27, 2014.

230 Two of the men—Cortez Brown (also known as Victor Safforld) and Eric Johnson—were barred from suing by the *Heck* decision because they pled guilty in exchange for substantial sentence reductions, while Stanley Wrice filed a petition for a certificate of innocence in May 2014.

231 Their lawyers had previously attempted to amend the complaint in the Cannon

While the district court judge in *Kitchen* dismissed Daley,[232] Rebecca Pallmeyer, who was the district court judge in *Tillman*, denied Daley's motion to dismiss.[233] In her lengthy opinion, Judge Pallmeyer summarized Tillman's allegations of torture and abuse:

> [Burge detectives] Boffo and Dignan questioned Plaintiff while he was handcuffed to a wall, and Boffo struck Plaintiff on the head. At another point, [detective] Hines struck Plaintiff in the head and the stomach, causing him to vomit, and drove Plaintiff to a secluded location, forced Plaintiff to his knees, held a gun to his head, and threatened to kill him "like you killed that woman." . . . Hines struck Plaintiff on his back and head with a telephone book, causing his nose to bleed on his clothing and in the interrogation room, then forced Plaintiff to clean up the blood with paper towels. Defendant Boffo kicked Plaintiff in the leg, and [detectives] Boffo, Dignan, Hines, and Yucaitis used their thumbs to push against Plaintiff's ears, pushed his head back, and poured 7-Up into his nose. Plaintiff also alleges that Defendants Yucaitis and Dignan repeatedly subjected him to near-suffocation by placing a plastic bag over his head, and that Defendant Dignan hit Plaintiff on the leg with his flashlight and waved the flame from a cigarette lighter under his arm. During the course of this interrogation, Plaintiff was not allowed to speak with a family member or an attorney. Plaintiff ultimately agreed to cooperate, and Defendant Yucaitis later testified that Plaintiff made oral admissions concerning his involvement in the crime.[234]

With regard to Daley, Tillman alleged a course of conduct that began in the early stages of Daley's eight year term as State's Attorney of Cook County and continued throughout his twenty-year reign as Mayor. In summary, Tillman alleged that:

> Former Mayor and State's Attorney Richard M. Daley and former Chicago Police Superintendent LeRoy Martin refused and failed to investigate a pattern of torture carried out at Area 2 prior to Plaintiff's arrest, proximately causing Plaintiff's torture and wrongful conviction. Plaintiff claims that Daley, Martin, former Chicago Police Superintendent Terry Hillard, former aide to the Chicago Police Superintendent, Thomas Needham, and

---

case to add a RICO claim that included Daley, but the amendment was rejected by the trial judge. *See* Cannon v. Burge, No. 05 C 2192, 2007 WL 2278265 (N.D. Ill. Aug. 8, 2007).

232 Kitchen v. Burge, 781 F. Supp. 2d 721,735 (N.D. Ill. 2011).

233 Tillman v. Burge, 813 F. Supp. 2d 946, 968 (N.D. Ill. 2011).

234 *Id.* at 956; *see* KosWorks, *Michael Tillman: The Torture and Wrongful Conviction of an Innocent Man*, YouTube (Nov. 7, 2011), http://www.youtube.com/watch?v=SL8k67seaRA.

> former Office of Professional Standards Director Gayle Shines all conspired to suppress evidence of police torture that Plaintiff claims would have been exculpatory.[235]

The Court later further detailed the allegations against Daley:

> Plaintiff's Complaint includes allegations regarding the torture of other individuals in Area 2, including the high-profile case of Andrew Wilson. . . . Plaintiff alleges that the named Defendants in this case, along with others, engaged in this practice, failed to intervene to end it, and suppressed information regarding this extensive pattern of abuse. Plaintiff alleges that as Mayor and State's Attorney, Defendant Richard Daley had personal knowledge of the alleged abuses perpetrated by Burge and other Defendants at Area 2, Plaintiff asserts that, had Daley and Martin investigated the allegations of abuse at Area 2 prior to his arrest, he would not have been tortured and would not have been wrongfully convicted. Plaintiff further alleges that as a result of a conspiracy between Daley, Martin, Hillard, Needham, Shines and others to suppress information about torture at Area 2, "Plaintiff's wrongful prosecution was continued, his exoneration was delayed and his imprisonment lasted far longer than it otherwise would have." According to Plaintiff, between 1989 and 1992, Daley and Martin were given "additional actual notice that Burge was the leader of a group of Chicago detectives that systematically tortured and abused African American suspects" through an Amnesty International report and public hearings. Plaintiff alleges that in 1996, despite his knowledge that findings of torture and abuse had been made against Defendant Dignan, Daley promoted Dignan to lieutenant. Plaintiff also alleges that Daley, against the advice of his senior advisers, "personally insisted" throughout his tenure that the City of Chicago "continue to finance the defense of Burge, Byrne, Dignan, and other Area 2 detectives, despite his personal knowledge that Burge committed acts of torture.[236]

While the judge dismissed Daley from Tillman's § 1983 suppression of evidence claim, finding that his actions while State's Attorney were covered by prosecutorial immunity and his actions as mayor did not constitute suppression of evidence—and also excused him from Tillman's § 1983 coercive interrogation claim—she held that Tillman had sufficiently pleaded § 1983, § 1985, § 1986, and state-law conspiracies against all of the defendants, including Daley:

> [Tillman's] allegations suggest that Plaintiff's torture was more

---

235 *Tillman*, 813 F. Supp. 2d at 953–54.
236 *Id.* at 958.

> than just an isolated incident, and suggest, further, that the suppression of the truth about what occurred at Area 2 was the result of coordinated efforts that continued for some time. . . As discussed above, the Defendant Officers are alleged to have participated directly in the torture, as did Burge; [Assistant State's Attorney] Frenzer allegedly did so as well, by attempting to take a statement when he knew the torture was ongoing; Martin and Daley are said to have undermined and obstructed findings of torture; Shines allegedly suppressed findings of torture; and Plaintiff claims that Needham and Hillard continued to suppress findings and undermine investigations into torture at Area 2 after they took office. Plaintiff has listed a litany of actions at Area 2 furthering and concealing the abuse that took place there . . . and has also provided specific allegations regarding acts of torture performed on this Plaintiff and on others. . . . These allegations are sufficient to allege a § 1983 conspiracy.[237]

Upholding the § 1985 and § 1986 conspiracies, the court determined that "[Tillman] has alleged that all or nearly all of the victims of the alleged conspiracy were members of the same class, and that racial epithets were commonly used during the course of this torture. Those allegations lend sufficient credence to Plaintiff's claims at the pleading stage."[238] Finally, the court also upheld Tillman's state-law conspiracy claim, restating the alleged conspiracy, and Daley's role in it, in broad and powerful terms:

> Though he does not again outline the specifics of these actions in Count X, the allegations are the same—that Defendant Officers, Burge, and Frenzer participated in the torture itself and that Daley, Hillard, Martin, Needham, and Shines covered up and suppressed evidence of that pattern and practice of torture of which Plaintiff was a victim.[239]

XXIII. Legislative Initiatives

In 2009, the Illinois Legislature created the Illinois Torture Inquiry and Relief Commission (TIRC)[240] in response to demands from community groups and lawyers for the torture victims, and it continues to review more than 100 complaints filed by Illinois prisoners who allege torture and abuse. Under its mandate, it has remanded sixteen cases to the Cook County courts for evidentiary

---

237 *Id.* at 976.

238 *Id.* at 977–78.

239 *Id.* at 978.

240 *See* Illinois Torture Inquiry and Relief Commission Act, 775 Ill. Comp. Stat. Ann. 40/45 (West 2009).

hearings,[241] and has done so despite recurring funding crises and political attacks orchestrated by Cook County State's Attorney Anita Alvarez, whose office continues to be disqualified from appearing in Burge-related cases.[242]

Local and national activists and lawyers also collaborated with Chicago Congressman Danny Davis in drafting and championing the Law Enforcement Torture Prevention Act of 2011, which would make police torture a federal crime without a statute of limitations.[243] Davis reintroduced the legislation in January 2012 after a congressional briefing that featured presentations on Chicago police torture as well as other police and prison human rights violations.[244] Unfortunately, the bill has little chance of passing while the House of Representatives continues to be controlled by conservative Republicans.

Locally, The Illinois Coalition Against Torture gathered more than 3,500 signatures in support of a City Council resolution that declared Chicago a torture-free zone, and the resolution, which was sponsored by Alderman Joe Moore, passed by a unanimous vote in January 2012.[245] In October of 2013, Aldermen Joe Moreno and Howard Brookins, in response to an organizing campaign by the Chicago Torture Justice Memorials Project and lawyers from the People's Law Office, introduced a reparations ordinance that would require the city to administer financial reparations to all torture survivors who are unable to sue for financial compensation because the statute of limitations for such claims has expired; provide all torture survivors and their families with tuition-free education at City Colleges; create a center on the South Side of Chicago that would provide psychological counseling, health care services and vocational training to those affected by law

---

241 *Ill. Torture Inquiry and Relief Commission Decisions*, TORTURE INQUIRY & RELIEF COMM'N, http://www2.illinois.gov/itrc/Pages/TIRCDecision.aspx (last visited May 26, 2014).

242 *See* G. Flint Taylor, *Unholy Alliance Seeks to Dismantle Illinois Torture Commission*, HUFFINGTON POST (October 16, 2013, 1:16 PM), http://www.huffingtonpost.com/g-flint-taylor/unholy-alliance-seeks-to-_b_4103757.html.

243 Law Enforcement Torture Prevention Act of 2011, H.R. 3781, 112th Cong. § 250 (2012).

244 *Congressional Briefing on LEPTA*, PREVENT TORTURE: SUPPORT THE LAW ENFORCEMENT TORTURE PREVENTION ACT (LETPA) BLOG (Mar. 29, 2012), http://torture prevention.blogspot.com/2012/03/congressional-briefing-on-letpa-1-17-12_29.html (featuring statements by Congressman Davis, torture survivor Darrell Cannon, National Police Accountability Project Executive Director Brigitt Keller, and People's Law Office attorney G. Flint Taylor).

245 *"Torture Free" Chicago Resolution*, ILL. COAL. AGAINST TORTURE (ICAT) (Jan. 18, 2012), http://illinoiscat.org/torture-free-chicago-resolution/.

enforcement torture and abuse; and require the Chicago Public Schools to teach about these cases. The ordinance also calls for public torture memorials and a formal apology from Chicago's leaders to those who were tortured and their communities.[246]

XXIV. Burge Conviction Affirmed

In April 2013, a three-judge panel of the Seventh Circuit Court of Appeals upheld Burge's perjury and obstruction of justice conviction. The opinion was written by Judge Ann Williams, the only African-American judge in the history of the Seventh Circuit. Introducing the court's decision, Judge Williams wrote:

> Former Chicago Police Commander Jon Burge presided over an interrogation regime where suspects were suffocated with plastic bags, electrocuted until they lost consciousness, held down against radiators, and had loaded guns pointed at their heads during rounds of Russian roulette. The use of this kind of torture was designed to inflict pain and instill fear while leaving minimal marks. When Burge was asked about these practices in civil interrogatories served on him years later, he lied and denied any knowledge of, or participation in, torture of suspects in police custody. But the jury heard overwhelming evidence to contradict that assertion and convicted Burge for obstruction of justice and perjury.[247]

Judge Williams further discussed the history of Burge and his confederates' pattern of torture:

> For many years a cloud of suspicion loomed over the violent crimes section of the Area 2 precinct of the Chicago Police Department (CPD) located on Chicago's south side. Jon Burge joined the CPD in 1970 and rose to commanding officer of the violent crimes section in the 1980s, but his career was marked by accusations from over one hundred individuals who claimed that he and officers under his command tortured suspects in order to obtain confessions throughout the 1970s and 1980s. Burge was fired in 1993 after the Office of Professional Standards investigated the allegations, but he was not criminally charged. Years later the Circuit Court of Cook County appointed special prosecutors to investigate the allegations of torture, but due to statutes of limitation, prosecutors never brought

246 *Ordinance Seeks Reparations for Chicago Police Torture Survivors*, Chi. Torture Justice Memorials (n.d.), *available at* http://chicagotorture.org/articles/ordinance-seeks-reparations-chicago-police-torture-survivors/ (last visited Sept. 15, 2014). As of October, 2014, a majority of the City Council members had signed on to the Ordinance, and it was awaiting a public hearing before the Council's Finance Committee.

247 U.S. v. Burge, 711 F.3d 803, 806 (7th Cir. 2013).

> direct charges of police brutality against Burge. Eventually, the City of Chicago began to face a series of civil lawsuits from victims seeking damages for the abuse they endured.[248]

Judge Williams summarized the "horrific" evidence that the government introduced against Burge at trial:

> At trial, the government called multiple witnesses to testify about the methods of torture and abuse used by Burge and others at Area 2 in order to establish that Burge lied when he answered the interrogatories in the Hobley case . . . . [T]he witnesses at trial detailed a record of decades of abuse that is unquestionably horrific. The witnesses described how they were suffocated with plastic bags, electrocuted with homemade devices attached to their genitals, beaten, and had guns forced into their mouths during questioning. Burge denied all allegations of abuse, but other witnesses stated that he bragged in the 1980s about how suspects were beaten in order to extract confessions. Another witness testified that Burge told her that he did not care if those tortured were innocent or guilty, because as he saw it, every suspect had surely committed some other offense anyway.[249]

The court then went on to dismiss Burge's assertions of trial and sentencing errors, which it summarized as follows:

> Burge raises several challenges to his convictions on appeal, which we do not find persuasive because the evidence shows that he lied when he answered the interrogatories, his false statements impeded an official proceeding, and they were material to the outcome of the civil case. Overall, we conclude that no errors were committed by the court and Burge received a fair trial. Finally, Burge objects to the district court's reference to a victim impact letter at his sentencing, but it is well established that hearsay is admissible at sentencing hearings, so we affirm.[250]

XXV. Settlements in the Civil Cases

Since 2007, the amount of taxpayer money paid to private lawyers to defend Burge and his alleged co-conspirators, including Daley, in torture-related cases has more than doubled to over $21 million.[251] In the *Tillman* and *Kitchen* cases, as the deposition of

---

248 *Id.* at 807.
249 *Id.* at 808.
250 *Id.* at 806.
251 These numbers have been compiled by the People's Law Office from figures obtained from the City through Freedom of Information Act requests and from other public information. *See* People's Law Office, Summary of Documented City and

Daley approached, settlements with the City totaling $11.5 million were reached, and, as of September 2014, the City had paid out $64.1 million in settlements in the torture cases.[252] When the amounts expended by the City to pay Burge's pension, by the county to pay Special Prosecutors and settlements against county prosecutors, and by the State to fund the Illinois Torture Inquiry and Relief Commission and to compensate wrongfully convicted torture victims under the Illinois Court of Claims Act[253] are included, the total exceeds $100 million.[254] Factoring in the more than $22 million paid to Burge's confederates in pension money over the years,[255] and the money expended by the federal government to investigate and prosecute Burge, the ever-mounting total is estimated at $125 million.

Conclusion

Over the decades since the Chicago police torture scandal first became known, much has been accomplished. Men have been freed from prison and death row, and many of them have been compensated for their torture and wrongful convictions; Burge, once a highly decorated police commander, has been fired and, much later, convicted and sent to prison to serve four-and-half years with fellow prisoner Bernie Madoff; a Torture Commission has been created, is reviewing many additional torture complaints, and has recommended hearings in a number of them; a special master has been appointed to search for additional imprisoned torture victims; Special Prosecutors Egan and Boyle reluctantly acknowledged that crimes were committed by Burge and his men; the role of former Chicago Mayor Richard M. Daley has been recognized by a federal judge; and Chicago Mayor Rahm Emanuel has offered a begrudging public apology for Burge's crimes.[256] As significant as these victories, hard won by lawyers and activists, is the fact that the legal, political, and public perception of the allega-

---

County Expenditures in Burge Torture Scandal (last updated Sept. 30, 2014) [hereinafter Burge Expenditures] (on file with author).

252 *Id.*

253 705 Ill. Comp. Stat. Ann. 505/1–29 (West 2014).

254 Burge Expenditures, *supra* note 251.

255 *See* People's Law Office, Pensions Paid to Area 2 and 3 Officers Accused of Torture Under Jon Burge (through Sept. 2014) [hereinafter Torture Pensions] (on file with author).

256 *See* Fran Spielman & Tina Sfondeles, *Rahm 'Sorry' For Burge Crimes*, Chi. Sun-Times, Sept. 12, 2013; Flint Taylor, *Rahm Emanuel Apologizes for Police Torture. Now What?*, Nation (Sept. 18, 2013), http://www.thenation.com/article/176247/rahm-emanuel-apologizes-police-torture-now-what.

tions of a pattern and practice of racially motivated police torture in Chicago has turned 180 degrees from a dismissive disbelief that was fueled by an all-encompassing official cover-up to an accepted historical reality that was placed by the United Nations in the same category as U.S. torture at Abu Ghraib and Guantanamo Bay, and commands front-page headlines in Chicago when the mayor offers an apology.

Nonetheless, much remains to be accomplished. Burge still receives his pension;[257] somewhere between fifteen and forty Burge victims remain behind bars;[258] many others, including Anthony Holmes and Darrell Cannon, have received embarrassingly little or no compensation; all of Burge's key operatives, particularly John Byrne and Peter Dignan, have escaped prosecution for their perjury and obstruction of justice;[259] and a federal statute that would prevent such injustices languishes unpassed in the U.S. House of Representatives. This unfinished business looms before the lawyers and activists who have waged these battles over the decades, and must be completed before the City of Chicago can remove the stain of the police torture scandal from its collective conscience.

---

257 In a decision that further fanned community outrage, the Police Pension Board decided in a 4-4 vote that Burge could continue to collect his police pension despite his conviction. Illinois Attorney General Lisa Madigan challenged this decision by bringing suit in Cook County Chancery Court. The case was dismissed by the trial judge, the appellate court reversed, and the Illinois Supreme Court, in a four to three decision, reversed the Appellate Court, holding that Burge can continue to collect his pension, which has now reached the total of nearly $700,000. *See* State of Illinois v. Burge, No. 11 CH 04366, 2011 WL 4073313 (Cir. Ct. Cook County Sept. 2, 2012) (Novak, J.); *rev'd sub nom.* People *ex rel.* Madigan v. Burge, 981 N.E. 2d 1058 (Ill. App. Ct. 2012); *rev'd,* 2014 IL 115635 (Ill. S. Ct. 2014). *See also* TORTURE PENSIONS, *supra* note 255.

258 In 2013, the People's Law Office and the MacArthur Justice Center filed a state class action case under the Post-Conviction Hearing Act, 725 ILL. COMP. STAT. ANN 5/ 122-1–8 (West 2014), that sought evidentiary hearings for a class of prisoners comprised of all Burge-related torture victims who remain behind bars. *See* Notice of Hearing and Class Action Petition, Plummer v. People, Nos. 84 CR 21451, 91 CR 10108 (Cir. Ct. Cook County Oct. 16, 2012). On March 12, 2014, Chief Judge Biebel dismissed the class action, but appointed a special master, Dean David Yellen of the Loyola Law School, "to identify all incarcerated individuals who have valid claims of coerced confessions at the hands of Commander Burge and those under his authority . . . and to present their names to this Court for the appointment of private *pro bono* counsel to assist them in litigating their individual claims under the Post Conviction Hearing Act." Plummer v. People, Nos. 84 CR 21451, 91 CR 10108 at 8 (Cir. Ct. Cook Cnty. Mar. 12, 2014).

259 *See* G. Flint Taylor, *A Slap in the Face of Torture Victims*, CHI. SUN-TIMES (Nov. 27, 2012), http://www.suntimes.com/news/otherviews/16658057-452/a-slap-in-the-face-of-torture-victims.html#.U3-n95RdVIg.

DISCRIMINATORY MAINTENANCE OF REO PROPERTIES AS A VIOLATION OF THE FEDERAL FAIR HOUSING ACT

Stephen M. Dane, Tara K. Ramchandani, & Anne P. Bellows†

CONTENTS

I. INTRODUCTION

As the foreclosure crisis continues to work a devastating path through the nation's neighborhoods, it is leaving in its wake a glut of bank-owned homes, known as Real Estate Owned (REO) properties in the finance and housing industries. Many of these REO properties have been allowed to fall into deplorable states of disre-

† Mr. Dane is a partner at the civil-rights law firm Relman, Dane & Colfax, PLLC based in Washington, D.C. Ms. Ramchandani is an associate at the same firm, and Ms. Bellows is the 2013 Relman Civil Rights Fellow. The authors would like to acknowledge the important work of Jean Zachariasiewicz, another associate at the firm who is litigating several REO matters.

pair, causing harm to neighbors, communities, and local governments.

News reports regarding blighted REO properties describe an unpalatable litany of damage: one house with burst pipes, smashed and boarded up windows, and "overwhelming" odors of rotting food and decay;[1] another with chest-high weeds, a rodent infestation spilling over into the neighbor's property, and surrounded by increased gang activity;[2] a third with a "disintegrating front porch," exposed wiring, piles of rubbish, and infestations of rats, snakes, ants, bees, and termites.[3] These properties were each owned by one of the nation's largest banks at the time their condition was reported.[4] Nor are properties like these the exception. A 2012 survey of approximately 400 REO properties in Los Angeles found that fully half of the homes were in a "state of blight," and nearly a third were "seriously blighted."[5]

Not surprisingly, poorly maintained REOs create a host of problems for neighborhoods and communities. Blighted properties pose health and safety risks in impacted communities due to pests, decay, and vulnerability to crime.[6] Local governments are forced to spend millions of dollars to address code violations, perform maintenance mitigating dangerous or blighted conditions, demolish unsafe structures, and identify and contact those responsible for vacant properties.[7] These expenditures strain budgets that could be used for other community priorities. The impact on the

---

1 Tim Reid, *U.S. Cities Struggle with Blighted Bank-Owned Homes*, REUTERS (June 8, 2012), http://www.reuters.com/article/2012/06/08/us-usa-housing-blight-idUSBRE85707320120608.

2 Jessica Garrison & Angel Jennings, *Second Bank Is Sued Over Blight*, L.A. TIMES (July 12, 2012), http://articles.latimes.com/2012/jul/17/local/la-me-us-bank-slumlord-20120717.

3 Megan O'Matz & John Maines, *Bad-Neighbor Banks Neglect Thousands of South Florida Homes, Sun Sentinel Finds*, SUN SENTINEL (Apr. 28, 2012), http://articles.sun-sentinel.com/2012-04-28/news/fl-bad-neighbor-banks-20120428_1_banks-shift-vacant-homes-vacant-properties/3.

4 Each of the banks involved ranked among the top thirty banks in the U.S. by assets in 2013. *See* David Benoit, *The Top 50 U.S. Banks by Assets*, WALL ST. J. (Sep. 26, 2013), http://blogs.wsj.com/moneybeat/2013/09/26/the-top-50-u-s-banks-by-assets/.

5 Tim Reid, *supra* note 1.

6 *See, e.g.*, Lea Deutsch, *Collateral Damage: Mitigating the Effects of Foreclosure in Communities*, 22 TEMP. POL. & CIV. RTS. L. REV. 203, 207–08 (2012).

7 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-34, VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 37 (2011) [hereinafter GAO-12-34], *available at* http://www.gao.gov/products/GAO-12-34; *see also* WILLIAM AGPAR, MARK DUDA & ROCHELLE NAWROCKI GOREY, HOMEOWNERSHIP PRES. FOUND., THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY (2005), *available at* http://www.nw.org/network/neighborworksProgs/foreclosuresolutionsOLD/documents/2005Apgar-DudaStudy-FullVersion.pdf.

housing market is also significant. Vacant and foreclosed properties are well known to depress surrounding home values;[8] poor maintenance can only exacerbate that effect. And as shoddy maintenance and neglect result in deteriorating appearances and physical conditions for REO properties, their availability for sale is adversely affected, constraining housing options in impacted communities.

These adverse effects have prompted an array of policy initiatives and lawsuits designed to combat the problem of poorly maintained REO properties. Federal regulators have developed standards for REO maintenance by lenders who are subject to their supervision.[9] Major cities, including Los Angeles and Cincinnati, have sued big banks over blighted REO properties on a nuisance theory of liability.[10] Chicago and more than a thousand other municipalities have enacted ordinances requiring registration of vacant properties and setting standards for their maintenance and repair.[11] Each of these efforts offers an important opportunity to create higher standards of accountability for financial institutions that own vacant residential properties.

Although these efforts are admirable, they overlook a disturbing reality in the servicing and maintenance of REO properties: a dimension of race discrimination in minority neighborhoods. Numerous reports have shown that communities of color were disproportionately targeted for the most expensive and toxic mortgages pedaled during the bubble, and as a result suffered disproportionately high foreclosures.[12] Now evidence sug-

---

8 *See* GAO-12-34, *supra* note 7, at 44–45.

9 OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK: OTHER REAL ESTATE OWNED 14 (2013), *available at* http://www.occ.gov/topics/credit/commercial-credit/other-real-estate-owned.html; FED. RESERVE BD., QUESTIONS AND ANSWERS FOR FEDERAL RESERVE-REGULATED INSTITUTIONS RELATED TO THE MANAGEMENT OF OTHER REAL ESTATE OWNED (OREO) ASSETS (2012), *available at* http://www.federalreserve.gov/bankinforeg/srletters/sr1210.htm.

10 *See* Garrison & Jennings, *supra* note 2 (discussing Los Angeles suits against U.S. Bankcorp and Deutsche Bank); Kermit J. Lind, *Can Public Nuisance Law Protect Your Neighborhood from Big Banks?*, 44 SUFFOLK U. L. REV. 89, 110 (2011) (discussing Cincinnati's suits against Wells Fargo and Deutsche Bank).

11 *See* Mary Ellen Podmolik, *Chicago Loses Court Challenge to Vacant Building Registry*, CHI. TRIB. (Aug. 26, 2013), http://articles.chicagotribune.com/2013-08-26/business/chi-chicago-vacant-building-registry-20130825_1_fhfa-federal-housing-finance-agency-fannie-mae. A federal court recently held, however, that such local ordinances could not be applied to Fannie Mae and Freddie Mac under the doctrines of preemption and federal immunity to state and local taxation. Fed. Hous. Fin. Agency v. City of Chicago, 962 F. Supp. 2d 1044, 1056 (N.D. Ill. 2013).

12 Robert B. Avery et al., *The 2006 HMDA Data*, 93 FED. RES. BULL. A95–97 (2007), *available at* http://www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final

gests that the history of residential racial discrimination by banks is repeating itself yet again: the financial institutions that own REO properties adhere to lower standards of maintenance and upkeep in neighborhoods of color than they do in white neighborhoods.

For example, the National Fair Housing Alliance (NFHA) has published two reports, one in 2011 and another in 2012, documenting the results of its investigation of racial disparities in REO maintenance.[13] NFHA found that

> [w]hile REO properties in White neighborhoods were more likely to have well-maintained lawns, secured entrances, and professional sales marketing, REO properties in African-American and Latino neighborhoods were more likely to have poorly maintained yards, unsecured entrances, look vacant or abandoned, and have poor curb appeal.[14]

NFHA and more than a dozen of its member fair housing organizations have filed administrative complaints with the U.S. Department of Housing and Urban Development (HUD) directly challenging the racial disparities in REO maintenance as a violation of federal civil rights law.

This Essay explains how racial disparities in the maintenance and marketing of REO properties by lenders after foreclosure may result in violations of the federal Fair Housing Act.[15] In Section

---

.pdf (documenting racial disparities in high-priced mortgages); DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 5, 11, 19–23 (2011), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf; RICK COHEN, THE KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY AT OHIO ST. UNIV., A STRUCTURAL RACISM LENS ON SUBPRIME FORECLOSURES AND VACANT PROPERTIES 4–5 (2008), *available at* http://www.kirwaninstitute.osu.edu/reports/2008/10_2008_StucturalRacismandSubprimeRickCohen.pdf; Geoff Smith & Sara Duda, *Lender Owned Largely Vacant Properties Disproportionately Impact Communities of Color*, WOODSTOCK INST. (Nov. 13, 2008), http://www.woodstockinst.org/blog/2008/lender-owned-largely-vacant-properties-disproportionately-impact-communities-color.

13 *See* NAT'L FAIR HOUS. ALLIANCE, HERE COMES THE BANK, THERE GOES OUR NEIGHBORHOOD: HOW LENDERS DISCRIMINATE IN THE TREATMENT OF FORECLOSED HOMES (2011) [hereinafter HERE COMES THE BANK], *available at* http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=UF6xIHF35rI%3D&tabid=3917&mid=9405; NAT'L FAIR HOUS. ALLIANCE, THE BANKS ARE BACK, OUR NEIGHBORHOODS ARE NOT: DISCRIMINATION IN THE MAINTENANCE AND MARKETING OF REO PROPERTIES (2012), *available at* http://www.nationalfairhousing.org/Portals/33/the_banks_are_back_web.pdf.

14 HERE COMES THE BANK, *supra* note 13, at 2.

15 42 U.S.C. §§ 3601–3619, 3631 (2012). Although this Essay focuses on the federal Fair Housing Act, other civil rights laws may also apply to the racially disparate neglect of lender-owned REOs. For example, 42 U.S.C. § 1982 guarantees that "all citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The U.S. Supreme Court has recognized that the statute may be violated where the chal-

II(A), we demonstrate that lenders' comparative neglect of REO properties in Black and Latino neighborhoods constitutes prohibited racial discrimination under the Act. Then in Section II(B), we turn to an analysis of statutory language, case law, and HUD regulations supporting three distinct bases of liability for discriminatory neglect of REO properties in neighborhoods of color. First, the neglect of REO properties in neighborhoods of color significantly and adversely affects their availability for purchase in violation of sections 3604(a) and 3605.[16] Second, racial disparities in maintenance constitute discrimination in the terms, conditions, and privileges of sale of a dwelling and in the provision of services in connection therewith, in violation of section 3604(b).[17] Finally, discriminatory maintenance of REOs "perpetuates segregation" in ways that are prohibited by the Fair Housing Act.[18]

II. Application of the Fair Housing Act to Discriminatory Maintenance of REO Properties

The legal theories discussed below constitute a fairly straightforward extension of well-established precedent to the maintenance and sale of REO properties. Indeed, these claims are the natural extension of jurisprudence holding that redlining and other forms of housing discrimination based on neighborhood racial composition are forbidden by the Fair Housing Act.

A. The Fair Housing Act's Application to Neighborhood-Based Discrimination Is Well Established

Discrimination in housing services based on the racial composition of a neighborhood is a familiar practice in American housing markets, and it is forbidden by the Fair Housing Act.[19] Courts have long held, for example, that the Fair Housing Act forbids "racial steering" where real estate agents "direct[ ] prospective home buyers interested in equivalent properties to different areas according to their race" and the race of the relevant neighborhoods.[20] It is

lenged conduct "depreciate[s] the value of the property owned by [B]lack citizens." City of Memphis v. Greene, 451 U.S. 100, 123 (1981). Evidence that blighted REOs do indeed "depreciate[ ] the value of property" owned by Black and Latino citizens suggests that § 1982 may provide a remedy to homeowners adversely affected by lenders' failure to maintain REOs in their neighborhoods. *See id.*

16 *See infra* Section II(B)(1).

17 *See infra* Section II(B)(2).

18 *See infra* Section II(B)(3).

19 Ring v. First Interstate Mortg., Inc., 984 F.2d 924, 927–28 (8th Cir. 1993).

20 Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 94 (1979); *see also* Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975), *aff'd and remanded*,547 F.2d 1168

equally well established that the Fair Housing Act prohibits "redlining," or discrimination in the provision of housing-related financial services based on the race of a neighborhood.[21]

The term *redlining* takes its name from color-coded maps included in lending manuals produced in the 1930s by the federal Home Owners Loan Corporation (HOLC).[22] Undesirable neighborhoods—which were defined in part by the presence or predicted increase of racial and ethnic minorities, particularly African Americans—were marked with red lines and described as a poor credit risk.[23] HOLC's redlined maps profoundly influenced mortgage lending throughout the country as both private banks and the Federal Housing Administration (responsible for federal home loan guarantees) adopted HOLC's criteria, including the focus on neighborhood racial composition.[24]

After the passage of the Fair Housing Act, federal courts held that the Act prohibited redlining in private mortgage lending because it injected "racial considerations" into the availability of housing and related financial services.[25] Next, application of the Act was

---

(6th Cir. 1977) (confirming that § 3604(a) of the FHA makes it unlawful to channel a prospective buyer into or away from an area based on the buyer's race).

21 *See* Simms v. First Gibraltar Bank, 83 F.3d 1546, 1551 n.12 (5th Cir. 1996) ("Redlining means 'mortgage credit discrimination based on the characteristics of the neighborhood surrounding the would-be borrower's dwelling.'"); Old West End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100 (N.D. Ohio 1987) (mortgage redlining violates the Fair Housing Act); *accord* Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 2d 489 (S.D. Ohio 1976). *See also* N.A.A.C.P. v. Am. Family Mut. Ins. Co., 978 F.2d 287, 300 (7th Cir. 1992) ("*American Family*") (redlining in homeowner's insurance is forbidden by the Fair Housing Act); *accord* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1359–60 (6th Cir. 1995); Nat'l Fair Hous. Alliance v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 60–61 (D.D.C. 2002).

22 DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 51–52 (1993); *see also Simms*, 83 F.3d at 1551 n.12 ("The term [redlining] derives from loan officers evaluating home mortgage applications based on a residential map where integrated and minority neighborhood are marked off in red as poor risk areas.").

23 MASSEY & DENTON, *supra* note 23, at 51–52.

24 *Id.* at 52–55, 105. *See also* NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, *How We Got Here: The Historical Roots of Housing Segregation*, *in* THE FUTURE OF FAIR HOUSING (2008) ("[T]o 'assist' with lending decisions, the Federal Housing Authority prepared 'neighborhood security maps' that were based largely on the racial, ethnic, and economic status of residents. . . . Because federally-backed mortgages were rarely available to residents of 'transitional,' racially mixed, or minority neighborhoods, lenders began 'redlining' those neighborhoods."); Calvin Bradford & Anne Schlay, *Assuming a Can Opener: Economic Theory's Failure to Explain Discrimination in FHA Lending Markets*, 2 CITYSCAPE 77, 78–79 (1996), *available at* http://www.huduser.org/periodicals/cityscpe/vol2num1/bradford.pdf.

25 *See, e.g.*, *Laufman*, 408 F.Supp. at 493.

extended to redlining in homeowners' insurance discrimination.[26] Following the evolution of lending discrimination, courts have more recently recognized so-called "reverse redlining" claims where lenders target predominantly minority areas for predatory mortgages.[27]

A mortgage redlining case from the late 1980s, *Old West End Association v. Buckeye Federal Savings & Loan* (*Buckeye*),[28] provides a useful illustration of a claim based on the race of a neighborhood, rather than the race of the particular plaintiff. In *Buckeye*, the court considered a redlining claim brought by white buyers who were denied a mortgage loan for a home in a minority neighborhood even though the sale price was supported by an independent appraisal and the buyers were creditworthy.[29] The bank argued that the buyers could not prove discrimination.[30] The court rejected this argument because plaintiffs had put forward expert evidence showing "statistically significant differences between Buckeye's treatment of conventional mortgage loan applications originating from white neighborhoods and Buckeye's treatment of similar applications from integrated or minority neighborhoods."[31] The race of the particular buyers was "irrelevant" to the determination of whether the bank's lending practices were racially discriminatory—precisely because discrimination on the basis of neighborhood racial composition is sufficient to support a claim under the Fair Housing Act.[32]

The same theory applies with equal force in the case of neighborhood disparities in lenders' REO property maintenance. Indeed, in many ways this new phenomenon is simply a continuation of our country's long history of residential discrimination by financial institutions: first mortgages were withheld from neighborhoods of color, then more recently neighborhoods of color were targeted for expensive and unfair mortgages,[33] and now financial

---

[26] *Am. Family Mut. Ins. Co.*, 978 F.2d at 300; *Nationwide Mut. Ins. Co.*, 52 F.3d at 1359–60; *Nat'l Fair Hous. Alliance*, 208 F. Supp. 2d at 60–61 (D.D.C. 2002).

[27] Steed v. EverHome Mortg. Co., 308 Fed. App'x. 364, 368 (11th Cir. 2009); City of Memphis v. Wells Fargo Bank, N.A., 09-2857-STA, 2011 WL 1706756, at *14 n. 56 (W.D. Tenn. May 4, 2011) (collecting cases demonstrating that reverse redlining violates the FHA and supports a claim of disparate treatment).

[28] 675 F. Supp. 1100 (N.D. Ohio 1987).

[29] *Id.* at 1103.

[30] *Id.* at 1105.

[31] *Id.*

[32] *See id.* at 1102–03.

[33] *See, e.g.*, Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 385–86,

institutions are allowing REO properties in neighborhoods of color to deteriorate due to a lack of proper maintenance. Although the harmful conduct has varied over time, the geographic nature of discrimination remains unchanged, and is thus equally cognizable under the Fair Housing Act. Evidence that there are differences in the services provided to REO properties according to the race of the neighborhood is thus sufficient to establish a prima facie case of racial discrimination under the FHA.[34]

B. Discriminatory REO Maintenance Impedes Availability, Constitutes Discrimination in the Provision of Services, and Perpetuates Segregation

This section outlines three independent bases of liability under the Fair Housing Act. First, neglect of REOs in neighborhoods of color significantly and adversely affects the "availability" of those properties for sale, in violation of sections 3604(a) and 3605.[35] Second, discrimination in the maintenance of REO properties falls squarely within the language of section 3604(b), which prohibits discrimination in the "terms, conditions, or privileges" of the sale of a dwelling "or in the provision of services . . . in connection therewith."[36] Third, the impact of REO properties on surrounding properties perpetuates segregation by constricting the mobility of households of color and discouraging others from moving into Black and Latino neighborhoods.

1. The Neglect of REO Properties in Neighborhoods of Color Significantly and Adversely Affects Their Availability for Purchase

The discriminatory provision of maintenance services to REO properties in neighborhoods of color can create significant barriers to the prospective purchase of those properties. This adverse impact on the availability of housing in neighborhoods of color creates a cause of action under section 3604(a), which makes it

398–400 (2010) (describing historical and recent forms of mortgage lending discrimination).

34 *See Buckeye*, 675 F. Supp. at 1105.

35 Section 3604(a) provides that it shall be unlawful "to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny*, a dwelling to any person because of race . . . ." 42 U.S.C. § 3604(a) (2012) (emphasis added); section 3605 provides that it shall be unlawful for any entity "whose business includes engaging in residential real estate-related transactions to discriminate against any person *in making available such a transaction* . . . because of race . . . ." *Id.* § 3605 (emphasis added).

36 *Id.* § 3604(b).

unlawful "to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race[.]"[37] For the same reason, the conduct constitutes a violation of § 3605, under which is it is illegal for entities "whose business includes engaging in real estate-related transactions," like selling REO properties, to discriminate "in making available such a transaction, or in the terms or conditions of such a transaction."[38]

In some cases, the damage resulting from discriminatory neglect may be so severe that the premises are uninhabitable, thereby rendering REO residential properties literally "unavailable" for sale or rental. The consequences of withholding maintenance and repairs from properties in neighborhoods of color can impede the sale of a dwelling in other ways, even where the damage is not so extreme. First, the visible condition of the property may suggest that the property is not for sale or may discourage buyers from looking at the property. This barrier to access is actionable under the line of cases interpreting "refus[al] to negotiate" as encompassing discriminatory actions that discourage or restrict the choices of housing available in the market.[39] Second, the physical damage to properties in neighborhoods of color resulting from REO neglect will discourage potential buyers and may preclude the closing of a sale where the appraisal does not support the loan amount requested.

In cases regarding racial steering, courts have held that conduct that discourages or restricts the choices of dwellings in the marketplace on the basis of race constitutes a violation of § 3604(a).[40] To determine whether conduct was sufficiently "discouraging" to trigger a claim under section 3604(a), courts look "to whether the statement or conduct would have an untoward effect on a reasonable person under the circumstances who is seek-

---

[37] *Id.* § 3604(a).

[38] *Id.* § 3605. Subsection (b)(2) of that provision includes "[t]he selling . . . of residential real property" in the definition of "residential real-estate related transactions." The section is thus applicable to the banks that hold title to the properties, as trustees or otherwise, because they regularly engage in the sale of REO residential properties.

[39] *See* Vill. of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990); Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977).

[40] *See, e.g.*, *Bellwood*, 895 F.2d at 1529 (noting that "any effort to discourage" may be sufficient to make out a racial steering claim under § 3604(a)); *Zuch*, 394 F. Supp. at 1047 (noting that "any action by a real estate agent which in any way impedes, delays, or discourages on a racial basis a prospective home buyer from purchasing housing is unlawful").

ing housing."[41]

Although courts have normally confronted conduct that restricts buyers' choices on the basis of race in steering cases against realtors, the proposition that housing may be made "unavailable" through actions that discourage a buyer from inspecting a property is capable of broader application. HUD regulations demonstrate the breadth of § 3604(a) in this regard. 24 C.F.R. § 100.70(a) provides in pertinent part that "[i]t shall be unlawful, because of race . . . to discourage or obstruct choices in a community, neighborhood or development."[42] Subsection (c) of the same provision clarifies that prohibited actions under (a) "include, but are not limited to: (1) Discouraging any person from inspecting, purchasing, or renting a dwelling because of race . . . , or because of the race . . . of persons in a community, neighborhood or development."[43]

This regulatory language is broad enough to cover allegations of discrimination grounded in racially disparate maintenance of REO properties. Where REOs in Black and Latino neighborhoods are disproportionately likely to show visible defects—like an accumulation of trash or debris, overgrown grass and shrubbery, unsecured or broken doors and windows, unsecured holes in the structure, or broken and missing steps and handrails—such deterioration "would have an untoward effect on a reasonable person" seeking housing.[44] Such deplorable conditions will discourage the average person from inspecting or purchasing an REO dwelling, thus "obstruct[ing]" housing choices in communities of color.[45] A court or HUD could determine that racial discrimination in the provision of property maintenance services violates 24 C.F.R. § 100.70 and 42 U.S.C. § 3604(a).

Beyond the physical appearance of the property, buyers may also be discouraged by the prospect of costly repairs to remediate the damage from improper and inconsistent maintenance of REOs located in minority neighborhoods. In the 2011 study mentioned in the introduction to this Essay, the Government Accountability Office (GAO) reported on efforts by city officials and community organizations to "mitigate the damage" caused by such properties

---

41 Heights Cmty. Cong. v. Hilltop Realty, Inc., 774 F.2d 135, 140 (6th Cir. 1985).

42 24 C.F.R. § 100.70(a) (2013).

43 *Id.* § 100(c). Note that this regulatory language also explicitly recognizes that the Fair Housing Act prohibits discrimination on the basis of neighborhood racial composition, as we argue in *supra* Part II(A).

44 *See Heights Cmty. Cong.*, 774 F.2d at 140.

45 24 C.F.R. § 100.70(a), (c).

by acquiring and rehabilitating them.[46] Although GAO found that "many view acquisition and rehabilitation as a strong strategy to combat the problems of vacant properties," the study reported that the high costs of rehabilitating damaged properties sometimes make such efforts infeasible.[47] The GAO noted that "[w]ith costly rehabilitation and low housing values, governments, community development organizations, or investors may not be able to recoup their costs for rehabilitating properties in poor condition by reselling them."[48]

Evidence suggests that REO properties in neighborhoods of color are disproportionately likely to suffer from physical damage that would be costly to repair, like unsecured holes in doors, windows, and structure—problems which are very likely to give rise to even more costly complications like mold and infestations.[49] If relatively deep-pocketed municipalities, investors, and organizations that are purposefully seeking to rehabilitate foreclosed properties are put off by the high costs of repairs resulting from inadequate maintenance, individual homebuyers will be likewise deterred. As a result, the poor maintenance of properties in neighborhoods of color may operate to effectively remove those properties from the market. Moreover, even in those cases where buyers enter into a contract to buy damaged properties, banks may refuse to finance the sale if the condition of the property leads to an appraisal below the purchase price, defeating the transaction altogether.[50] The costly problems resulting from inadequate maintenance are thus another mechanism through which the discriminatory conduct of banks and property servicers impedes the sale of properties in neighborhoods of color, discouraging and restricting the choice of housing on the basis of race, in violation of the Fair Housing Act.[51] This conduct by lenders makes their REO properties "unavailable" for purchase on a discriminatory basis in violation of sections 3604(a) and 3605.[52]

---

46 GAO-12-34, *supra* note 7, at 52.

47 *Id.* at 54–55.

48 *Id.*

49 *See, e.g.*, sources cited *supra* note 13.

50 *See* Steptoe v. Sav. of Am., 800 F. Supp. 1542, 1546 (N.D. Ohio 1992) (recognizing that "[a]n appraisal sufficient to support a loan request is a necessary condition precedent to a lending institution making a home loan").

51 *See* 24 C.F.R. § 100.70(a), (c); *see generally* Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1529 (7th Cir. 1990).

52 Our § 3604(a) argument is fundamentally different from the one considered by the Seventh Circuit three decades ago in a case regarding a county's failure to maintain vacant tax-sale properties in Black neighborhoods, Southend Neighborhood Im-

2. Racial Disparities in REO Maintenance Constitute Discrimination in the Terms, Conditions, and Privileges of Sale of a Dwelling and in the Provision of Services in Connection Therewith

Section 3604(b) of the Fair Housing Act provides that it shall be unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race[.]"[53] HUD's regulations implementing this section specify that "[p]rohibited actions under this section include, but are not limited to . . . [f]ailing or delaying maintenance or repairs of sale or rental dwellings" because of race.[54]

The maintenance of REO properties unquestionably constitutes the "provision of services" in connection with dwellings that are on the market.[55] Regardless of the reach of § 3604(b) in connection with the provision of services after the initial acquisition of housing, a source of some disagreement among circuits, courts have not doubted that the statute applies to services provided in connection with the sale of housing.[56]

Moreover, where discriminatory neglect results in physical damage to the premises or a deterioration of the landscaping, the buyer in any sales transaction is denied the "privileges" of maintenance afforded by the REO owner in similar sales transactions in white neighborhoods.[57] Additionally, as a consequence, sales transactions involving poorly maintained REOs in neighborhoods of color result in the transfer of title to the dwelling under less favorable "terms" and "conditions" that place on buyers the respon-

provement Association v. St. Clair County, 743 F.2d 1207 (7th Cir. 1984). In that case, nearby homeowners argued that the blighted vacant properties "damaged their interest in neighboring properties" by lowering home values and interfering with their ability to secure loans. *Id.* at 1208, 1210. The Seventh Circuit rejected their claims, reasoning that Section 3604(a) covered only conduct affecting the "availability" of housing, not home values. *Id.* at 1210. The *Southend* court did not consider the impact of poor maintenance on the prospective "availability" for sale of vacant properties. *See id.*

53 42 U.S.C. § 3604(b) (2012).

54 24 C.F.R. § 100.65(b)(2) (2013).

55 *See* 42 U.S.C. § 3604(b).

56 Clifton Terrace Assocs., Ltd. v. United Techs. Corp., 929 F.2d 714, 720 (D.C. Cir. 1991) (Sec. 3604(b) concerns "services and facilities provided in connection with the sale or rental of housing"); Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005) (arguing that the language regarding services should not be "unmoor[ed]" from the sale or rental of a dwelling).

57 *See* 42 U.S.C. § 3604(b).

sibility of undertaking repairs and cleaning up the property.[58]

While the applicability of the statute seems plain, the regulation enacted by HUD is even more direct: "[f]ailing or delaying maintenance or repairs" of dwellings for sale based on race is a "prohibited action[ ]" under section 3604(b).[59] REO properties are nearly by definition dwellings intended for sale, and the evidence suggests that certain lenders and their property maintenance servicers are "failing or delaying maintenance or repairs" to some REO properties on a discriminatory basis. HUD regulations interpreting the Fair Housing Act are entitled to and have routinely been granted deference from courts under the *Chevron* doctrine since Congress delegated to the agency the legal authority to issue interpretive regulations under the Fair Housing Act in 1989.[60] By expressly listing discriminatory failure to maintain dwellings for sale as a "prohibited action" under the Act, the regulatory provision thus resolves any doubt about the applicability of section 3604(b) to the maintenance of vacant homes.[61]

The failure to provide adequate maintenance and repairs to REOs in neighborhoods of color, while adhering to higher standards in white neighborhoods, falls under the plain language of the regulation. This discriminatory treatment of properties in different neighborhoods, then, should be understood as discrimina-

---

58 *See id.*

59 24 C.F.R. § 100.65(b)(2).

60 *See, e.g.*, NAACP v. Am. Family Mut. Ins., 978 F.2d 287, 300 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)) (deferring to a HUD regulation interpreting the Act to prohibit insurance redlining); Meyer v. Holley, 537 U.S. 280, 287–88 (2003).

61 This regulation essentially overrules the § 3604(b) holding of the *Southend* case discussed earlier. *See supra* note 52. In that case, the Seventh Circuit held that the county's failure to maintain vacant tax sale properties in Black neighborhoods was not actionable under § 3604(b) because that provision covered municipal services "such as police and fire protection or garbage collection," not the maintenance of county-owned properties. *Southend*, 743 F.2d at 1210. Even setting aside the HUD regulation, the restriction of § 3604(b) to core municipal services is no longer good law. The Seventh Circuit itself has subsequently entertained § 3604(b) suits against private parties. *See, e.g.*, *Am. Family Mut. Ins.*, 978 F.2d at 299 (property insurance is a "service" in connection with housing); *see also* Bloch v. Frischholz, 587 F.3d 771, 780 (7th Cir. 2009) (claim against condo association could proceed because ongoing governance by the association was a "condition" of plaintiffs' purchase of their unit). Other courts have directly rejected *Southend*'s restriction to core municipal services. *See, e.g.*, *Clifton*, 929 F.2d at 720 (noting the lack of authority and analysis to support *Southend*'s conclusion); s*ee also* ROBERT SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 12B:1 (2013) (noting that "anyone who commits one of the acts proscribed by the statute's substantive provisions is liable to suit, unless he is covered by one of the exemptions contained in § 3603(b) or § 3607").

tion "in the provision of services" in connection with dwellings, in violation of § 3604(b).

3. Discrimination in the Maintenance of REOs Perpetuates Segregation

The Fair Housing Act is also violated by acts that perpetuate housing segregation.[62] As explained by the Seventh Circuit, the basis for a perpetuation of segregation theory is that "[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns."[63]

The same reasoning underscores why providing lower quality maintenance services to REOs in Black and Latino neighborhoods harms interests that are central to the protections of the Fair Housing Act. The racial disparities in maintenance act to perpetuate segregation through their effects on property values and stability of minority neighborhoods. The prospects for integration in the affected neighborhood will also be diminished because white buyers will be deterred—along with others—from purchasing homes there, leaving the existing segregated racial composition of these neighborhoods unchanged. Additionally, the presence of a deteriorated and possibly dangerous REO in a neighborhood inevitably affects home values for surrounding homeowners.[64] Lower home values, in turn, will restrict the ability of minority homeowners to move into majority white or integrated neighborhoods by reducing the equity they can use to buy a new home. Allowing properties in neighborhoods of color to so deteriorate has the "necessary and foreseeable consequence of perpetuating segregation" by re-entrenching the economic dynamics that maintain racial segregation.[65]

---

62 *See* Schwemm, *supra* note 62, § 10:7 ("[T]he perpetuation of segregation theory is an independent way of establishing a Fair Housing Act violation[.]"); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–38 (2d Cir. 1988); United States v. City of Parma, 494 F. Supp. 1049, 1097, 1099–1100 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562, 575–76 (6th Cir. 1981); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) [hereinafter *Arlington Heights II*]; United States v. City of Black Jack, Mo., 508 F.2d 1179, 1184–1186 (8th Cir. 1974).

63 *Arlington Heights II*, 558 F.2d at 1289 (*citing* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211) (internal quotations omitted).

64 The GAO report cited earlier relays findings "that vacant foreclosed properties may have reduced prices of nearby homes by $8,600 to $17,000 per property in specific cities." GAO-12-34, *supra* note 7 at 1, 44–45.

65 *See Arlington Heights II*, 558 F.2d at 1290; *see also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844–60

III. Conclusion

Redlining is no more acceptable in the provision of maintenance services than it is in the provision and pricing of mortgages or homeowner's insurance. Banks and their maintenance servicers have assumed the responsibility of maintaining REO dwellings for eventual sale in the marketplace; they must accept their responsibility to provide those services equally across all neighborhoods, regardless of racial composition. The failure to do so results in racial discrimination in the provision of services with regard to housing; in the terms, conditions, and privileges of sale of REO properties in neighborhoods of color; and in the availability of those properties to prospective purchasers. These harms, when imposed on the basis of race, violate the Fair Housing Act.

(June 1994) (describing how racialized disparities in neighborhood conditions perpetuate segregation).

A TRIBUTE TO JUSTICE: HONORING FORTY YEARS OF STRUGGLE TO ADVANCE JUDICIAL PROCESS FOR CRIMES AGAINST HUMANITY IN CHILE[1]

A Conversation with Judge Baltasar Garzón Real, Sir Geoffrey Bindman, and Joan Garcés, Moderated by Almudena Bernabeu

ALMUDENA BERNABEU: Good afternoon, everybody. My name is Almudena Bernabu.[2] I have the beautiful and great honor to be

[1] These remarks were delivered as part of *A Tribute to Justice*, an event commemorating the 40th anniversary of the military coup d'etat in Chile, presented by the Charles Horman Truth Foundation at the Third Church of Christ Scientist in New York City on September 9, 2013. Other speakers and honorees included Peter Weiss, Judge Juan Guzmán Tapia, Jennifer Harbury, Reed Brody, Peter Kornbluh, and Prof. Cynthia Soohoo. The program was co-sponsored by CUNY School of Law, the Center for Constitutional Rights, the Institute for Policy Studies, and the North American Congress on Latin America, with support from the Ford Foundation. The editors thank Joyce Horman for permission to transcribe the program, and gratefully acknowledge the assistance of Bridget Lombardozzi and Southern District Court Reporters, P.C. The remarks have been edited for length and grammatical continuity. Videos of the entire *Tribute to Justice* program can be accessed at http://www.hormantruth.org/ht/2013videos.

[2] Almudena Bernabéu has served as International Attorney for the Center for Justice and Accountability (CJA) since early 2002. Bernabéu leads CJA's Latin America program, practicing U.S.-based civil Alien Tort Statute litigation against human rights abusers and universal jurisdiction criminal human rights prosecutions before the Spanish National Court. Bernabéu is also Director of CJA's Transitional Justice Program. Bernabéu currently serves as the lead private prosecutor on two human rights cases before the Spanish National Court: one filed on behalf of survivors of the Guatemalan Genocide and the other brought against senior Salvadoran officials for the massacre of Jesuit priests in 1989. Bernabéu has worked in human rights and international law for the past decade. She has published many articles on human rights litigation in national courts and its effectiveness in the struggle against impunity, as well as on reforming Spanish asylum and refugee law. She has lectured at universities in multiple countries, participated in numerous conferences internationally, and has conducted trainings for lawyers and government prosecutors. Bernabeu is also Vice President of the Spanish Association for Human Rights (www.apdhe.org), and serves as an advisor at the Human Rights Clinic at Santa Clara University. Bernabéu is a member of the advisory board of the Peruvian Institute of Forensic Anthropology (EPAF) (www.epafperu.org), a forensic group providing evidence on human rights violations investigations and prosecutions. In 2012, Bernabeu won the prestigious Katharine & George Alexander Law Prize, and the *Yo Dona* Magazine Award. She was named one of the 100 most influential people by *Time* magazine in 2013, and just received the SCEVOLA award for ethics and professional excellence. Ms. Bernabéu holds an LLM degree from the University Of Valencia School Of Law, where she specialized in Public International Law. Trained in Spanish and U.S. law, she is a member of the Valencia and Madrid Bar Associations and the American Bar Association.

the moderator and make an introduction. Hopefully I speak slow enough so you can all understand me. I apologize ahead of time. I do have a heavy accent, but it makes me more appropriate tonight because I'm from Spain.

I also want to thank Joyce Horman and the Charles Horman Truth Foundation for inviting all of us and for putting this beautiful event together and including me in it. Next to me, we have three people and a fourth great companion. I don't think they need an introduction, but I have the duty to do it. We have next to me Judge Baltasar Garzón from the Spanish National Court.[3]

---

[3] Judge Baltasar Garzón Real is internationally renowned as the Spanish jurist who issued the first detention request, through Interpol, for former Chilean dictator Augusto Pinochet on charges of abductions, torture, murder, forced disappearances and terrorism. General Pinochet's subsequent arrest in London on October 16, 1998, marked the first dramatic application of the principle of universal jurisdiction—the right of third countries to prosecute crimes against humanity committed in other nations where the perpetrator is shielded from justice. Judge Garzon's effort to indict and extradite Pinochet to Spain resulted in his house arrest in London for over 500 days and stripped him of the "sovereign immunity" he had maintained from prosecution for his human rights atrocities. Judge Garzón relentlessly pursued the Pinochet case, eventually winning a ruling in London that Pinochet be extradited to Madrid to stand trial. For political reasons, the British government freed Pinochet to return to Chile instead, but he was immediately prosecuted there also. Garzón's precedent-setting prosecution transformed Spain into a center of international human rights accountability and paved the way for similar efforts to prosecute crimes against humanity committed in Argentina, Guatemala, and El Salvador.

In 2000, Judge Garzón began to investigate charges of genocide, terrorism, and torture committed by Argentine military officers during the dictatorship that lasted from 1976–1983. In 2003, Judge Garzón obtained the arrest and extradition of an Argentine Navy intelligence officer, Ricardo Cavallo, who was living in Mexico, on charges of genocide and terrorism. In April 2005, Judge Garzón convicted another Argentine naval officer, Adolfo Scilingo, for participating in "death flights" of 30 political prisoners and the National Criminal Court of Spain sentenced him to 640 years in prison in Spain. In 2009, Judge Garzón accused six officials of the administration of George W. Bush of authorizing and facilitating human rights abuses as part of the war on terrorism and urged Spanish prosecutors to investigate them in connection with the torture of prisoners at the U.S. military's Guantánamo Bay base in Cuba. Under pressure from Washington, revealed by the Wikileaks cables, Spanish authorities blocked efforts to apply universal jurisdiction to U.S. officials for those abuses.

In 2008, Judge Garzón opened the first inquiry into Franco's supporters' crimes against humanity committed during the war between 1936 and 1939 and during the fascist dictatorship established after it. Shortly after Judge Garzón declared his jurisdiction, he was accused by the Fascist Party of abusing his judicial authority for opening the inquiry. In what many observers believe was political retribution, Judge Garzón was suspended from serving as a judge for eleven years in February 2012. Judge Garzón has served on Spain's Central Criminal court, the Audiencia Nacional. As examining magistrate of the Juzgado Central de Instrucción No. 5, Garzón led the investigation of Spain's most important criminal cases, including terrorism, organized crime, and money laundering. In 2012, Garzón became senior legal counsel to the anti-secrecy group, Wikileaks, to help defend its founder, Julian Assange. Judge Garzón is a graduate of the University of Seville (1979). Between 1999 and 2008

Judge Baltasar Garzón is not only known for his role in the Argentine[4] and Pinochet[5] cases, but many other efforts of universal jurisdiction[6] and international criminal law and international human rights, both investigations and prosecutions. He is now in private practice. We all know a little bit about his adventures in our dear home country, but he is definitely a person committed in his travel—from the international criminal court to national jurisdiction to national investigations—on many levels. Right next to Judge Baltasar Garzón is Cristian Farias, who is a student at CUNY School of Law, who is going to help me and help Judge Baltasar with the translation.[7]

On the other side of Judge Baltasar is Sir Geoffrey Bindman, a solicitor from the UK and also a very well-known person.[8] If you

---

Garzón was awarded twenty-two Honoris Causa Doctoral Degrees. Judge Garzón received the Hermann Kesten Prize in 2009 and the International Hrant Dink Award in 2010. In 2011, Garzón received the first ALBA/Puffin award for human rights activism. The award committee cited his "exceptional courage in defense of human rights and his commitment to the recovery of historical memory regarding crimes against humanity."

4 *See* Ciaran Giles, *Baltasar Garzon: The Spanish Judge Setting the World to Rights*, INDEPENDENT (Nov. 4, 1999), http://www.independent.co.uk/news/people/profiles/baltasar-garzon-the-spanish-judge-setting-the-world-to-rights-743127.html (describing Judge Garzón's role in indicting Argentinian officials accused of human rights crimes).

5 General Augusto Pinochet was the leader of the coup d'etat which overthrew President Salvador Allende of Chile on September 11, 1973. He was responsible for the torture and death of thousands of his opponents. He was arrested in London in 1998 after Judge Baltasar Garzón issued a warrant charging him with human rights violations. *See* Jonathan Kandell, *Augusto Pinochet, Dictator Who Ruled by Terror in Chile, Dies at 91*, N.Y. TIMES (Dec. 11, 2006), http://www.nytimes.com/2006/12/11/world/americas/11pinochet.html. He was the first dictator to be humbled by the international justice system since the Nuremberg trials. *See The Nuremberg Legacy: Pinochet and Beyond*, U.S. HOLOCAUST MEMORIAL MUSEUM, http://www.ushmm.org/confront-genocide/speakers-and-events/all-speakers-and-events/the-nuremberg-legacy-pinochet-and-beyond (last visited Sept. 8, 2014).

6 *See generally* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988) (providing an overview of universal jurisdiction and analyzing its applicability and potential to redress wrongs widely condemned by the global community).

7 *CUNY Law Review* Managing Articles Editor (2013–2014) Cristian A. Farias served as Spanish-English interpreter for Judge Garzón as he delivered his remarks.

8 Sir Geoffrey Bindman, QC is a British attorney specializing in human rights law who represented Amnesty International and Chilean victims' interests in the case against Chilean dictator Augusto Pinochet in the late 1990s. Bindman was responsible for the arrest order against Pinochet during his visit to London in 1998. Bindman has served as Chair of the British Institute of Human Rights since 2005. In 2003, he won The Law Society Gazette Centenary Award for Human Rights, and was knighted in 2006 for services to human rights. In 2011, he was appointed to the Queen's Counsel. In 1974, Bindman established Bindman's, LLP with the vision of "protecting the rights and freedoms of ordinary people." The firm offers a broad range of services to

read the book that Peter mentioned, *The Pinochet Effect*, he is also very well-portrayed in his role as a solicitor.

In a minute he'll tell you about human rights and civil rights in the context of the UK struggle over many years, and the important roles he played prior to the arrest of Pinochet. Right next to him is attorney and Professor Joan Garcés,[9] who is from my hometown, Old Elysium, who lived in Chile, studied in France and worked in Chile for many years. He was the attorney who brought the criminal complaint that precipitated the Pinochet case, on behalf of the victims and a foundation in Spain that [represented] the Chilean refugees.

We've been hearing, through the first panel, references about the facts and adventures, as I call them, that these three gentlemen

---

private individuals, NGOs, companies, and other organizations. Bindman received a law degree from Oriel College in Oxford and qualified as a solicitor three years later. He served as a legal advisor to the Race Relations Board for seventeen years. Bindman was a legal advisor to Amnesty International and represented the satirical magazine Private Eye. In the late 1980s, Bindman visited South Africa as part of an International Commission of Jurists delegation sent to investigate apartheid and subsequently became editor of a book on the topic, South Africa and the Rule of Law. In September of 2012, Bindman told BBC Radio that he agreed with Desmond Tutu that British Prime Minister Tony Blair should be prosecuted on the basis that starting the Iraq War was a "crime of aggression" in breach of the United Nations Charter.

[9] Joan Garcés is a Spanish attorney who has made major contributions to international human rights law in the fight against impunity for heads of government who commit crimes against humanity. When Salvador Allende became President of Chile in 1970, the newly elected President invited Garcés to serve as his personal advisor. He served in that capacity until the September 11, 1973 military coup forced him to leave Chile. Garcés fled to France to serve as personal advisor of UNESCO's Director General. He returned to Spain after the restoration of the representative form of government and became a member of the Madrid Bar in 1981. Garcés served as the lead counsel in the case that he initiated against Augusto Pinochet in Spain in 1996 using the principle of universal jurisdiction, heading a multinational team of lawyers representing survivors and families of survivors of more than 3,000 cases of assassination, forced disappearance, and torture committed under Pinochet's regime. When General Pinochet traveled to London in October 1998, Garcés filed a request with Judge Baltasar Garzón of Spain in order to obtain an arrest warrant and begin extradition proceedings against him. The path for this action was paved earlier by Garcés' legal and procedural work against crimes committed by the Pinochet regime. Pinochet's detention and the British Court's ruling granting his extradition to Spain marked the first time that a national court applied the principle of universal jurisdiction against a former head of state, declaring its legal right and ability to judge crimes against humanity committed in another country, despite self-granted local amnesty laws. Garcés graduated from the Universidad Complutense of Madrid and earned a doctorate in political science from the Sorbonne. He is a recipient of the Alternative Nobel Prize and France's National Order of Merit Award for his contributions to international law. He has been a professor of political science in leading universities of several countries.

went through and the struggle of those days in 1996 through 1998 and beyond, and up to the arrest of Pinochet in London.

What I wanted to say as a matter of introduction is that, back in October of 1998, when the arrest was about to happen, I was living in Spain, just graduated from law school, [and] passed the bar. I was working in a very boring law firm and, frankly, had no idea of what a career even meant to me, but I was trying to conceive that there [would] be, somewhere, somehow, a career for me to build. . . . In a very intuitive way, I don't think I knew enough. I was celebrating as I followed in the press [that] the arrest warrant was issued.

In those days, I remember with emotion and a little bit of agony, because it was not clear whether the arrest [would happen] and [if he would be held] in London. I remember putting a cheap bottle of champagne in the refrigerator to see if we could open it in the context of the arrest or not. We ended up dancing in the stairway of my apartment in front of my neighbors, who thought that I was a little nutty. But we celebrated the arrest of Pinochet. I don't think I knew entirely—well, now I am sure I didn't know—what that meant. It was the sense that something right was done, something historical.

I couldn't understand, much less anticipate, that I [would] become a human rights attorney, that I [would] do human rights defense in many countries, many of which happen to be in the Latin America region, and [that] the so-called "Pinochet effect"[10] that I was going to witness from a privileged position for the next twenty years would mean so much.

But, really, I think the Pinochet arrest changed Chile. It had changed Chile forever. And I think that's true for the rest of the world. It was definitely true for my personal career.

We're here to discuss the future of universal jurisdiction and, hopefully, this doesn't sound super-pretentious, but I want to tell these gentlemen that I am the future of their work and [I admire] their courage in working in universal jurisdiction, because I make sense only in the aftermath of their effort and their ability to do it. They really brought justice to a dimension that we didn't know. We aimed for it after Nuremberg,[11] but nobody had the ability to bring

---

10 The arrest of Pinochet in London set a historic precedent in international law for holding accountable former heads of state accused of human rights crimes. *See generally* NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2006).

11 *See Nuremberg Trials*, HISTORY, http://www.history.com/topics/world-war-ii/

it down to a more realistic terrain, and I think they did. With that, I wanted to open the questions, and then I want to do something unorthodox, which is to [share] three words to describe our speakers, because I happen to know them on a more personal level. Not a traditional introduction.

I would like to say about Sir Geoffrey Bindman [that] when I think about him, I think about solidarity, the consistent solidarity of the English community, civil rights and human rights. Since the 1970s, when the big load of refugees got to London, they always [found] support.

When I think about Mr. Joan Garcés, I think about commitment. Commitment and rigor; his heart is probably three-quarters Chilean. He had rigor and super-professional legal work, never deviating from the law for a second. That, I think, is an example for all of us young, a little precocious and brash lawyers, to take on.

And from Baltasar, courage, audacity, and the vision from his position. I believe and respect the people that take where they are in life and their professions and do the best they can, and don't question the high cost [to] their personal and professional life. Baltasar has done that.

With that, I'm going to ask the first question to Sir Geoffrey Bindman. I'm going to start to try to do it chronologically. My understanding is that you had attempted to arrest General Augusto Pinochet, life-sitting senator at the time, a few times prior to the successful effort in 1998.

SIR GEOFFREY BINDMAN: Yes.

MS. BERNABEU: I would like if you [could] explain a little bit, including the legal basis, because I don't think we understood the UK to be a country with provisions that may be similar to universal jurisdiction. I would like to know the legal basis for that process, solicitor.

MR. BINDMAN: Well, it's quite correct that before the arrest of Pinochet in London, I had tried to have him arrested on two previous occasions when he was visiting London. The [legal] basis was this. First of all, unlike the United States, we in Britain have the right for individuals to bring a prosecution. In order to do that, the individual has to go to a magistrate's court, [which is] the lowest

---

nuremberg-trials (last visited Sept. 8, 2014) (providing a historic and interactive overview of the Nuremberg Trials following the fall of Nazi Germany).

criminal court, and ask for a warrant of arrest for the accused person. Now, there is a snag to this. The Attorney General of the country has the power to stop a private prosecution, but he can only do that after it's been started. So we thought—and Amnesty [International] was involved in this—that if we at least could get started and get an arrest warrant issued against Pinochet, that in itself would make a big impact and it would put the government under pressure to stop it if they wanted to.

Unfortunately, on both those occasions, the magistrate was very reluctant to make a quick decision. He wanted to think about it, and he adjourned his decision. Meanwhile, Pinochet was alerted and left. On one occasion, he had come to visit an Arms Fair in Birmingham, England; on the other occasion, I think it was for medical treatment. But he got away on both those occasions.

The great difference and the great advantage of what Judge Garzón and Joan Garcés were able to do—and they are the real architects of Pinochet's arrest—was to use an established procedure of extradition. This put the onus and the burden on the British government, the British authorities and the British police to carry out the arrest and to pursue the legal case. So the legal case against Pinochet was actually presented by the British government. They had to do it because they were required to under the European extradition treaty between the Spanish government, the British government, and all of the other European governments.

Now, when that had happened and the arrest had taken place, there was an immediate response from Pinochet and his lawyers. They went straight to the high court to try and quash the arrest. They tried to say that Pinochet was immune from prosecution and, therefore, from arrest. The whole case in Britain, right up to the time that Pinochet was allowed to return to Chile, rested on the question of immunity of a head of state. That's a crucial issue which, in the last discussion, interestingly, did not feature so much as it might have. That was the crucial decision.

MS. BERNABEU: Now I want to turn the question to Joan. Tell us a little bit about the work that was involved, [over] many years. Walk us through the process that brought you to that complaint. If I understand the history, the complaint filed against the Argentine junta happened barely days before.

So walk us through the process that brought you to that complaint filed a few days after against Pinochet and others.

JOAN GARCÉS: Good evening. As every lawyer knows, an old case

goes to court, moves through the courts, and, in this case . . . without particularly strong facts, [results in a victory] against the individuals for their responsibility. This case begins on the 11th of September 1973, and continues for years for the victims and relatives who were seeking justice in the Chilean courts. They were building the case. But as the Judge said, the doors of those courts of justice were closed for the victims. Outside Chile, we were—in the '70s, the '80s, and until 1990—in the Cold War. This meant that each big power in its respective zone of influence was committing crimes against humanity, crimes of aggression, and was not very interested in looking at what the other big power was doing in its respective zone of influence. In this particular case, the territorial jurisdiction was not applied by the Chilean courts, and [under] the principle of universal jurisdiction [there was no] court where it could have any possibility for success. But the victims were building the case in Chile. Then the Cold War ended in 1990 together with the dictatorship of Pinochet. Both things are linked. Pinochet's regime was a crutch of the Cold War. When this war ended, he was dropped by the big powers that were backing him. Then the moment came when the victims could have the possibility of going to a foreign court under the principles of universal jurisdiction. That was the case in 1996 in Spain. And why in Spain?

First, because the courts in Chile were closed at this time. It was not that Spain came to Chile, but that the Chileans came to Spain looking for a court. In 1996, Spain was going through a big clash between the judicial power and the executive power around crimes of the state, crimes committed by the government of Felipe González. It started with extrajudicial executions of some Basque nationalists. The judiciary began to investigate those crimes, and Spanish society was following this case. It ended with the home minister, Felipe González, being indicted, charged and condemned to die. It was quite unusual how a minister was tried because of crimes committed by the police. But of course that was Spain in 1996. Society and the magistrates were sensible to those crimes, crimes committed by the state. In this context, courts were closed in Chile, it was the end of the Cold War, and Spain, traditionally being sensible to crimes of the states, led the first claim, which was introduced in 1996. Spain declared universal jurisdiction and the victims began to come to Spain with their testimony about the fights that were gathering in Chile during the years of the dictatorship. And for two and a half years, we prepared the indictment. That was very difficult. The public prosecutor's office

in Spain was absolutely against this case. Not only [did they not] give us help, but they were attacking, appealing each [of the court's decisions that gave the] case the possibility to go ahead. Then when Pinochet was in London, [it was feasible] for us to ask for his arrest under the treaty of the European Convention [on] Extradition because the evidence was in the court.

MS. BERNABEU: That's a perfect way of reaching my next question to Judge Garzón. So the case was filed in 1996, but my understanding is that actually it went as a matter of the law [to] the Spanish national court and went to a different judge. You were not the original judge in the Pinochet case. So will you explain how the opportunity came for you to be in charge of that arrest warrant.

JUDGE BALTASAR GARZÓN: First of all, I'd like to thank the Charles Horman Foundation for inviting me to be here in New York. It's a pleasure to be here with you all. I think that in this story, you need to begin to acknowledge who the true architects of the process [were]. And without a doubt, for me the great architect of the Pinochet case was not Judge Garzón or any other judge initially, but it was Joan Garcés.

Joan Garcés was with Salvador Allende on that last day on September 11, 1973. He left the presidential palace with a request and I think that he was able to carry it out. For many years, forty years total, he has dedicated his life to the law. I know he doesn't like to hear this, but that's his problem.

I think that he, alongside others, took a very important initiative that converged during a historic moment in Spain. . . . At that time, Spain was able to apply the principle of universal jurisdiction for the first time and, perhaps, in a stronger way than in the Argentina case. The Argentina and the Chile cases were parallel [and] very similar. Argentina was a little bit ahead, [but] in a way they were walking in lockstep.

The initial proceedings to accept this process were first established in the Argentina case, and the arrest of Pinochet occured within the context of the Argentina case during what is known as "[Operation] Condor."[12] That explains the existence of two judges working at the same time.

---

[12] *See generally* JOHN DINGES, THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS (2004) (comprehensive look into the U.S.-backed Latin American military alliance known as Operation Condor, which would go on to carry out untold human rights crimes against left-wing opposition members and their sympathizers).

In my case I was investigating the different kinds of torture, repression, disappearances, [and] homicides that were being carried out during the Argentinean dictatorship after the complaint presented by the Progressive Union of Prosecutors in Spain. . . . They were also involved in presenting the case of Pinochet alongside Joan. . . . Within that dynamic, we arrived at October 1998.

I must warn you that by that point the tribunal of the Spanish National Court, which is the tribunal under which we operate, had not ruled positively regarding the jurisdiction of our court over this case. Once more, the prosecutor was in court actively opposing this measure [and was] decidedly against it, combative against it. We were about to throw punches at each other.

JUDGE GARZÓN: I must tell you that in those two proceedings beginning in October of 1998, I resolved more motions by that prosecutor than I have in thirty-two years of practice. That was the decision of the government at the time. It was opposed to the extradition [and] was doing everything possible so that [it] would not [advance].

To make a long story short, a week before October 16th, Joan Garcés came and saw me. He was not defending the Argentina case. And he informed me that Pinochet was, in fact, in London.

I told him, "Okay, very good. What do you want?" "Well, I want you to know that he's in London." "What can we do?" And I told him that I am the Judge from chamber number five not chamber number six, that they were out of a number of different chambers, that Judge number six has to make the decision. Then he told me, "Yes, that's true, but let's see how we can proceed with this." So I told him—he won't tell you this, but I'm going to tell you—"I'm going to take the affidavit or the deposition by Pinochet," and I'm sure when you tell him that, he will be for it.

Something like that occurred because my colleague took initiative to present this request to take a declaration from Pinochet in London. The agreement that Joan and I arrived at is that whatever action I took in this case would be known as an action taken by the Judge in chamber six so that [all] the pressure from the media [would be] on chamber six. There was perhaps a small story on myself, but it wasn't big. It never went anywhere.

My colleague was very burned down because the media was on him, asking, "Have you ruled on that request? Have you taken a declaration from Pinochet?" and all this. And he said, "Yes, I'm going to rule. Yes, I have ruled." I must tell you that that request

was never honored. It [was] never issued because the events after that didn't allow it.

Meanwhile, I asked the British authorities whether Pinochet was, in fact, in London. It was evident that he was there, but we had to go through the formal request process. The answer that the British police gave me was something along the lines of, "Why do you care about this?" I was a little surprised, but then I got a phone call from the British embassy in Spain.

It's worth noting a small story within a story. A year before, I had a big controversy with the counsel or the ministerial counsel to the embassy because I was complaining that Gibraltar was not cooperating with Spain in a case relating to money laundering. He said, "You're being unjust with me. You have not made a request. If you make a request, we're going to try and work with you." And he said, "If you have any doubts, we can talk." Then I said, "Okay, let's talk." And at last we formed a very important relationship. When he called me that afternoon, he told me, "They have answered you inadequately from London. That will not happen again because that would break up the important relationship that Great Britain has with your court. Well, so then you can make your request again."

I can't tell this whole story in two minutes, but he said, "Okay, fine, if I'm going to receive another request. I shall answer that request." Then they tell me, "Yes, Pinochet is in London." They ask me, "What do you want to do with him? What are you accusing him of?" That's where I have to go to Joan, because the main process was going on in the other courtroom. I had an open case, which was the [Operation] Condor, so I told Joan, "Here we can proceed with this case." In fact, that's what I did.

At that point, different information and different kinds of files were being exchanged. On October 16th of 1998, they said that Pinochet wanted to leave. I asked for the option to send an interrogatory with the questions for Pinochet in order to get his testimony. I asked Joan to prepare the questions, and that's how everything finished that day. Around 1 p.m. on a Friday, we said, "Okay, let's go home." And around 2 p.m., I received a message from the British police telling me Pinochet was leaving tomorrow, so we won't be able to take this testimony from him. "You have to make the decision because he's going to leave," they said. There was no one left in the court, [except] one person. I made the decision to hold back this office worker from leaving [the court] because she was about to leave. And when I gave her the request by

hand, she came back to my office and said, "Are you sure about this?" And I told her, "Just write and be quiet."

And that's how the arrest warrant was issued. I asked the Spanish police to be quiet because the judge may do so if he decides. The request was filed. The ministerial council informed me of how the situation was going, and then I went back to my native home in Andalusia. It was a popular holiday in my hometown at that time. All the way home I was getting different messages from London. I must acknowledge that I wasn't too sure that this arrest warrant would actually take effect. I went to watch some bullfighting with my favorite bullfighter. Julio Romero is his name. It was a disaster. . . .

While I was still at the bullfight, I received a call from the ministerial counsel. He said, "The police [are] going to the home of the judge with the arrest warrant." I asked, "What do you mean they're going with the arrest warrant?" They asked, "Didn't you issue it?" I responded, "Yes, I did." It was about 8 p.m. at that time. I began to finally understand that this was, indeed, working.

[At] around 10 p.m. I got a call from him again and he said, "Pinochet has been arrested."

That's how it happened. A short anecdote right before I finish. Sometime after, I was with Luis Moreno O'Campo and the Chilean counsel at Harvard University. When the moment came to speak about the Pinochet case, I was still working on the case. Luis Moreno O'Campo said, "Judge Garzón cannot speak on the subject. I'm going to explain all about it." We were in a big hall with the students, and he begins to explain how the arrest of Pinochet occurred. He said, "Judge Garzón, with his team [of] fifteen people, all together issued [an arrest warrant.]" I was looking at him, and under the table, he was tapping me on my knee.

Everybody started clapping. And I asked him, "Why did you do this? Why did you explain it like that?" [And he replied,] "If I tell everyone that you and one office worker did all of this on your own, they would never believe it."

The truth is, the day after, I called Joan Garcés. I told him, "Joan, Pinochet knows he's [been] arrested. We need to reaffirm and complete the arrest order, because since all of this did not have the complete history of [crimes for which Pinochet was responsible], we only put one case there and then we added 104 more cases."

So we finished up the case, thanks to Joan, and we finished up the order in twenty-four hours with eighteen translators, without

sleeping, eating sandwiches there in the court. The order was issued. And thanks to that order, Pinochet remained arrested. Because the first English judge made a mistake and put in the writing that it was homicide, instead of [a] disappearance. The Hague Court issued the order and continued on the second arrest warrant that we [worked on].

MS. BERNABEU: My second question is about obstacles and problems, and I know that you guys all went through a lot of them. I would like to ask, you this question, Sir Geoffrey: It's been said that there's the "before" and "after" Pinochet—that it's the first time a head of state was prosecuted. [But] it was not the first time a head of state had been prosecuted. It was the first time that a head of state [was] still sitting in power when he was prosecuted. He was a senator at the time, so that precipitated a whole layer of complications that the House of Lords and the UK needed to deal with, because of immunity. I think [that's] the first and foremost obstacle that we needed to get over. Would you tell us [your] insights of that?

MR. BINDMAN: [After Pinochet was] arrested, his lawyers went to the [high] court in London to get the arrest quashed on the basis that Pinochet was immune as a head of state. Of course, he was no longer head of state, but he had been head of state when the crimes took place.

So the high court in London was presided over by our Lord Chief Justice, a very liberal judge. Our government presented the case against Pinochet. Unfortunately, they did not handle it very well. I only got involved because I was told this was going to be heard in the high court. I went along to the high court on behalf of Amnesty [International]. The case was very badly argued by the lawyers representing the Spanish government [and] our British government lawyers. The court said he was immune, but they allowed it to be appealed to the House of Lords.

Now, at that point I wanted to get the case properly argued, and I applied to the House of Lords to get permission for Amnesty [International] and also for families. I contacted various victims, including Sheila Cassidy and various other people, and we built up a whole group of people seeking to intervene in the case. This is another example of the rather informal way these things happen. I telephoned the House of Lords and said I wanted to apply for us to intervene. This was on a Friday, I think. The case was coming in on the Monday. Somebody in the office said, "Well, I think we've got

one of the judges here. I'll ask him." So the judge happened to be somebody I knew very well, a very liberal judge. And they said, "We'll call you back." A half hour later I got a call saying that the judge, Lord Slynn, looked at this, and he said [it was] fine. "Just send us a written petition." So that's how Amnesty [International] got involved.

I then put together a team of advocates and we were very lucky that Ian Brownlie, who was the professor of International Law at Oxford University, the most famous international lawyer in Britain, was very willing to help, and he became our leading advocate. We put together a very strong case. . . . [U]nfortunately, we had to do that because there was no real argument on international law from the British government representatives.

So, in effect, although I was not involved in the arrest itself, I can claim to have contributed to getting the arguments put before the court so that the issue of immunity was properly dealt with.

MS. BERNABEU: Would you explain briefly what the arguments were? What was the argument presented to the court?

MR. BINDMAN: Well, the argument was that, although everybody accepts that a head of state has immunity from anything he does while he's in office, an ex-head of state does not have immunity. That was our argument.

We also argued that, even if there is immunity, it can't apply to torture. Our case was based on torture. And we eventually succeeded in the House of Lords, but then a whole new question came up about whether one of the judges, Lord Hoffmann, who had connections with Amnesty [International], was qualified to sit or not. But that's a long story.

MS. BERNABEU: And, Joan, keeping with this theme [of obstacles] . . . and as Baltasar's beautiful story shows, how many [hurdles] you needed to jump. Tell us about the political conditions in Spain and Chile, two scenarios perhaps different than the particular instance.

In Spain, what was happening and what kind of political environment [did you have] to struggle [with] to keep this case alive and eventually successfully litigate it? And what was the political scenario in Chile, and how did that affect, if at all, your work?

MR. GARCÉS: We are talking about crimes committed by the state, with state officers or with the means of [the] state, and that means

politics. And it's not easy if you are trying to prosecute someone [who] is backed by political powers.

In this case, in our analysis, the international political situation was vital. As I said before, it was impossible during the Cold War. Even after that, we needed to find evidence. That work was done in two and a half years from Spain, after more than fifteen years in Chile. But we also needed a court of justice. And where was this court of justice? Pinochet and other people were being investigated in Spain, but he was not there. And then it was necessary to get his arrest and extradition. As I said, how could we get the order of arrest, the warrant of arrest? The judge explained that. But the problem was [whether] it could be executed, and for that we needed a court of justice with enough power and independence to execute the order. Once again, things happened because they can happen.

[Pinochet was in Ecuador] in March 1998, a few months before his arrest. I was informed of his presence in Ecuador. Someone told me, "Well, he's outside Chile now." And Chile never expected that an order of arrest coming from a foreign tribunal would ever be executed against Pinochet. My answer was, he's in Ecuador now, I guess, but I would not move one finger to get him arrested in Ecuador because the judiciary in Ecuador at that time could never implement the order of arrest in an effective way.

Pinochet then came to London and we got this case. We never imagined he would be in London, but it was our responsibility to react immediately and in a way that avoided political and other interferences. I learned about Pinochet's presence in London through the media. The Chilean media were saying that he was in London for medical treatment. [I began] to prepare the file for the court to order his arrest. I received a phone call from someone [who] worked with Amnesty International and was very interested in getting Pinochet arrested, but we couldn't get that without a judge ordering the arrest. They said, "We think that we can only get this order in Spain. Can you help us?" My answer was, "Thank you for the information, but I am very busy."

Who was he? I didn't know. And even if I knew, I would not say what I was doing over the phone. So the surprise effect was absolutely necessary. And that goes to your question. Political interference could take place at any moment and that was outside of our control, so we [had to] manage [and] handle those things in another way.

When the arrest took place, and the judge explained how, [it]

was very important what the United States government [would] do because of the special relationship between the United Kingdom and the United States. The case was being prepared in the United States since 1996. The Pinochet case is a second stage of the Letelier case. Orlando Letelier was the former Ambassador of Chile in the United States during the government of Salvador Allende, and he was murdered in a terrorist attack in Washington, D.C. in September 1976. Thanks to the work of two very good lawyers, Sam Buffone and Michael Tiger, with the backing of the Institute of Policy Studies in Washington, where Letelier was the director [at the time], ensured that an assiduous investigation took place. We had [the] benefit [of] this investigation in Spain.

Thanks [again] to the cooperation of those lawyers [who] reached [out] to get the U.S. Department of Justice to cooperate with the prosecutor in Spain. I was here in Washington [a] year and a half before the arrest of Pinochet with one of the other chaps investigating [the] magistrate that was [on] this case taking testimony from some witnesses. That meant that the cooperation between the Spanish justice and the U.S. justice was already established when Pinochet was arrested in October '98.

MS. BERNABEU: Mr. Garcés, you anticipated my next question. I have other questions about the victims and the large impact of these cases, but we may not have time. But I want to end with a note on the U.S. anticipat[ing] that. There's been an evolution in thinking about [the] obstacles [and] the evidence available. And there's no question, we heard Peter Weiss and Reed Brody talk today about the contradictions of cases not going forward. Although I'm hopeful in the ATS and ATCA[13] cases, the civil suits, there's also been an evolution in the U.S., through the declassified documents. We have Peter Kornbluh here, Kate Doyle, experts at analyzing the documents and what they contributed.

So for you, my dear, [is it] possible that you think there is [a] more comprehensive ability for practitioners—that is prosecutors, lawyers—[or] for victims to successfully [bring] these cases and if the U.S. [particularly]contributed?

JUDGE GARZÓN: We can't talk about the victims, but I can't help talking about the victims. The Pinochet case would not have been

[13] Alien Tort Statute, 28 U.S.C. § 1350 (2012) (imposing civil liability in federal district court for tort claims brought by foreigners claiming "violation of the law of nations or a treaty of the United States"). The law is also referred to as the Alien Tort Claims Act, or ATCA.

possible without the victims, without the support of the victims, without the human rights organizations and lawyers, Reed Brody, among them. He was working with others to bring this case forward.

The institutions went along with this. They did not take the initiative themselves. Maybe a magistrate or some prosecutor here and there. Fortunately they were where they needed to be in order for this to take effect, but it wasn't a state initiative. Once the case had been opened, the collaboration of the various countries was not uniform.

It's true that the message [President] Bill Clinton gave was very clear: that he was not opposed to the arrest. . . . The important thing about this is [that] the U.S. favored this investigation. For example, with respect to the monies that Pinochet was holding outside of the country, the Riggs case,[14] was started here in the U.S. That bank was sanctioned, I believe, a $17 million penalty. Finally, that bank closed down.

Thanks to the victims, the initiative of Joan Garcés, and the Salvador Allende Foundation, among others, my court ordered the money laundering charges against all of these bank executives, as well as the Bank of Chile, Pinochet, and all of his family, because they had $27 million, if I remember correctly.

Finally, we obtained about $8 million, and that's the only money that was related to Pinochet that went directly to the victims. I ordered that a distribution system was set up through the foundation.

The importance of the Pinochet case, and other cases such as the one[s] in Argentina and Guatemala that have been subject to universal jurisdiction, is that something that was once almost impossible—to obtain cooperation on the basis of documents that were once classified—was being opened up. . . . [This] had [also] happened in Spain with different state crimes, to the point that now it's almost one of the primary sources of information. So in that area, the cooperation aspect was very important.

There was a time where ten, twelve, up to fifteen countries

---

14 In July 2004, a report of the U.S. Senate's Permanent Subcommittee on Investigations stated that from 1994 to 2002 General Pinochet maintained at least six personal and corporate accounts at the Riggs National Bank in Washington, D.C., with deposits ranging from $4 million to $8 million. *See* Larry Rohter, *Pinochet Continues to Haunt Chile's Civilian Government*, N.Y. TIMES, July 18, 2004, at N12. In 2005, Riggs ultimately paid $8 million to resolve the case filed in Spain in 1988 related to findings that General Pinochet ordered assassinations in the mid-1970s. Saul Hansell, *Riggs National Will Settle Spanish Suit Linked to Pinochet*, N.Y. TIMES, Feb. 26, 2005, at C4.

were cooperating side by side. The House of Lords consolidated the cases into one case of torture. In March of 1999, they gave us until April 11th of 1999 to complete the case, because on April 11th, the Jack Straw decision would be issued with respect to whether the case would go on or not. From March 24 to April 11, we added thirty-five more cases of torture to the proceeding so that the decision would be even stronger. We consolidated work from many countries, [such as] Switzerland, Chile, and Guatemala, [and] we got all of the victims to come forward and to cooperate in moving this matter forward.

And it's important to note one thing: Pinochet returned to Chile, but the extradition case was won. Judge Ronald Bartle decided in favor of the extradition to Spain for the 1,148 cases of disappeared people. Of course, the case did not move forward, but remained there for the jurisprudence of Great Britain.

MS. BERNABEU: Thank you so much to my three speakers. Thank you, everybody. Thank you very much.