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Lassiter Notwithstanding: **The Right to Counsel in Foreclosure Actions**

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As I write, 250,000 new households are going into foreclosure every three months.[1] In the first three months last year, 22 percent of homeowners were "underwater" (i.e., owed more than their homes were worth), while a third of home sales in the previous year were either short sales or purchase of bank-repossessed properties.[2] Few signs of improvement are on the horizon: 1.5 million foreclosures occurred in the first half of 2009 alone, and some estimate that 8.1 million mortgages will be in foreclosure over the next four years.[3] The result is a tidal wave of cases swamping the state and federal courts—cases whose sheer volume and procedural irregularities strain the promise of due process.

The shortage of legal assistance during this crush of "foreclosure actions" compounds the due process concerns: no state provides a statutory right to counsel in any foreclosure proceedings, and consequently more than half of foreclosed homeowners are handling their cases without counsel.[4] Yet having an attorney is critical: while even a delinquent borrower may have a variety of options (e.g., mediation, modification, relief under federal law, various state-law claims and defenses) only an attorney can evaluate the options properly and advise the homeowner as to the most efficacious strategy.

Establishing a Fourteenth Amendment right to counsel in foreclosure actions requires an advocate to contend with the U.S. Supreme Court's decision in *Lassiter v. Department of Social Services*.[5] Where there is no threat to "physical liberty," by which the Court meant incarceration, *Lassiter* created a presumption against the right to counsel in civil cases.[6] Overcoming this presumption requires application of the three-factor

[1]Mortgage Bankers Association data from NeighborWorks America, http://bit.ly/8124yk.

[2]Reuters, More than One in Five Homeowners Underwater, May 6, 2009, http://bit.ly/7v6pXb.

[3]Nick Timiraos, *Foreclosure Filings Hit 1.5 Million Homes in First Half of '09,* Wall Street Journal Blogs July 16, 2009, http://bit.ly/4YFy9d; John Rao & Geoff Walsh, National Consumer Law Center, Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections 8 (2009), http://bit.ly/83lshF.

[4]In judicial-foreclosure states, mortgage lenders or servicers must file a court action in order to foreclose on a mortgage. In nonjudicial-foreclosure states, lenders or servicers may foreclose through the mortgage or lending contract by exercising a power-of-sale clause. Judicial proceedings in nonjudicial-foreclosure states are initiated only when a debtor seeks a permanent injunction against foreclosure or files for bankruptcy, the latter triggering an automatic stay of the foreclosure. I use the term "foreclosure actions" to cover both traditional foreclosure filings by the lender or servicer and foreclosure-related judicial proceedings initiated by the debtor. Regarding the lack of counsel in foreclosure actions, see Melanca Clark & Maggie Barron, Brennan Center for Justice, Foreclosures: A Crisis in Legal Representation 12, 14 (2009), http://bit.ly/4sQxML.

[5]*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

[6]*Id.* at 26-27.

test from *Mathews v. Eldridge*: the private interests at stake, the state's interest, and the risk that the procedures used will lead to erroneous decisions.[7]

Fortunately, even the *Lassiter* Court acknowledged that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances."[8] Here I explain how the current national epidemic of foreclosure actions passes the *Lassiter* test, even absent any threat of incarceration.[9] I do not take up the threshold requirement of proving "state action" so as to trigger due process guarantees; for that discussion, see my *Going Public: The State-Action Requirement of Due Process in Foreclosure Litigation* in this issue. Nor do I here tap state constitutional due process clauses as being broader and therefore more fertile ground for pursuing a due process right to counsel in foreclosure actions.[10]

Presumption Against Counsel Except Where Physical Liberty at Stake

The *Lassiter* dissent and subsequent commentators have questioned whether the Court created out of whole cloth the presumption against the right to counsel in civil cases unless physical liberty is at stake.[11] In practice, some courts have wrongly treated the presumption as a complete bar to the right in nonincarceration cases, skipping the *Mathews* analysis entirely.[12] Conversely many post-*Lassiter* courts finding a state constitutional right to counsel in termination of parental rights proceedings have rejected the presumption either explicitly or *sub silentio*.[13] The presumption's primary flaw is its downplaying of all nonincarceration interests; as one commentator put it, "*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child."[14]

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[7]*Id*. at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

[8]*Lassiter*, 452 U.S. at 24 (citation omitted).

[9]Some commentators suggest that the deprivation of housing can implicate a liberty interest because many of those deprived of housing become homeless and consequently subject to arrest and incarceration for vagrancy or (if mentally ill) institutionalization. See, e.g., Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harvard Civil Rights–Civil Liberties Law Review 557, 567 (1988).

[10]See, e.g., *Matter of Kimber Petroleum*, 539 A.2d 1181, 1187 (N.J. 1988) ("[T]he doctrine of fundamental fairness, which has roots in the New Jersey Constitution and in New Jersey common law, has been applied to grant persons procedural protections that may exceed those offered by the due process clause of the federal constitution."); *Matter of K.L.J.,* 813 P.2d 276, 282 n.6 (Alaska 1991) (in private involuntary adoption case, court finds right to counsel under Alaska Constitution's due process clause; court "reject[s] the case-by-case approach set out by the Supreme Court in *Lassiter*. Rather, our view comports more with the dissent …").

[11]*Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting); Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 Temple Political & Civil Rights Law Review 733, 741–42 (2006) ("The Court created this presumption without justifying it …. In the physical liberty cases … the Court had no occasion to decide whether or not there should be a presumption against the appointment of counsel in state-initiated [termination-of-parental-rights] proceedings.").

[12]See, e.g., *Wilson v. Department of Rehabilitation and Corrections,* 1991 WL 54191, at *1 (Ohio Ct. App. 1991) (unpublished) (" an indigent litigant is entitled to appointed counsel only where the litigant may lose his physical liberty if he loses the litigation"); *Bejaran v. California Department of Corrections and Rehabilitation*, No. Civ. S-08-00817, 2009 WL 2365550, at *7 (E.D. Cal. 2009) (citing *Lassiter* for proposition that "[t]here is no right to counsel in a civil case, although 28 U.S.C. § 1915(d) authorizes courts to appoint counsel to represent indigent prisoners"). See also Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, 40 Clearinghouse Review 186, 187 (July–Aug. 2006) (describing courts that misconstrue the presumption).

[13]See, e.g., *South Carolina Department of Social Services v. Vanderhorst*, 340 S.E.2d 149, 153 (S.C. 1986) ("under our interpretation of *Lassiter*, cases in which appointment of counsel is *not* required should be the exception"); *Matter of K.L.J.*, 813 P.2d 276, 285 (Alaska 1991) (Alaska courts "do not weigh the factors in a due process analysis against a 'presumption' that appointed counsel is required only if a person's physical liberty is at stake"); *In Interest of E.H.*, 609 So. 2d 1289, 1290 (Fla. 1992) (reaffirming holding of *In re D.B.*, 385 So. 2d 83 (Fla. 1980) that "a constitutional right to appointed counsel arises where the proceedings can result in permanent loss of parental custody"); *In re A.S.A.*, 852 P.2d 127, 129 (Mont. 1993) (quoting approvingly from *Lassiter* dissent).

[14]Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After* Lassiter v. North Carolina, 15 Family Law Quarterly 205, 219, 221 (1981). See also *In re Luscier*, 524 P.2d 906, 909 (Wash. 1974) ("Surely, the reasoning … which requires the appointment of counsel if there is the possibility of even a 1-day jail sentence, must also extend to a proceeding where a parent may be deprived of a child forever.").

Foreclosures present a strong challenge to the presumption. Beyond causing loss of a family home, foreclosure has potentially enormous collateral consequences, such as loss of home equity, homelessness, disruption to education, damaged credit, removal from the community (if the homeowner is forced to move far away), emotional distress, and health problems, both mental and physical. A homeowner who loses a foreclosure case may also face a subsequent deficiency judgment that further damages the homeowner's ability to secure new housing and prevents the homeowner from gaining economic security. When combined with the other *Lassiter* factors, these potential consequences should overcome the dubious presumption against a right to counsel where no threat of incarceration is present.

Strength of Individual Interest

Described as "one of the essentials of human existence," housing has

> a special character, not only because it consumes so large a portion of the household budget, especially for lower-income families, but because it is … the central setting for so much of one's personal and family life as well as the locus of mobility opportunities, access to community resources, and societal status.[15]

The Supreme Court has frequently been assertive in preventing racial discrimination in housing, and "one may doubt whether discrimination affecting some less 'fundamental' commodity would have provoked these bold responses."[16] Because of the ties—sentimental and to neighborhood and community—it creates for owners, housing is nonfungible and cannot be easily replaced. The American Bar Association, in its 2006 resolution supporting a right to counsel for low-income persons in civil cases affecting basic human needs, identified "shelter" as one of the core areas where counsel ought to be required, and at the state level there has been some judicial and legislative recognition of housing as a fundamental right.[17]

Apart from the human needs that shelter fulfills is the matter of a homeowner's property interest. The Supreme Court recognizes tenants' "significant interest in property: indeed, of the right to continued residence in their homes," and a homeowner's interest—of potentially unlimited duration—is arguably stronger.[18] This conclusion is buttressed by public opinion as well: the Court's 2005 affirmation of the use of eminent domain to take private residences for quasi-public use created an enormous public backlash and led Justice Clarence Thomas in dissent to quote Justice William Blackstone for the proposition that "the law of the land … postpone[s] even public necessity to the sacred and inviolable rights of private property."[19] Foreclosed homeowners also lose their equity entirely and may face deficiency judgments—separate and

[15]*Williams v. White Plains Housing Authority*, 309 N.Y.S.2d 454, 460 (N.Y. Sup. Ct. 1970); Chester Hartman, *The Case for a Right to Housing*, 9 Housing Policy Debate 223, 230 (1998).

[16]Frank I. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 Harvard Civil Rights–Civil Liberties Law Review 207, 210 (1970) (referring to *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968)).

[17]American Bar Association Task Force on Access to Civil Justice, Report to the House of Delegates 10 (2006), http://bit.ly/5xlilS; John Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 Washington University Journal of Law and Policy 555, 564 (2000) (concluding that *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) ("Mount Laurel II"), means that "the New Jersey Constitution embodies an implicit constitutional right to shelter"); *Rosales v. Huntington-by-the-Sea Mobilehome Park*, 240 Cal. Rptr. 22, 25 (Cal. Ct. App. 1987) (unpublished) (while California Supreme Court may have held that housing is not fundamental, "Legislature may have reached a contrary determination" because statute states that "[t]he availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order").

[18]*Greene v. Lindsey*, 456 U.S. 444, 451 (1982).

[19]*Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting). Justice Thomas also commented that "no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes" (*id.* at 520).

strong property interests that deserve due process protection.[20]

The Supreme Court's holdings in *Lindsey v. Normet* and *Arlington Heights v. Metropolitan Housing Development Corporation* are sometimes perceived to bar the possibility that housing is a fundamental constitutional right.[21] However, this reading is inaccurate.[22] In *Lindsey* tenants subjected to an eviction action after withholding rent for repairs argued that the need for decent shelter and the "right to retain peaceful possession of one's home" should be recognized as fundamental interests triggering due process and strict scrutiny of the eviction statute.[23] The Constitution does not contain "any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement," the Court responded.[24] In *Arlington Heights* the Court upheld a zoning ordinance that had a disparate impact on potential African American renters; the Court cited *Lindsey* to find no reason "to subject the Village's action to more stringent review simply because it involves respondents' interest in securing housing."[25]

Lindsey and *Arlington Heights*, however, concerned only tenancy issues: the rights to habitable housing and to continue tenancy while refusing to pay rent due to a breach of warranty of habitability (*Lindsey*), and the right to secure leased housing (*Arlington Heights*). Such issues are not at play in a foreclosure case. Moreover, unlike homeowners, tenants outside the context of publicly subsidized housing have no right to continued occupancy beyond the term of the lease.[26]

While any single right at stake in foreclosure may not quite rise to the level of "fundamental," the combination of rights at issue justifies the appointment of counsel and presents a powerful response to the first prong of the *Mathews* test.

Risk of Erroneous Deprivation and Procedural Safeguards

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest … and the probable value, if any, of additional or substitute procedural safeguards."[27] While the majority in *Lassiter* conceded that litigation tasks "may combine to overwhelm an uncounseled parent" so as to increase the chance of error, Justice Harry Blackmun's dissent pointed out that this was "a profound understatement" since it did not acknowledge the unsophistication of most indigent parents and the "gross disparity in power" between the parent and an opponent like the state.[28] Even an indigent litigant who has a meritorious defense "may be unable to establish this fact,"

[20]Rao & Walsh, *supra* note 3, at 38.

[21]*Lindsey v. Normet*, 405 U.S. 56 (1972); *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). See, e.g., *Collins v. AAA Homebuilders Incorporated*, 333 S.E.2d 792, 796 (W. Va. 1985) ("[t]he United States Supreme Court has held that housing is not a fundamental or constitutional right and, therefore, the Fourteenth Amendment's strict scrutiny test is not applicable," citing *Lindsey* and *Arlington Heights*); *Taxpayers Association of Weymouth Township Incorporated v. Weymouth Township*, 364 A.2d 1016, 1034 (N.J. 1976) ("[t]he Supreme Court has expressly rejected the contention that housing is a 'fundamental' right protected by the fourteenth amendment").

[22]See Florence Wagman Roisman, *Establishing a Right to Housing: A General Guide*, 25 Clearinghouse Review 203, 208 (July 1991) (noting that "[t]he case does not even deal with the obligations of governments; it simply is a case between a private landlord and a private tenant").

[23]*Lindsey*, 405 U.S. at 73.

[24]*Id*. at 74.

[25]*Arlington Heights*, 429 U.S. at 259 n.5.

[26]See, e.g., Julie Becker et al., *D.C. Circuit Says that Enhanced-Voucher Tenants Have "Right to Remain" and Landlord's "Benign Motive" Does Not Justify Source-of-Income Discrimination,* 43 Clearinghouse Review 74 (May–June 2009).

[27]*Matthews*, 424 U.S. at 335. Although *Lassiter* mentions only the "risk of erroneous deprivations" and not "the probable value, if any, of additional or substitute procedural safeguards," the *Lassiter* Court pincites the specific page in *Mathews* that mentions this additional component.

[28]*Lassiter*, 452 U.S. at 30; *id*. at 46, 44 (Blackmun, J., dissenting).

given that such a litigant does not have sufficient knowledge to identify legal errors by the state or know how to challenge such errors.[29] Echoing Justice Blackmun's concerns, commentators have criticized *Lassiter*'s blindness to the serious and substantial risk of erroneous deprivation in such proceedings.[30]

Even the *Lassiter* Court, however, would be hard-pressed to deny the enormous risk of error in foreclosure proceedings. The mortgage foreclosure process is inherently daunting for an unrepresented litigant facing a heavily resourced opponent; in fact, even as far back as the eighteenth century, "equity's traditional abhorrence of forfeitures caused it conclusively to presume unequal bargaining power in all mortgages."[31] The process has become significantly more complex due to the evolution of the mortgage market over the past several decades, not only creating higher rates of error but also making many cases less open-and-shut than they first appear. As Eileen Yacknin of Neighborhood Legal Services in Pittsburgh puts it, even where the borrower is admittedly delinquent, "huge, sophisticated, complicated legal issues" could be at stake.[32]

The most common defense in a judicial foreclosure or a hearing relating to a bankruptcy-imposed automatic stay of foreclosure is that the plaintiff is not the proper party in interest.[33] While a mortgage transaction begins with the consumer and a bank (often through a mortgage broker), this relationship is rarely still intact when the foreclosure is filed because of the selling, slicing, and pooling of mortgages. It is believed that 66 percent of all mortgages since 2001 have been securitized, a process so complicated that an indigent homeowner will almost certainly be unable to untangle it.[34] Even attorneys struggle to keep up: as one specialist commented, "It's hard to tell [attorneys] to leap into this area of law because it's difficult and complex," due to the need to know "[f]ederal laws. State laws. Local procedures. Labyrinthine paper trails that purportedly lead to promissory notes. The ins and outs of lending institutions and their morass of forms."[35]

The problem of the foreclosing plaintiff being the wrong party to sue is common for securitized loans because the actual mortgage note is frequently not given to the trust.[36] Moreover, because the loans are often sold repeatedly and "passed through multiple hands … not surprisingly, the people handling these transactions got sloppy. In many cases they failed to comply with the basic legal requirements for assigning negotiable instruments."[37] One study of over 1,700 foreclosures found that in 40 percent of them the foreclosing entities did not show proof of ownership.[38]

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[29]*Id.* at 46 (Blackmun, J., dissenting).

[30]Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter, 36 Loyola University of Chicago Law Journal 363, 366 (2005); Kevin Shaughnessy, Lassiter v. Department of Social Services: *A New Interest Balancing Test for Indigent Civil Litigants*, 32 Catholic University Law Review 261, 283 (1982); Rosalie Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to* Lassiter, 14 Touro Law Review 247, 257–59 (1997); Nadine Vasser, *The Indigent Parent's Right to Counsel in Termination of Parental Rights Proceedings*, 16 Journal of Contemporary Legal Issues 329, 331 (2005).

[31]David A. Super, *Defending Mortgage Foreclosures: Seeking a Role for Equity*, 43 Clearinghouse Review 104, 105 (July–Aug. 2009).

[32]Interview with Eileen Yacknin, Staff Attorney, Neighborhood Legal Services Association, Pittsburgh, Pa. (July 24, 2009).

[33]This defense is not available when seeking a preliminary injunction in a nonjudicial-foreclosure state since the lender in that scenario is not the one initiating the challenge.

[34]Steven Seidenberg, *Salvage Plan*, ABA Journal, May 1, 2009, http://bit.ly/5B8Luo.

[35]Brian Reed, *Lawyers Make Pro Bono Leap Into Foreclosures*, NPR, May 17, 2009, http://bit.ly/584rHA.

[36]Debra Cassens Weiss, *"Law School 101" Could Help Struggling Owners*, ABA Journal, Nov 15, 2007, http://bit.ly/8WHskQ; Amir Efrati, *Judges Tackle "Foreclosure Mills,"* Wall Street Journal, Nov. 30, 2007, http://bit.ly/7aRGf6.

[37]Maeve Elise Brown & Lisa Sitkin, *Defending Postforeclosure Evictions*, 43 Clearinghouse Review 96, 101 (July–Aug. 2009).

[38]Gretchen Morgenson, *Foreclosures Hit a Snag for Lenders*, New York Times (Nov 15, 2007), http://bit.ly/8LBI1R (describing Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy*, 87 Texas Law Review 17 (2008)).

One specific complication related to standing comes from the Mortgage Electronic Registration System (MERS), which has registered about 60 percent of all mortgages in the United States.[39] MERS does not originate loans or engage in loan servicing, but cases have arisen about MERS' role in the mortgage process.[40] In *In re Wilhelm* several banks sought to lift an automatic stay of foreclosure due to a bankruptcy filing.[41] The banks argued that MERS had assigned them the relevant deeds of trust and the promissory notes, but the court found that the banks lacked standing because the contract did not "authorize MERS to transfer the promissory notes at issue."[42] Similarly in *In re Vargas* the bankruptcy court found that MERS had failed to authenticate or produce the promissory note it supposedly held; in fact, MERS "makes no pretense that it holds the note …. Its business is only to hold deeds of trust as an agent for the holder of the note."[43]

Even delinquent borrowers may have an array of other viable affirmative defenses or counterclaims to foreclosure actions due to lenders' and servicers' widespread malfeasance via such actions as production of fraudulent documents, backdated assignments, incorrect scoring, lending without regard to ability to pay, loan padding, servicing abuses, or steering consumers unnecessarily into more expensive products. The newswire is rife with stories of private and government suits against lenders and servicers for a range of misbehavior. For instance, hundreds of thousands of borrowers have been steered into subprime loans despite being qualified for prime loans.[44] One study found "questionable fees" tacked onto almost half the mortgages in Chapter 13 bankruptcy proceedings—fees that might have caused some homeowners to fall behind and be subjected to foreclosure.[45] According to a news report, foreclosure attorneys are "giving false statements in court about who owns mortgages, or whether the homeowner is willing to negotiate, or whether they have completed all the legal steps to put a foreclosed house back on the market."[46] And one bankruptcy court, rejecting the lender's "bona fide error" defense, found that the lender had, "in a shocking display of corporate irresponsibility, repeatedly fabricated the amount of the Debtor's obligation to it out of thin air."[47]

Foreclosure-rescue scams add an entirely new layer of complexity and make involvement of an attorney even more important. In trying to save their homes, many homeowners have had titles transferred without their knowledge or have unwittingly sold their houses, demonstrating the homeowners' inability to understand the original transaction, not to

[39]Press Release, Mortgage Electronic Registration System, MERS Launches Homeowner Education Site (n.d.), http://bit.ly/4IVy0f.

[40]See Christopher Lewis Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System* (Social Science Research Network, Working Paper, 2009), http://bit.ly/4xsfpH.

[41]*In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009).

[42]*Id.* at 404.

[43]*In re Vargas*, 396 B.R. 511, 520 (Bankr. C.D. Cal. 2008).

[44]Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, Wall Street Journal (Dec. 3, 2007), http://bit.ly/54cc6C.

[45]Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosures,* New York Times (Nov 6, 2007), http://bit.ly/8SXTQH.

[46]Todd Ruger, *Lies a New Tool in Foreclosure,* HeraldTribune.com, May 10, 2009, http://bit.ly/7xHfDw.

[47]*In re Maxwell*, 281 B.R. 101, 117 (Bankr. D. Mass. 2002). See also Michael Rispoli, *N.J. Attorney General Targets Mortgage Modification Frauds,* NJ.com, July 15, 2009, http://bit.ly/BJ0On ("Including the two lawsuits announced today, the state has filed 11 civil mortgage fraud complaints since June 2008, naming 102 individual and corporate defendants."); Reuters, *U.S. Mortgage Fraud "Rampant" and Growing—FBI*, July 7, 2009, http://bit.ly/8BEzK0 (reporting 36 percent increase in mortgage fraud in 2008); KDKA, *Local Mortgage Brokers, Appraisers Indicted*, Pittsburgh CW, Feb 4, 2009, http://bit.ly/6BudH2 (involving misrepresentation of buyers' incomes and brokers' knowing placement of buyers into homes they could not afford); Emmet Pierce, *10 Indicted in Alleged Foreclosure Conspiracy*, San Diego Union-Tribune, Feb. 3, 2009, http://bit.ly/8KhAUX (indictments on more than 150 felony counts).

mention the subsequent court process.[48] Carolyn Carter of the National Consumer Law Center comments that these scams "take advantage of the fact that the homeowners are desperate and there's no other visible path for them to obtain help."[49] In fact, the scams are predicated on convincing the homeowner that the scammer "[has] the expertise to deal with the complex problems and anxiety created by foreclosure."[50] Some of the scams are perpetrated by attorneys, making the fraud more complex and difficult to decipher.[51] Even attorneys assisting homeowners can have difficulty untangling some fraudulent reconveyance transactional scams, and reconveyance scams in particular "can be unusually complex, or just obtuse, and this makes it more likely that the acquirer has committed a material breach [of contract]."[52]

In addition to intentional behavior by lenders and servicers and the question of standing, the massive crush of foreclosure filings by lenders/servicers has led to a variety of unintentional errors—e.g., negligent payment processing or failing to follow the technical requirements of the Truth in Lending Act—that could deprive homeowners of their valuable interest. In one bankruptcy case, a judge found a lender had tacked prepayment penalties onto loans that had not been prepaid and asked "whether the lawyers … are examining any of the documents they are filing," commenting that the lender appeared to believe that "filing any old pleading without undertaking any investigation into its accuracy is perfectly acceptable practice."[53] In another case, an attorney reviewed 180 closed foreclosure cases in Sarasota County, Florida, and found errors in 75 percent of them.[54] One bankruptcy judge was driven to complain that

> [u]nfortunately the parties' confusion and lack of knowledge, or perhaps sloppiness, as to their roles is not unique in the residential mortgage industry …. Nor are "mistakes" and misrepresentations limited to the identification of roles played by various entities in this industry …. The Court has had to expend time and resources, as have debtors already burdened in their attempts to pay their mortgages, because of the carelessness of those in the residential mortgage industry and the bombast this Court and others have encountered when calling them on their shortcomings.[55]

Homeowners' due process rights are typically unprotected by "procedural safeguards" in state foreclosure statutes. Indeed, homeowners actually have fewer due process protections than renters, as landlord-tenant laws in most states have been modified over the years to provide better balance, while the foreclosure laws have remained "frozen in the past."[56] For instance, bankruptcy judges are prohibited from altering mortgage terms for residential property.[57] Thirty states have a nonjudicial-foreclosure process that

[48]Prentiss Cox, *Foreclosure Equity Stripping: Legal Theories and Strategies to Attack a Growing Problem*, 39 Clearinghouse Review 607, 609 (March–April 2006).

[49]Interview with Carolyn Carter, Deputy Director for Advocacy, National Consumer Law Center (July 21, 2009).

[50]Cox, *supra* note 48 at 610.

[51]*Bar Names Foreclosure Lawyers Under Scrutiny*, California Bar Journal, October 2009, http://bit.ly/65AQE8 (describing how one-quarter of investigations by Office of Chief Trial Counsel relate to foreclosure complaints and mentioning 58 percent increase in active investigations over 2008).

[52]Cox, *supra* note 48 at 621, 626.

[53]*In re Haque,* 395 B.R. 799, 802 (Bankr. S.D. Fla. 2008).

[54]Ruger, *supra* note 46.

[55]*In re Nosek,* 386 B.R. 374, 380 (Bankr. D. Mass. 2008), aff'd in part, vacated in part on other grounds, 2009 WL 1473429 (D. Mass. 2009).

[56]Rao & Walsh, *supra* note 3, at 8.

[57]*Id*. at 17.

entirely removes court oversight.[58] Fewer than half the states require personal service of the notice of foreclosure.[59] Only a handful of states require the lender or servicer to try to conduct a preforeclosure workout with the homeowner or prevent the lender/servicer from immediately tacking on fees and costs upon missed payments. And more than half the states allow the lender/servicer to continue with a scheduled foreclosure sale even if the homeowner comes up with all the missing money prior to the sale date.[60]

The Obama Administration's Home Affordable Modification Program (HAMP), while creating a potential nonlitigation avenue for relief, ironically creates yet another risk of erroneous deprivation. At least sixteen lenders holding 80 percent of mortgages participate in the mortgage modification program.[61] Such lenders are required to service all eligible loans and temporarily suspend foreclosure.[62] Some servicers may be obligated to contact the borrower proactively to offer modification prior to bringing a foreclosure action.[63] But some practitioners say that servicers are ignoring these requirements (or do not know that their bank is participating), and the testimony of Diane Thompson of the National Consumer Law Center identified serious HAMP servicer-compliance issues.[64] Such facts could present a complete defense to a foreclosure action were an attorney available to help identify and assert them.

That some judges have felt compelled to take matters into their own hands underscores the significant risk of error. For instance, one Brooklyn judge threw out 46 of the 102 foreclosure motions before him even in some cases when the homeowners had not responded to the motions.[65] Notwithstanding such efforts, "[t]he courts usually rely on defendants to point out problems in the cases against them. But in foreclosure court, many homeowners make no attempt to defend themselves. Judges cannot step into that role."[66]

The media have covered the incapacity of litigants to self-represent effectively in foreclosure.[67] Indeed, any more complex proceedings than foreclosures in which indigent litigants are expected to defend themselves are difficult to imagine. The one-sided nature of foreclosure exacerbates the problem: as one federal judge put it in response to a bank's strained efforts to obtain diversity jurisdiction, "[p]laintiff's 'Judge, you just don't understand how things work,' argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process."[68] Overall, these factors demonstrate the extraordinary need for a trained attorney to avoid the very real risk of erroneous deprivation.

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[58]*Id*. at 8.

[59]*Id*.

[60]*Id*.

[61]National Association of Realtors, http://bit.ly/7jebJ5.

[62]U.S. Department of the Treasury, Making Home Affordable: Summary of Guidelines (2009), http://bit.ly/5HTiH7; U.S. Department of the Treasury, Home Affordable Modification Program Guidelines, http://bit.ly/4u9wdp.

[63]Freddie Mac, Borrower Solicitation Requirements, http://bit.ly/8hnG8v.

[64]*Preserving Homeownership: Progress Needed to Prevent Foreclosures: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 111th Cong. 20–30 (2009) (statement of Diane Thompson of National Consumer Law Center and on behalf of National Association of Consumer Advocates), http://bit.ly/6Wto3.

[65]Michael Powell, *A "Little Judge" Who Rejects Foreclosures, Brooklyn Style*, New York Times, Aug. 30, 2009, http://bit.ly/6JqO0T.

[66]Ruger, *supra* note 46.

[67]Jonathan Glater, *In a Downturn, More Act as Their Own Lawyers*, New York Times, April 9, 2009, http://bit.ly/4qwcNy.

[68]*In re Foreclosure Cases*, 2007 WL 3232430, at *3 n.3 (N.D. Ohio 2007) (unpublished).

State's Interest

In termination-of-parental-rights cases, while the parent has an undeniably strong interest in parenting, the state has an "urgent" interest that is decidedly adverse to the parent, namely, a "parens patriae interest in preserving and promoting the welfare of the child."[69] A number of courts have held that these competing interests are "evenly balanced."[70] By contrast, in a foreclosure action the state's interest is not contrary to the homeowner's. In fact, because of foreclosure's significant negative impact, the state (i.e., the municipality) has a strong interest in *preventing* foreclosure.

One study in Chicago showed that a single foreclosure could cost the local government $20,000 due to "lost tax revenue, unpaid utilities, extra costs for police, maintenance and other city services required to deal with increased crime and vagrancy associated with vacant housing stock ...."[71] California lost an estimated $4 billion in tax revenue in 2008, while New York lost $102 million between 2007 and 2009.[72] Another study determined that a 1 percent increase in foreclosures correlates to a 2.33 percent increase in crime.[73] The flood of cases in judicial-foreclosure states also heavily taxes the court system, whereas providing counsel to homeowners might encourage lenders and servicers to arrange workouts and avoid litigation that increases judicial expense.

Foreclosure has also been linked to homelessness among lower-income borrowers; this can have a profound impact on city coffers. Foreclosed low-income homeowners are unlikely to be able to purchase a new home after the foreclosure, due to damaged credit and lack of liquid assets, and thus can wind up competing for very limited low-income housing stock. Such stock has diminished over time, and the former homeowners may be subject to rental credit checks that they cannot pass due to the foreclosure; both factors increase the risk of homelessness.[74] In one study, 30 percent of service providers estimated that at least 20 percent of their clients became homeless as a result of foreclosure.[75] Studies in New York show that every homeless family costs the city $36,000 per year and that homeless children suffer from health problems that likely cost cities additional tax money in emergency services.[76] In short, as has been noted for evictions,

> the government has an interest in ensuring that low-income tenants faced with eviction do not become homeless. That interest is fiscal where the government has an obligation to care for the homeless, and it derives from public policies against disruption of home life, public education, placement of children in foster care, increased rates of unemployment, and other economic and social dislocations associated with homelessness.[77]

That some cities have themselves become plaintiffs in foreclosure cases demonstrates the significant state interest in

[69]*Lassiter,* 452 U.S. at 27; *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

[70]See, e.g., *In re "A" Children*, 193 P.3d 1228, 1257 (Haw. Ct. App. 2008); *State v. Grannis*, 680 P.2d 660, 664 (Or. Ct. App. 1984); *State ex rel. T.H. v. Min*, 802 S.W.2d 625, 626–27 (Tenn. Ct. App. 1990).

[71]Clark & Barron, *supra* note 4, at 8.

[72]*Id*.

[73]Dan Immergluck & Geoff Smith, *The Impact of Single-family Mortgage Foreclosures on Neighborhood Crime*, 21 Housing Studies 851, 863 (2006), http://bit.ly/5QKBrq.

[74]Scherer, *supra* note 9, at 565.

[75]National Coalition for the Homeless et al., Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis 5 (2009), http://bit.ly/5TbuA1.

[76]Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Public Law, Policy and Ethics Journal 699, 709 (2006).

[77]Frances Werner, *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 Housing Law Bulletin 65, 68 (1987).

preventing foreclosures. In *City of Baltimore v. Wells Fargo* the city claims that Wells Fargo engaged in "reverse redlining" by deliberately targeting African American communities for predatory loan products, in violation of the Fair Housing Act. The complaint alleges that this unlawful behavior contributed to 33,000 homes being foreclosed since 2000, leading to decreased property taxes, reduced transfer-tax revenue (as a result of the depressive effect of the foreclosures on the market), and increased fire and police costs for vacant properties.[78]

■ ■ ■

In foreclosure actions the words of Justice George Sutherland resonate strongly: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[79] Given the risk of loss of the family homestead, the likelihood that valid claims will go unasserted in the absence of counsel, and the state's dire need to prevent further foreclosures from contributing to widespread neighborhood decay, the due process right to be heard requires the assignment of counsel in many cases. While not every case may warrant counsel, *Mathews* held that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process *as applied to the generality of cases*, not the rare exceptions."[80] A categorical right to counsel would restore equity and public confidence to a foreclosure process that until now has provided little of either.

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COMMENTS?

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—The Editors

[78]The complaint is available at http://bit.ly/8IGG3F. In July 2009 the city survived a motion to dismiss based on standing (*Mayor and City Council of Baltimore v. Wells Fargo Bank National Association*, 631 F. Supp. 2d 702 (D. Md. 2009)).

[79]*Powell v. State of Alabama*, 287 U.S. 45, 68–69 (1932).

[80]*Matthews*, 424 U.S. at 344 (emphasis added).

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